International Criminal Court

Trial Chamber III

Situation: Republic of Kenya

In the case of The Prosecutor v. Paul Gicheru - ICC-01/09-01/20

Presiding Judge Miatta Maria Samba

Closing Statements - Courtroom 2

Monday, 27 June 2022

(The hearing starts in open session at 9.35 a.m.)

THE COURT USHER: [9:35:54] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE SAMBA: [9:36:13] Good morning, everyone.

My -- is the mic on? Yes. Good morning, everyone.

Madam Court Officer, can you please mention the case.

THE COURT OFFICER: [9:36:34] Good morning, Madam President.

This is the situation in the Republic of Kenya, in the case of The Prosecutor versus Paul Gicheru, case reference ICC-01/09-01/20.

And for the record, we are in open session.

PRESIDING JUDGE SAMBA: [9:36:47] Thank you very much.

Can I ask the parties to introduce themselves, starting with the Prosecution.

MR STEYNBERG: [9:36:53] Good morning, your Honour. Good morning, everyone. My name is Anton Steynberg, appearing for the Prosecution today. With me, trial lawyer Alice Zago; associate trial lawyers, Julia Spiesberger, Laura Warrlich, Inbal Djalovski; associate legal officer, Mariana Gutierrez; case manager, Grace Goh; and intern Oguzhan Ozturk. Thank you.

PRESIDING JUDGE SAMBA: [9:37:21] Thank you very much, Mr Steynberg.
Mr Karnavas for the Defence, please.
MR KARNAVAS: [9:37:32] Good morning, your Honour. And good morning to everyone in and around the courtroom. I'm with Ms Suzana Tomanovic, Noah Al-Malt, Daria Mascetti and Victoria Amann-Lasnier.
PRESIDING JUDGE SAMBA: [9:37:42] Thank you very much, Mr Karnavas.
And for the record, I note that the accused, Mr Gicheru, is joining us via video link.
A very good morning to you, Mr Gicheru.
MR GICHERU: [9:37:53] Good morning, Madam President.
PRESIDING JUDGE SAMBA: [9:37:55] Thank you very much.
We are now hearing the closing statements of the parties in these proceedings. As stated in decision number 329, each party has been allotted one hour, and we will start by hearing the statement of the Prosecution.
In between -- after the Prosecution would have done his statement, Mr Karnavas, we'll observe a five-minute break and come back. But I'll ask all parties to stay in Court, so it will be a short one.
Mr Prosecutor, the floor is yours, please.
MR STEYNBERG: [9:38:43] I'm grateful, your Honour.
Your Honour, the Prosecution's closing brief sets out in detail how the evidence presented proves beyond reasonable doubt Paul Gicheru's guilt on all eight counts of corrupt influencing of Prosecution witnesses. This evidence stands uncontroverted by any Defence witnesses. As instructed by the Chamber, the Prosecution will not repeat the submissions in its closing brief, but rather focus on responding to the Defence's arguments and case theory, to the extent that the latter can be discerned from the Defence brief.

Your Honour, the Defence brief adopts a flawed approach to the assessment of evidence. It indulges in a piecemeal examination of individual witnesses and documents, but ignores the combined effect of the damning and mutually corroborating body of incriminating evidence. Stripped of its rhetoric and hyperbole, the Defence brief essentially invites the Chamber to: (i) reject Prosecution witnesses' evidence - in totality - on the basis of exaggerated past credibility issues; (ii) to ignore a significant body of corroborating evidence; and (iii) to buy into speculative conspiracy theories, unsupported by any acceptable evidence.

Finally, the Defence brief deflects from the real issues by raising imaginary or irrelevant criticisms of the Prosecution's investigation and witness preparation sessions. However, none of this detracts from the compelling evidence that is before the Chamber.

In sum, the Defence criticisms may be grouped under several well-worn defence tropes: (i) the Prosecution witnesses are liars; (ii) my client was framed; (iii) it's all a conspiracy; and (iv) if only the Prosecution had or had not done X, Y or Z, then my client's innocence would have been revealed. None of these arguments, your Honour, disturb the conclusion that the Prosecution has proved its case beyond reasonable doubt.

I do not propose to respond to the Defence's arguments on the individual witnesses, charges or modes of liability, since these have already been addressed in detail in the Prosecution closing brief. Nor will I respond to the intemperate language of the Defence brief, other than to observe that the tone of the rhetoric is often inversely proportional to the substance of the submissions. Rather, I will address certain themes raised in the Defence brief and the logical and evidential flaws in the Defence's theory.

At the outset, however, it bears repeating that the Chamber is essentially faced with a binary choice. Either the witnesses and evidence presented by the Prosecution are true and correct in their essential features and Mr Gicheru is indeed guilty as charged, or else he has been the victim of a grand conspiracy of breathtaking scope, intricacy and duration. There is no middle ground. There is no innocent explanation consistent with the Prosecution's evidence, and none has been suggested by the Defence. If the Chamber accepts the Prosecution evidence, it must return a verdict of guilty on all eight counts of corrupt influence, contrary to Article 70(1)(c) of the Statute.

Before proceeding further, however, I would like to propose that rather than reading all of the references to the briefs and to underlying evidence in full, with the leave of the Chamber and the permission of my learned friend, I have provided copies of my reading notes to the Chamber that contain the complete references.

PRESIDING JUDGE SAMBA: [9:42:47] Thank you.

MR STEYNBERG: [9:42:50] I will not have to tax the transcribers then with -- with that.

I'd like to start, your Honour, by making a few submissions on the Defence's legal approach to the assessment of evidence and the standard of proof.

Starting with the Defence approach to the standard of proof, the Defence statement of the "beyond reasonable doubt" standard is by and large correct, your Honour, but it introduces an element of imprecision by the insertion of the word "material" in its recap of the Appeals Chamber's dictum in the Bemba appeal. This reads in its original form as follows, quote:

"[...] the trial chamber is required to make findings of fact to the standard of proof 'beyond reasonable doubt' only in relation to those facts -- "

And not those material facts as stated by the Defence --

"only in relation to those facts that correspond to the elements of the crime and mode of liability of the accused as charged".

Why is this significant, your Honour? It is because the term "material facts" is commonly used in a broader sense to refer to those facts that the Prosecution must plead in its DCC in order to give the Defence sufficient notice of the case that it intends to present. But such material facts may extend beyond the essential facts necessary to prove elements of the offence and the applicable modes of liability. The Prosecution's submission, your Honour, is that the jurisprudence of the Court makes it clear that it's only the latter facts and not the former that must be proved beyond reasonable doubt.

For this reason the Prosecution submits that the formulation at paragraph 15 of the Prosecution's closing brief is a more accurate expression of the law.

THE INTERPRETER: [9:44:46] From the English booth: Could counsel please be requested to slow down for the purposes of interpretation. Thank you.

MR STEYNBERG: [9:44:50](Overlapping speakers) Turning to the issue of inferential reasoning.

Once again, the Defence's formulation for the test for inferential reasoning is also correct, but only insofar as the fact sought to be inferred is a fact requiring proof beyond reasonable doubt, as just discussed. It follows that not every underlying or intermediate fact needs to be proved beyond reasonable doubt, and for this reason such facts do not have to meet the inferential reasoning test outlined by the Defence.

I refer in this regard to paragraph 15 and footnote 30 of the Prosecution's closing brief.

As previously mentioned, the Defence adopts a piecemeal approach to the assessment of evidence. While the Defence brief pays lip service to the need for an holistic

assessment of evidence, in practice it does the opposite. Each witness and each piece of evidence is assessed in isolation, declared unreliable or incapable of belief, and then rejected outright. When addressing corroboration, other evidence deemed unacceptable through the same myopic approach is simply ignored. At no point does the Defence step back and assess the impact of the evidence in its totality. However, your Honour, this is precisely how a court should not go about assessing evidence. To the contrary, the Prosecution submits that the Chamber should be guided in its assessment of the evidence by the principles established in the consistent body of jurisprudence of this Court, as set out in section A.I. of the Prosecution closing brief, which I will not repeat.

THE INTERPRETER: [9:46:29] Message from the interpretation booth: Could a member of the team of Mr --

MR STEYNBERG: [9:46:30] (Overlapping speakers) Turning to the Defence's use of the term --

THE INTERPRETER: [9:46:30] -- of the Prosecutor please request that he slow down.

MR STEYNBERG: [9:46:42](Overlapping speakers) -- "hearsay", your Honour, the Defence brief frequently attacks the Prosecution evidence as hearsay and invites the Chamber to reject it on this basis. In fact, the word "hearsay" is mentioned no fewer than 123 times in the Defence brief. However, aside from the fact that hearsay evidence is not inadmissible at this Court, the term is often applied to evidence that is not in fact hearsay at all.

So for instance, the brief describes as hearsay P-397's evidence regarding his meetings and interactions with the accused. But in fact, P-397 provides an account of evidence that he personally witnessed and experienced, which is, in truth, direct evidence. It is of course the case that P-397 is unavailable to testify for reasons which have been

well ventilated before this Court, and the Prosecution is thus constrained to rely on his prior recorded testimony under Rule 68(1)(c).

I'm being told to slow down.

But that of course is an entirely different issue and one that the Chamber will consider in determining the weight of this evidence. However, as set out in detail in the Prosecution's closing brief, P-397's evidence is credible, consistent and corroborated in its essential features and should be accepted by the Chamber. In weighing the reliability of the evidence, your Honour, the Chamber should also take into account the accused's false denial of his relationship with P-397, a point to which I will return presently.

The Defence also dismisses as hearsay the recordings and evidence of witnesses concerning their conversations with intermediaries and associates when, in truth, only a small portion of these conversations can properly be labelled as hearsay.

For instance, at paragraph 87 of the Defence brief, P-800's evidence that Barasa called him and stated that he, Barasa, had accepted a bribe and asked P-800 to do the same is referred to as hearsay. But this is, in fact, direct evidence of these events and the fact that this conversation was not recorded does not make it hearsay. By the same token, the various statements of intermediaries and associates aimed at corruptly influencing the witnesses constitutes direct evidence of the actus reus of corrupt influence. And evidence of intermediaries persuading the witnesses who agreed to withdraw to come back to Kenya and to meet with Mr Gicheru provides direct evidence of the existence and operation of the common plan. Only in those few narrow instances where the perpetrators state that Mr Gicheru did X or said Y can the evidence properly be labelled as hearsay.

But, your Honour, even then the Chamber may rely on this evidence. The

Appeals Chamber in the Bemba et al. appeal rejected Defence arguments that the Trial Chamber had erred in relying on "remote and untested hearsay" in the form of intercepted communications. The Appeals Chamber found that the interaction between other members of the common plan that was reflected in the intercepted communications, quote:

"[...] shows that Mr Bemba's co-perpetrators acted under the common understanding that Mr Bemba was involved in the scheme of illicit witness coaching and gave instructions regarding the expected testimony." unquote.

So too in the present case, the OPC recordings demonstrate that Barasa, Bett, Yebei, and P-495, all acted with the common understanding that Mr Gicheru was the person to whom targeted witnesses were to be brought to negotiate and receive their bribes.

So I invite the Chamber to examine critically the Defence's assertions regarding hearsay evidence. But to the extent that certain evidence may be correctly labelled as hearsay, it may still, where appropriate, be relied upon by the Chamber, as set out in the Prosecution's closing brief. Particularly, your Honour, for corroboration or to establish peripheral or intermediate facts not requiring proof beyond reasonable doubt.

I move on then, your Honour, to the Defence's approach to the credibility of Prosecution witnesses.

It is no surprise that certain Prosecution witnesses had credibility issues and had at some point told lies, including under oath. This is, after all, a corruption case. Prosecution witnesses were bribed and intimidated into agreeing to sign recanting affidavits - making fabricated allegations against the Prosecution and other witness - and to provide false evidence in the Ruto and Sang case. It is for this very reason that the Prosecution went to such great lengths to obtain objective

corroboration for the witnesses' evidence, such as recording of approaches by perpetrators, bank records, communication data and so forth, as explained by lead investigator P-730.

For the most part, the corrupted witnesses readily admitted those lies once the influence of the accused and associates was removed. However, the corrosive effects of corrupt influence was more pervasive in others and some witnesses were - unsurprisingly - embarrassed or scared to admit the full extent of their wrongdoing. So for instance, P-800 was initially reluctant to implicate his friend as the person who took him to meet the accused, but later came clean as trust was established. And while P-516 admitted - very reluctantly - to receiving payments from Mr Gicheru to withdraw as a Prosecution witness, he steadfastly refused to concede that he had lied in other aspects of his evidence in the Ruto and Sang case.

The Defence relies on these and other credibility issues, real or imagined, to argue that the evidence of all the Prosecution fact witnesses, excluding P-738, must be rejected lock, stock and barrel. However, this approach ignores the jurisprudence of the Bemba et al. Trial Chamber, confirmed on appeal, that, quote:

"[...] no witness is *per se* unreliable, including a witness that has previously given false testimony before a court. Instead, each statement made by a witness must be assessed individually. The testimony of one and the same witness may therefore be reliable in one part, but not reliable in another."

While the testimony of such witnesses should be approached with caution and the presence or absence of corroboration will be an important consideration, a far more nuanced and reasoned analysis of the witnesses' testimony than that performed by the Defence is required, particularly in a case of this nature. Ultimately, the question that the Chamber must answer is not whether or not the witnesses have lied in the

past, but whether or not they were lying when they testified before this Chamber that they were corruptly influenced by the accused and his associates.

Although I promised not to react to the criticism of each witness, I am constrained to observe that many of the Defence's criticisms of the witnesses' testimonies before this Chamber are based on exaggerated or imagined inconsistencies, which are then characterised as, quote, "lies under oath". Unquote.

So for instance, the Defence incorrectly claims at paragraph 61 of the brief and footnote 356 that P-613, quote, "testified that she lied to the VWU because she was bored and lonely". Unquote. However, an examination of the testimony cited reveals that she made no such admission.

Similarly, the Defence accuses P-800 of lying under oath about whether or not he was permitted to contact other OTP witnesses, based on a supposed contradiction between pages 33 and 53 of transcript 52. But this is based on a misinterpretation or, at best, selective interpretation of his evidence. The Defence claims at paragraph 80 of their brief that P-800 testified that he was, quote, "permitted", unquote, to contact other witnesses. What the witness actually said was, quote:

"I explained that, due to the fact that we were coming from the same and we knew where we -- we were, at times [...] we could speak without permission." Unquote.

"We could speak without permission." In context, what the witness was saying, I submit, is that they would sometimes speak to other witnesses despite not having permission, but he did not claim that he was actually permitted to do so. These are but two examples, and I invite the Chamber to examine, for instance, the Defence's claims at paragraph 150, footnotes 882 to 885, and paragraph 115, footnotes 673 to 674.

Your Honour, many other assertions by the Defence brief are also based on strained or cynical interpretations of the evidence, but I trust the Chamber will draw its own

conclusions when reviewing the underlying material.

I move on now to the issue of corroborating evidence.

The Defence attacks the items of corroborative evidence relied on by the Prosecution on an individual basis, but fails to consider the holistic effect of this evidence. So the Defence points out - correctly - that the bank records of 397 and 341 do not in themselves prove conclusively that the source of the huge cash deposits was the accused. But the Defence fails to consider that the mere fact that not just one, but two, of the corrupted witnesses both came into huge amounts of money - way beyond their previous means - at the precise time they were allegedly being targeted by the accused and his associates, has, in itself, significant corroborative value. I digress to point out, however, that the very reason why the witnesses were all paid in cash was precisely to avoid leaving a paper trail connecting them to Mr Gicheru. This was explained to the witnesses by the accused himself, as well as his associates. And I refer your Honour to the references in footnote 190 of the Prosecution's trial brief.

The Defence's alternative theories for these deposits are entirely speculative. The Defence hypothesises that P-397's deposits might have been the proceeds from the sale of a plot of land. But the only evidence of this, in the form of an investigation report, reveals that as of 7 May 2013, P-397 had not yet found a buyer for his farm. This is a week after the money was deposited in his account. And as regards P-341, the Defence simply speculates that he might have "sold property or acquired money from his 25 dependents", unquote. Apart from the fact that one does not normally receive money from dependents - it's normally the other way around, of course - but there is no evidential basis whatsoever for this assumption.

Regarding the Defence's criticism of the reliability of the bank records, there are ample indicia of reliability for both documents, and P-397's deposits are also

confirmed by contemporaneous SMS alerts from the bank, as is revealed in his telephone data. The fact that P-341 did not bring his bank statements in a sealed envelope with a business card attached does not make them suspect, your Honour, as claimed by the Defence. These bank statements bear the witness's name, the official stamp of the bank, and the signature of the branch manager, on each page. The statement is entirely regular on its face and there are no indications whatsoever of any tampering or manipulation, nor has the Defence identified any. Furthermore, as to the Defence's criticism that the witness bank card number does not much the account number, there is no evidence to suggest that these numbers are necessarily the same, especially in Kenya.

Turning then to the telephone data produced by the Prosecution, the Defence argues that this does not establish conclusively that the accused was in contact at the relevant time with the relevant persons. Again, while this is correct, the Defence does not consider the implication of the fact that the accused - a person whom they say is allegedly selected at random to be the scapegoat of some grand conspiracy - is positively connected through the phone data to almost every significant actor implicated by the witnesses as participating in the witness corruption scheme. Remember, your Honour, that it is undisputed that the witnesses did not know Mr Gicheru and had no dealings with him prior to these events, with the exception of P-397, whose relationship -- whose allegations of relationship the accused made I will discuss shortly.

However, how could these witnesses possibly have known in 2013, what the phone data would subsequently reveal in 2021? Was it just dumb luck? Now one or two overlaps between the persons implicated by the witnesses and the phone data might be dismissed as a coincidence, but there are no fewer than 10 common plan members

and associates and other persons of interest linked to the accused by the phone data. This includes managers Simatwo and Maiyo; intermediaries Barasa and Bett; associates Busienei, P-495 and Kogo; as well as lawyers Njuguna and Mitei; and of course the ultimate beneficiary of the scheme, Mr William Ruto.

I note in this regard that the Defence brief mistakenly alleges that the relevant contact details for Ruto were not contained in the phone data. And this is at paragraph 188 of the Defence brief and footnote 1018. However, this is incorrect, your Honour. Proper inspection of the record reveals that the number is in fact reflected in the records, and I refer the Chamber to KEN-OTP-0160-0043 at items 1766 to 1767. I invite my learned friend to withdraw that assertion.

I must also respond to another repeated assertion in the Defence brief concerning the telephone data, but I will have to do so in somewhat oblique terms since we are in public session. And that is the allegation that information establishing the connection between the accused and the relevant persons I have just listed was, quote, "inserted", unquote, in 2018. The implication being, I presume, that it did not exist prior to that. However, clear inspection - closer inspection, I beg your pardon - will reveal that all the relevant data was created on exactly the same day at precisely the same time, give or take one minute: to be precise, 6 October 2018, between 07:26 and 07:27 Universal Time.

And not only those numbers, but hundreds of others too. It would be physically impossible to have inserted all these numbers manually and this can only have been inserted through importing the data from another device or a backup. So while the initial date of creation of the various entries cannot be determined from the phone data, it was clearly not created for the first time on this date and must have existed previously.

This is also consistent with the report of the Forensic Science Section admitted under Rule 68(2)(b), which concludes that the data in its present location was uploaded through restoring a previous backup.

I turn then to the OPC recordings, one-party consent recordings.

The Defence has to date failed to provide any consistent or coherent theory explaining the OPC recording evidence. Perhaps my learned friend will finally provide an explanation today for the first time, in which case I may be forced to seek leave to reply.

The Prosecution has disclosed to the Defence no fewer than 117 different recorded conversations, 97 of which have been submitted into the record, together with their relevant transcriptions and translations. These conversations were recorded by P-738, P-613, P-800, P-495 and P-397 respectively from May 2013 to July 2014 and involve intermediaries and associates Yebei, Barasa, Bett, P-495 and the accused himself.

If accepted, this body of evidence provides cogent proof of the existence and *modus operandi* of the witness interference scheme and the accused's participation and role therein. It also strongly corroborates the evidence of Prosecution witnesses to this effect.

Against this background, the Defence neglects to address the OPC recordings as a body of evidence in its closing brief. However, as best as can be gleaned from the Defence's cross-examination, and from its analysis of the evidence of the Prosecution witnesses, it appears to suggest that all of these recordings -- all of these recordings were pre-scripted by one or more of the Prosecution witnesses, with the agreement and cooperation of the persons being recorded. The allege purpose, it seems, was to create false evidence in support of bogus claims of witness interference in order to

receive witness protection and the attendant benefits. And for some reason, which is yet unexplained, they decided to inject the accused's name into their false narrative as the guiding hand behind the witness interference scheme.

Apart from the fact that there is not a shred of acceptable evidence of any such agreement, this simply does not gel with the contents and tone of these recorded conversations. Some of the recordings concern mundane matters or logistical arrangements for proposed meetings, including some meetings that never happened. Associates clearly speak in guarded or coded languages and sometimes express reluctance to discuss matters on the phone.

Your Honour, had the purpose been to manufacture evidence to implicate Mr Gicheru as the person behind it, one would have expected to see a far more clear, explicit and polished narrative and much less irrelevant chit-chat. And this purpose could have been served in one or two short and clear meetings without going to the extent of arranging face-to-face meetings. In contrast, your Honour, the interlocutors are quite careful for the most part not to mention Mr Gicheru's name on the phone, even though it is clear from the language and context that they are referring to him. The most explicit discussions of Mr Gicheru's involvement and role are largely reserved for the face-to-face meetings with Barasa and 495 respectively, when presumably they thought they were safe from interception.

It is also inconceivable, your Honour, that the intermediaries and associates would deliberately incriminate themselves on record of serious criminal offences simply for the benefit of the Prosecution witnesses.

And in the case of Barasa and P-495, knowing that they had been recorded offering bribes to OTP witnesses and that these conversations would be handed to the investigators, it is absurd to suggest that they would then travel outside Kenya to

meet with the witnesses and deliberately expose themselves to arrest.

And what of the OPC recordings between Barasa and P-738? The Defence has not suggested that this witness was involved in any conspiracy to falsely implicate the accused or to falsify evidence, and her credibility stands entirely unimpeached. She was not even cross-examined. How are these calls to be explained, other than what they clearly are, an increasingly desperate effort by Barasa to corruptly influence the witness to return to Kenya and meet with Gicheru to receive her payments before leaving for The Hague to testify.

Your Honours, this speculative theory simply defies all logic and belief and should be rejected by the Chamber as a reasonable possibility.

I turn then to the recorded call between P-397 and the accused.

The Defence's explanation for the accused's recorded conversation with P-397 is strained and inconsistent with the contents and context of the calls. The Defence asserts that in the face of statements by P-397 regarding the accused's involvement in his withdrawal as a Prosecution witness, the accused was, quote, "non-responsive", unquote. As I will shortly demonstrate, this is not entirely correct. But even to the extent that it is, this is in itself significant. Unresponsiveness, in circumstances where a response would be expected from an innocent person, may be incriminating per se, particularly in the absence of any reasonable explanation. As a lawyer himself, the accused would have been well aware of this.

So when the witness says to the accused, quote, "Please figure out how you're going to help me. Because I agreed to withdraw from the ICC. Now I'm in your hands ..." unquote, the obvious response would be, "What do you mean you agreed to withdraw from the ICC? What does this have to do with me?" And this is particularly significant, your Honour, since in his interview under caution,

Mr Gicheru denied knowing that P-397 was in fact an ICC witness. If that were indeed true, I submit that it is inconceivable that this revelation would not prompt a response. Instead, the accused deflects by saying, quote, "You know when those people do their stupidity like that ..." and then trails off, unquote.

However, on a another occasion, the Defence does respond and his response are significant. When P-397 says to the accused, explicitly, quote:

"You are the one who had me return to you. And you persuaded me, we spoke to you together with Sila SIMATWA [sic], you told me, 'My dear, you are one of our people'. I've come to you and now you start putting me in the bush again." Unquote.

Again, no indignant denial or surprised query. Rather, on this occasion, the accused's response is to object that the witness has mentioned his name on the telephone and that of Simatwo. And when the witness complains that Simatwo has been avoiding him, Gicheru replies, quote:

"I don't know where he is. You know, I even planned things without talking to him for a while." Unquote.

So what are these things that Mr Gicheru was planning together with Simatwo? In the absence of any reasonable explanation from the accused, the only inference consistent with the evidence is that he was talking about the witness interference scheme.

Finally, when the witness is questioned if perhaps he, quote, "wronged Gicheru's office somehow", unquote, and offers to refund the money, Mr Gicheru simply says, "Stop." Not "What money? What are you talking about?" Just "Stop."

Your Honour, the only person who would be able to provide an explanation for these highly incriminating responses is the accused. He was unable to do so in his

interview under caution and he has chosen not to do so in this trial as is his right, but the questions remain unanswered. The Defence brief doesn't even attempt to grapple with this evidence. Instead it complains that P-397 conversation -- sorry, that P-397's conversation was, quote, "scripted", unquote. Apart from being inaccurate, as the verbatim record of the interview will attest, the obvious response is "So what?" What would it matter if P-397's words were entirely scripted? What is important, your Honour, is the accused's response, or lack thereof, as the case may be. No objection was raised by the Defence on this basis at the time the evidence was submitted and none is raised now. Rather, the Defence again deflects with red herrings, hinting darkly at prosecutorial misconduct, but failing to point out any specific consequences or request any remedy, a theme which permeates the Defence brief.

I move on now to the accused's interview under caution.

The brief also does not address the significant admissions made by the accused during his interview with the OTP. In particular, his transparent and evolving lies concerning his relationship with P-397 and Yebei. Although the Defence adopts the accused's ultimate version that he represented P-397 in a land transaction, it does not acknowledge the fact that the accused initially categorically denied knowing him. Then, when confronted with the recorded conversations with P-397, the accused at first claimed that he could not recognise his own voice. He then conceded that it must have been someone he was familiar with and that perhaps he was a client, but he would need to check his office records.

Subsequently, the accused stated that he recalled the threats P-397 had received and remembered calling Busienei on his behalf. Finally, he came up with a version that he had acted for P-397 in a land matter and gave evermore detailed descriptions of

the transaction. All the references, your Honour, are in the speaking notes.
Your Honour, the accused also admitted having read about P-397's disappearance in the newspapers, despite previously claiming that he did not read the newspapers when asked about Yebei's disappearance. While the Defence now wants the Chamber to accept the accused's final version that P-397 was a legitimate client, it failed to produce any of the records Mr Gicheru claimed to have at his office, which could easily have established a genuine attorney-client relationship if this were true. Land transactions typically produce lots of -- lots of paper in my experience.
Your Honour, I submit that the accused's evasiveness and dissembling concerning his relationship with P-397 is a clear indication that their relationship was not in fact a legitimate business relationship, but rather one based on corruption, as P-397 alleges.
Similarly, the accused's developing story regarding his relationship with Yebei is even more transparently false in my submission. Time prevents me from recounting the evolution of his story from categorically denying having heard the name Yebei, to admitting that he knew him as an ICC witness, and finally conceding that Yebei had been to his office on several occasions, while maintaining that he merely accompanied Gicheru's client P-15, for no apparent reason. He then also recalled that he had, in fact, been interviewed by the Kenyan police concerning the disappearance of this person. A fact that I imagine would have been hard not to remember.
In weighing whether it is reasonably possible that the accused was falsely implicated by the witnesses or whether he was indeed involved in a corrupt relationship with them, in concert with his common plan associates, his lies about his relationship with a corrupted witness and an alleged intermediary weigh heavily in favour of the latter, your Honour.

The Defence conspiracy theory, "My client was framed."

The Defence asks the Court to accept as a reasonable possibility that his client was framed by eight separate witnesses. But this theory is so riddled with inconsistencies and improbabilities, in the absence of any acceptable evidential basis, it amounts to nothing more than fanciful speculation and wishful thinking.

Firstly, the evidence of eight Prosecution witnesses implicating the accused and his associates is too voluminous and too consistent for this to have been a coincidence, in the sense that these witnesses independently decided to falsely incriminate the same person or persons.

No, if the accused were framed, this could only have been the product of a grand conspiracy. This conspiracy would require at least seven of the eight Prosecution witnesses who implicated the accused - all but P-738 - to not -- to not -- have not only communicated, but agreed amongst each other to falsify evidence of witness interference and to falsely implicate the accused, as well as various members of his common plan, such as, Simatwo, Maiyo, Busienei and various common plan intermediaries. They must have compared notes and agreed to replicate the same modus operandi in their accounts. And they must have persisted with this conspiracy over a period spanning nine years and while located in different countries in East Africa and, later, the world.

The Defence fails to provide any credible explanation as to why the accused would have been selected as the target for the alleged conspiracy. None of the witnesses testified to having any prior dealings or relationships with Mr Gicheru, or any reason to hold a grudge against him. Nor has Defence presented or identified any evidence to this effect, with the exception of the evidence of the accused's unsworn and evolving self-serving claim that P-397 was a client in a land transaction, which I have

just mentioned. The only reason put forward by the Defence was the fact that the accused had represented P-15 in his withdrawal as a Prosecution witness. But this remains entirely speculative. I observe that a more obvious target would have been one of the counsel directly involved in the Ruto and Sang case.

Secondly, the alleged purpose of this grand conspiracy, namely to obtain benefits and relocation out of Africa to a First World country, quote-unquote, does not stand up to scrutiny. To start with, the Defence narrative is based on a false, and frankly insulting, assumption that every African wants nothing more than to leave Africa and move to Europe or America or some other developed country. And the alleged benefits of entering a witness protection programme are exaggerated, while the costs - financial, social and emotional - are ignored.

As regards the benefits, it is significant that while the schedules of OTP witness expenses were disclosed for each of the Prosecution witnesses, only one was used in cross-examination and tendered into evidence, that for P-613. This then is the high water mark of evidence of the alleged benefits that supposedly prompted this conspiracy.

But the schedule of benefits for P-613 reveals that, apart from covering her upkeep and necessary expenses, including her children's school fees, she benefited to the tune of $30 a month, or less than $1 a day; a paltry sum to commit perjury for. Although we know that most of the witnesses were subsequently admitted into witness protection by the VWU - the independent unit of the Registry responsible for the protection of both Prosecution and Defence witnesses - apart from this one benefit schedule, there is actually no evidence on record that the witnesses have in fact benefited, apart from the condescending assumption that if they are outside of Africa, they must necessarily be better off.

And the Defence ignores the costs of relocation, the costs to the witnesses. Witnesses who were relocated and accepted into the witness protection programme had to give up their careers, their sources of income, and were totally dependent on the Court for their very existence, including accommodation, food and education for their children. I pause to add that none of these witnesses were previously indigent or uneducated. All had jobs and were able to provide for themselves and their families prior to becoming OTP witnesses. They were then removed from their extended families and communities and moved to strange countries, where they sometimes did not speak the language and had absolutely no support network.

The Chamber has heard evidence on how several of these witnesses struggled to adapt and how language and education issues were problematic. The travails of P-274 and P-739 were particularly harrowing to hear. But P-516, P-738, P-613 and P-800 all experienced difficulties too. Naturally, they cried out for better conditions, and they cannot be faulted for doing so. However, despite all of this, the Defence would have the Chamber accept - as a reasonable possibility - that the expected benefits -- the expectation of benefits and relocation were sufficient to prompt these witnesses to conspire to falsely implicate the accused. Despite having experienced the realities of witness protection and relocation, and despite having nothing further to gain in most cases, the witnesses still came to Court and continued to propagate this supposed false narrative under oath.

Thirdly, this theory disregards the real and present security risks faced by Prosecution witnesses in this case -- in this situation. These were not just imagined. Testifying at the ICC in the Kenya situation carried real danger and witness protection was a necessity, not a luxury. As already alluded to, the Prosecution witnesses within Kenya faced intense and unyielding pressure and intimidation, in

some cases actual violence. Sometimes with fatal consequences. The evidence of witness interference from the witnesses in this case is but a fraction of the reported incidents of witness interference in the Ruto and Sang case, as outlined in the DCC. This is also a matter of record, your Honour, as is apparent from Trial Chamber V(A)'s decision to terminate the Ruto and Sang trial without prejudice, quote, "due to a troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses". Unquote.

The Defence's attempts to whitewash the phenomenon of witness interference as an invention of the unscrupulous witnesses to get witness protection -- to get into witness protection simply cannot stand in the face of overwhelming evidence to the contrary.

Finally, and most implausibly, your Honour, the conspiracy must also have involved various intermediaries -- the various intermediaries whose attempts to corruptly influence the witnesses were captured verbatim in the OPC recordings. This is the only explanation that the Defence has for these recordings. But for this to be true, the intermediaries must have knowingly agreed to being recorded offering bribes to witnesses, actions which would clearly be illegal in Kenya as they are before this Court. And having done so, Barasa and P-495 then travelled to neighbouring countries, placing themselves at risk of arrest to meet with P-800 and P-613 respectively. Why then would they agree to cooperate? What was in it for them? In the case of Yebei, Bett and Barasa, only an arrest warrant.

Turning to the criticisms of the Prosecution's investigation. The Defence attempts to shift the Chamber's focus from the evidence -- from the evidence to perceived shortcomings in the Prosecution's investigation. The Prosecution called P-730 to explain why certain investigative avenues were pursued and why others could not be

due to the significant cooperation and security obstacles to operating in Kenya, particularly in the Rift Valley. The Defence had the opportunity to cross-examine him, but his evidence stands undisturbed. Nor did the Defence lead any evidence to the contrary.

However, your Honour, these criticisms merely deflect from the cogent and consistent evidence the Prosecution did collect and present to the Chamber.

The Prosecution -- the Defence complains that the witness -- the Prosecution did not visit the crime scenes, which it perceives to be the Rift Valley. However, your Honour, many of these crimes took place not only in the Rift Valley, but at many locations across the region. So for instance, investigators were present observing Barasa corruptly influencing one witness, and P-495 corruptly influencing another.

Your Honour, I will skip a little bit of that because it's of less importance.

The Defence criticises the Prosecution for failing to call or interview certain witnesses. The Defence complains, amongst others, that the Prosecution failed to call each investigator so that they could be confronted by the Defence, and that the OTP did not interview each and every one of the managers and intermediaries of the common plan.

However, the Prosecution is not required to interview every alleged conspirator or to call every person involved in the investigation just so that the Defence can cross-examine them. While an accused has the right to confront all witnesses against him or her, this does not extend to a right to insist that the Prosecution calls a certain witness just so they might be confronted.

I also note that the Defence has had the Prosecution's witness list since November 2021, and if they considered that the accused's fair trial rights were breached by the failure to call certain witnesses, this should have been raised at the appropriate time

so that the Chamber could rule upon it. The Defence of course has the right to investigate their theories themselves and to call their own witnesses, including Prosecution witnesses, if necessary. They can also ask the Chamber to call witnesses under Article 64(6)(d). Having elected not to do so, the Defence cannot now complain that their evidence is not before the Chamber or speculate as to what it might have revealed.

The Defence criticises the Prosecution's witness interviews and preparation sessions, hinting at prosecutorial conduct while establishing none. These criticisms are unfounded and, in any event, irrelevant to the assessment of evidence.

As regards the witness preparation sessions, the Defence complains of improper coaching by the Prosecution. But witness preparation was conducted strictly according to the relevant protocol. Should the Defence have had grounds to doubt this, then they should have followed the remedies provided in the protocol at the relevant time. These include requesting copies of the video recordings of such sessions if there were grounds to suspect any misconduct.

The Prosecution observes that, in fact, on two occasions the Defence did request such recordings, both of which were granted by the Chamber. Significantly, however, the Defence failed to identify any improper conduct that was revealed in these recorded sessions. Yet they now speculate about impermissible coaching by the Prosecution in other witness preparation sessions for which they did not even request the recordings.

The Defence also complains about the duration of certain witness preparation sessions, but misrepresents the facts. So, for instance, the Defence claims that the Prosecution "proofed", quote-unquote, P-516, quote, "for seven days for a period of 43 hours and 15 minutes, during which 48 documents were shown to him." Unquote.

While the total number of hours is correct, the Defence omits to mention that the vast majority of the time was spent by the witness reading his prior statements and testimony in both the Ruto and Sang and case and the present matter, as the Witness Preparation Protocol requires. The protocol specifies that, quote:

"during the preparation sessions, the questioning lawyer must: [...] Provide the witness with an opportunity to review his or her prior statements". Unquote. And of the 48 documents shown to the witness, 43 comprised copies and transcripts of his own prior statements and annexes thereto.

Regarding allegations that the Prosecution improperly invited witnesses to expand upon their statements, the protocol requires that the questioning lawyer must, quote:

"Provide the witness with an opportunity to confirm whether his or her prior statements are accurate and to explain any changes as necessary". Unquote.

It also permits the questioning lawyer to:

"Review the statements together with the witness[es] and question the witness[es] on inconsistencies in his [...] prior statement[s].

[To] explain, in general terms, the topics that the calling party intends to cover in examination-in-chief.

[And to] explain, in general and neutral terms, that the witness may be questioned by counsel of the non-calling party on certain matters in his or her statement."

And finally, to:

"Show the witness potential exhibits, regardless of whether or not the witness has previously seen them, and ask him or her to comment on them for the purpose of ascertaining whether the witness can usefully comment on them during testimony."

Unquote.

The Defence does not explain how any of the Prosecution's conduct contravenes or

exceeds what is required or permitted by the protocol. Rather, their complaint appears to concern the protocol itself, notwithstanding that they did not object to this at the time.

I will move on, your Honour, to the final topic, which is the Defence's submissions on the modes of liability.

The Defence criticises the Prosecution's submissions on the mode of liability with respect to the actions of certain associates, but this criticism is misconceived and based on a misrepresentation -- a misapprehension of the Court's jurisprudence. I refer to paragraphs 167 to 186 of the Defence brief. The Defence claims that the Prosecution, quote, "misleads the Trial Chamber into overreaching and exceeding the scope of the charges". Unquote. Not so.

The Prosecution's primary position is that the associates are co-perpetrators - the relevant associates being discussed - and that their contributions were essential even if, with the exception of P-800, they intervened only with respect to one incident. As the Appeals Chamber has confirmed, a co-perpetrator need not, quote, "make an intentional contribution to each of the specific crimes [...] that were committed on the basis of the common plan", unquote, provided that those criminal incidents occur, quote, "within the framework of a criminal common plan, to which the co-perpetrator made an essential [element] with intent and knowledge". Unquote.

In this case, the Prosecution submits that the Pre-Trial Chamber erred in finding that, because the associates - except P-800 - each intervened only once to contact and persuade one witness to meet Gicheru or to withdraw as Prosecution witnesses, they did not make an essential contribution to the furtherance of the common plan. But the Trial Chamber is not bound by the PTC's application of the law of co-perpetration to the facts, and may draw its own conclusions based on the facts and circumstances

as confirmed by the Pre-Trial Chamber

PRESIDING JUDGE SAMBA: [10:38:42] Mr Steynberg, your time is up. I will give you some two minutes more to conclude, please.

MR STEYNBERG: [10:38:51] Thank you, your Honour, I will wrap it up in two minutes.

Just to round off this point then, your Honour, while the Chamber is barred under Article 74(2) of the Statute from exceeding the facts and circumstances described in the charges, it may nonetheless, quote, "evaluate them differently", unquote. I refer to the Al Hassan Charges Procedure Decision, at paragraphs 46 to 47. And in Ongwen, the Pre-Trial Chamber held that, quote:

"[if] the Defence" -- that "the Defence can raise at trial the matter of the proper interpretation of article 25(3)(c) of the Statute as the Trial Chamber is not legally bound to follow the Chamber's interpretation [of] the Confirmation Decision" -- "in the Confirmation Decision". I beg your pardon.

Hence, the associates' actions were confirmed by the PTC, and fall within the parameters of the charges, and the Chamber may conclude that they are in fact co-perpetrators and that their actions may be attributed to the accused.

I will leave that there.

Finally, your Honour, I point out as a housekeeping matter, one or two incorrect cross-references in the footnotes, but I don't think I'll need to read that out since I have handed up my reading notes and, if necessary, the Prosecution can file a corrigendum of the closing brief.

Thank you, your Honour. Then, unless the Chamber has any questions, those are the Prosecution's closing submissions.

PRESIDING JUDGE SAMBA: [10:40:29] Thank you very much, Mr Steynberg.

Mr Karnavas, I will break up for -- the Court will recess for some five minutes and when we come back, we'll listen to your own closing statement.

I'll ask members of the public podium to please wait. We shall do just five minutes and come back. Thank you very much.

THE COURT USHER: [10:40:54] All rise.

(Recess taken at 10.40 a.m.)

(Upon resuming in open session at 10.48 a.m.)

THE COURT USHER: [10:48:31] All rise.

Please be seated.

PRESIDING JUDGE SAMBA: [10:48:43] Okay. Now we listen to you, Mr Karnavas. The floor is yours, please. Thank you.

MR KARNAVAS: [10:48:50] Thank you, your Honour.

And good morning again to everyone in and around the courtroom.

The facts are what they are. You have them before you, you be the judge of it, no pun intended.

The OTP in its closing brief brazenly entreat you to inappropriately draw negative inferences against Mr Gicheru and to unjustifiably relieve it of its burden of proof. Having relied almost exclusively on the testimony of grifters, opportunists, skilled storytellers and documented liars, and with the Defence having exposed the abundance of reasonable doubt on every count in the case, the OTP now is faced with an acute dilemma: How to dress up its witnesses, how to rehabilitate them, how to transform them into honest, truthful, disinterested witnesses. How to manipulate their testimony. How to overlook their major - not minor, as they characterise - inconsistencies and overall flaws. How to ignore their discredited testimony. Or shall I put it, how to make a silk purse from a sow's ear.

Motivated by raw, unconstrained desire to win and corrupted by tunnel vision, evident from the way the investigation was conducted - and here, we never complained about not bringing those witnesses, but why didn't they investigate those they claim are part of this grand scheme - the OTP bought into and latched on to lies, fairy tales, fantastical excuses and rationalisations, all while ignoring obvious flaws and contradictions, and weaponising, weaponising the verb "to clarify" into a means of confabulation and memory development.

If you didn't get the facts right the first time or the second time, if you didn't tell us truth, just try, try, try again and again and again. We'll just call them minor inconsistencies, and your countless attempts to get it right, as we heard, clarifications. Just keep clarifying.

Realising that it cannot withstand the scrutiny demanded by the statutory provisions of the Rules of Procedure and Evidence of the ICC, the OTP now advocates for you, Madam President, to put your thumbs -- your thumb on the scales of justice to tilt them in favour by overlooking the weaknesses and gaps in its case, by casually assessing the evidence, by accepting its testimony on whose voice it is on the tape-recorded conversation and to adopt its interpretation of what was said in another telephone conversation by one of its witnesses who was scripted by the OTP investigators, but unfortunately, was unavailable to be confronted, examined and impeached by the Defence.

The OTP, in its brief, argues that it was disadvantaged, and that we took advantage of them by tailoring our case to its evidence by stonewalling them. Not agreeing to its proposed agreed facts; not divulging the theory of the Defence; not giving an opening statement; and not putting our case to the witnesses. They argue that you should view the evidence through its result-determinative prism; that you assess the

evidence by ignoring critical nuances in the ICC jurisprudence, which I'll point out; that you overlook the lack of quality in its investigation. Yes, they are expected to go and investigate.

That you fill in and bridge over the gaping gaps in their case; that you excuse the lack of certainty and ignore the reasonable doubt that persists in this case, and, might I add, that you haphazardly find that it has met its burden of proof.

Now, let me talk a little bit about this notion that we tailored the defence. They argue that we tailored our defence by stonewalling. I've never seen this before in a brief, I must confess. This is paragraph 63 and 309 of their brief. This argument is embarrassingly amateurish, and it's -- as it is, how shall I put it, absurdly vacuous.

Firstly, it is undisputably obvious that we, the Defence, relied exclusively on the disclosed material that we got from the OTP. There were no tricks. There were no surprises. There was no new evidence. Just what was in their possession for years and years, except the newly evidence that they came up with that was disclosed to us through this clarifying and memory-development interviews and proofing sessions, which we discussed during the trial.

Secondly, about tailoring. Here, with apologies, I might have to give a short lecture to the Prosecution on the art of trial advocacy. A trial by its very nature is an organic process. It's dynamic. It's not static. And it's a cardinal rule that you show up prepared, but you remain flexible. You remain in the moment. And to do otherwise, to do otherwise could amount to ineffective assistance of counsel.

When circumstances change, you should adapt. But once a theory is chosen, the trial begins with that theory, strategies and tactics may alter, but the theory remains.

And we'll talk about our theory, too.

Thirdly, where in the statutory provisions -- where in the statutory provisions, the

rules, the regulations, the practice directives or jurisprudence, does it prohibit the Defence from recalibrating or tailoring its defence during the proceedings? I've searched. I haven't been able to find any authority. I'm unaware of any authority. This is the very first I've ever heard of this.

Finally, so what. So what. How did this supposed tailoring we engaged in compromise the OTP in presenting its case or negatively impact its burden of proof obligation? How?

Rather than own up to the inconvenient details of its evidence and to make a go at arguing at the evidence, and to show that they proved their case beyond a reasonable doubt, they opt for excuses, and they opt for what I call the skunk factor.

You bring a skunk into the courtroom for a second or two, take him out. The skunk is out, but the stench remains. It's all about insinuation.

Simply, the Prosecution is attempting to deflect and misdirect, to patch and gloss over its inadequacies and failures to influence you by insinuating you to draw negative inferences. In other words, to compensate and assist it meeting its burden of proof.

They say we did not agree to their proposed agreed facts. Where in the Statute, in the rules, or the jurisprudence says that the Defence must agree to their proposed agreed facts?

And so what, again. How did this unwillingness or inability on our behalf compromise the OTP in presenting its case or negatively impacting its burden of proof obligation?

They argue we did not disclose in advance the basis of our defence. My goodness. I'm hearing this from professional prosecutors at an international tribunal. Where, in the Statute, the Rules of jurisprudence, does it say that the Defence must explain its case to the OTP in advance? Where?

But it gets better. But in any event, should I have telegraphed or emailed or sent him a WhatsApp message to tell them, "Hey, here are the weaknesses in your case. Please sure them up by doing a little clarifying and memory development when you question the witnesses and you proof them."

Can the OTP seriously, truthfully claim that they were in the dark? When you consider our submissions to the Document Containing the Charges, our numerous requests for disclosure material, the general nature of the statements of the witnesses that they chose to bring to this Court, can they seriously say? A newly minted lawyer with, I submit, a basic trial advocacy course of a few days under his or her belt could figure out the defence.

But it gets better. I submit that the Prosecution, especially the senior trial lawyer in this case, is being economical with the truth when he claims that we did not explain our theory of the case.

You may recall during the cross-examination of P-0613, in response to an intervention, I laid out the theory, the thesis, as I called it at the time. And later on - and this in the transcript 058, page 14 - the Prosecutor, Mr Steynberg, stands up and says, quote: "I am always grateful when we actually have some notice as to what the Defence theory is."

Now, granted, it was only the second witness. So we had been in the case for a matter of two or three days, but can he seriously say that we didn't know -- that we didn't disclose our theory?

But, again, so what. So what if we did not indulge them by providing them in advance what the theory was. Although I say that even Stevie Wonder, the great American blind, you know, singer, could see what the defence was. How did this failure on our part compromise the OTP in presenting its case or negatively impact its

burden of proof?

They go on and they complain, we did not give an opening statement. Goodness gracious. We did not give an opening statement. Where in the Statute does it say that the Defence must give an opening statement? It doesn't. And not to mention an opening statement is not evidence.

And so what? How did this strategic or tactical decision on the part of the Defence compromise the OTP in presenting its case or negatively impact its burden of proof obligation?

Frankly, if I were a prosecutor, or in this case, the Deputy Prosecutor of the ICC, I would be embarrassed to argue this, no less put it in writing for God and mankind to see it in perpetuity, that the Prosecution was disadvantaged, or that the Defence gained an advantage by not giving an opening statement.

They claim we did not put on a case in detail to -- we did not put our case in detail to each of the OTP witnesses. There's no statutory provision or rule in the ICC requiring the Defence to put its case in detail to each witness.

Now, there is a provision in the ICTY. And in the Ruto and Sang case, there was a practice directive that suggested that it would be a good idea to put your case to the witness so that the witness would not be confused. But there's no obligation.

Interestingly, they cite the very famous Browne v. Dunn case. It's an Australian case, as I understand it. In the United States, we don't have this notion of putting the case to the witness, you know, nor do we even use the phrase "I put to you". Though I used it because we are in this international setting and this seems to be the norm.

But in citing Browne v. Dunn and in citing ICTY Rule 90(H)(ii), the Prosecution would have noticed the appeal decision in the Krajišnik case, where it says:

"[I]t is sufficient that the cross-examining party put the nature of its case to the

witness[es], meaning the general *substance* of its case conflicting with the evidence of [a] witness, chiefly to [promote] this witness against any confusion."

They go on to say:

"There is" - quote - "no need for the cross-examining party to explain every detail of the contradictory evidence [...]"

They go on even further:

"[...] it is obvious in the circumstances of the case that the version of the witness is being challenged [...]"

That if that is the case:

"[...] there is no need for the cross-examining party to waste time putting its case to the witness."

And that's in the appeal judgment, paragraph 368.

In any event, this claim, like many of its other claims, is a canard. Anyone watching and listening to the cross-examination of the witnesses could tell, would have noticed that Ms Tomanovic and I robustly put our case to the witness.

But even if we failed to do that - as they claim - so what.

How did this failure compromise the OTP in presenting its case or negatively impact its burden of proof obligation?

We submit that the OTP is misdirecting you to view the evidence through a distorted, result-determinative prism. The OTP argues that you not assess the evidence of each witness separately -- at least, that's our reading of their brief. We disagree. The ICC jurisprudence from Bemba et al. informs us of a more nuanced approach than that which is claimed by the Prosecutor.

The Bemba et al. Trial Chamber held that, quote:

"[...] each statement made by a witness must be assessed individually."

Each statement made by a witness must be assessed individually.

Now this is the Trial Chamber, mind you, and it's in paragraph 202, but finding no error of this approach, the Appeals Chamber noted in paragraphs 1019, this is Bemba et al.:

"[...] whether a particular witness is considered credible will depend on a case-by-case assessment of the evidence, in light of all relevant circumstances."

Given the nature, we submit, of the testimony of the witnesses, the extent of their impeachment, their numerous statements, their clarifications, their half-truths, their lies, their inconsistencies, the uncorroborated hearsay, we submit that, with respect, that you must assess each statement made by the witnesses individually.

The OTP argues that you holistically analyse each individual item of evidence in light of the entire body of evidence, even if, when viewed in isolation, they are open to different interpretations; that's paragraph 11 and 13 of their brief.

We disagree. This approach to analysing the evidence holistically, as they claim it, is not consistent with ICC jurisprudence, nor is it a sound approach in this particular case in light of the testimony of the witnesses.

The Appeals Chamber in Gbagbo and in the separate opinion of Judges Van den Wyngaert and Morrison in the Bemba appeal judgment are instructive, and, we submit, should give sufficient guidance to you in assessing the evidence.

But what does a holistic evaluation of the evidence mean?

Well, it means that the weight accorded to individual witnesses evidence should -- should be determined in conjunction with other relevant evidence; Gbagbo, appeal judgment, paragraph 67, and that separate opinion I noted in paragraph 15, in the Bemba et al.

So in holistically evaluating the witness's testimony, what must be considered? Here,

we submit that the Ntaganda trial judgment, paragraph 78, provides some guidance. You must look to the entirety of the witness's testimony; the witness's consistency and precision in accounts; whether the information provided was plausible; the witness's conduct during their testimony, their demeanour; contradictions with prior-recorded testimony; and how that witness's testimony relates to the testimony of other witnesses. But here, I would add one more. I would add the days and the hours spent during the so-called proofing sessions.

Now Judge Van den Wyngaert and Morrison further explain in paragraph 15 of their separate opinion in Bemba, that holistic fact-finding cannot and, I quote, can:

"[...] not be an excuse or a reason for making findings beyond a reasonable doubt on the basis of a collection of weak evidence."

And, they go on to say, it:

"[...] cannot cure the weaknesses of individual items of evidence [...]"

It cannot be an excuse or a reason for making findings beyond a reasonable doubt on the basis of a collection of weak evidence, which we submit you have before you, and it cannot cure the weaknesses of individual items of evidence.

The OTP argues that you may rely on one part of a witness's testimony while rejecting others, since no witness is per se unreliable. Well, you know, even the clock is right twice -- a broken clock is correct twice a day. Fair enough.

No witness is per se, unreliable, but then again, the jurisprudence of the ICC is somewhat more nuanced. In Ngudjolo - I apologise for my pronunciation of the names - informs us that, and this is in the appeal judgment, paragraph 168, that some witnesses may be impeached to such a degree that they, quote:

"[...] cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony."

They go on to say:

"[...] witnesses whose credibility is [impeached]", quote, "may be relied upon to the extent that [they are] corroborated by other reliable evidence."

This is the jurisprudence, and all we ask is that you follow it.

The OTP argues that you need not consider evidence tainted or unreliable due to what they call minor inconsistencies; that's in paragraph 28. Well, if they were minor inconsistencies, I can assure you, your Honour, we certainly didn't waste our time during our cross-examination of those witnesses. We went after the big ticket items.

With the exception of two of their witnesses, all the other witnesses who appeared in court were impeached to such an extent and their evidence was shown to be so full of major inconsistencies on core aspects of their testimony, that they are, we submit, incapable of belief. They lied. They lied under oath. They lied under oath with determined reason and purpose.

And here, let me just go off script and say I'm offended by my colleague's -- my learned colleague's suggestion that I somehow was suggesting that all Africans want to leave for Europe. That was not the claim. The witnesses that he paraded before you, those were the ones that we demonstrated had a plan and wanted to get out, and we demonstrated that.

And we, in fact, brought one witness -- they brought one witness who gave good evidence on how he and two other witnesses plotted how to lie to the Prosecution, knowing that the investigators were not going into the field, and to that they say, so what. We say so plenty.

The OTP claims the Chamber should distinguish the actions and statements made while the witnesses were under the corrupt influence of the perpetrators and the

statements when the influence was removed. And this is in paragraph 35.
Well, first of all, they provide no legal authority as to that's how you should posit the assessment process. Well, how do you determine when they were under influence? At what point? And when, supposedly, this influence was lifted without doing a complete evaluation of the witnesses' testimony, without analysing that in conjunction with everything else, as I'll talk about it in a bit.
The OTP is asking you, your Honour, to ignore weaknesses, inadequacies, contradictions, documented lies and uncorroborated hearsay to support their position. And they're asking you to essentially cherry-pick, to simply adopt the most recent one, the most recent version of the many, many events. We had one witness, you know, he was questioned 50-sum times. Just adopt the very, very last one because, by that point, the clarification and memory development had been solidly put in place.
Normally, I wouldn't do this but -- in an international court, but I think it would be instructive considering the nature of the evidence that we heard and the arguments that are being made by the Prosecution, I'm going to give an example.
I used to tell this to my juries, but I think it's apt for judges as well, and it's my beef stew example.
Suppose you go to a restaurant and you order a beef stew. That's your favourite meal. You've been looking forward to it. Maybe you've been to that restaurant before. That beef stew looks good. Right texture, right colour. The scent, unbelievable. Take a spoon full, my goodness, it's tasty. Take a second one. Then you bite into a piece of meat. The first piece is good. The second one is also good. Tender, moist. The third one, you realise is rotten. It's bad.
Now what are you to do? Are you supposed to sift through your beef stew to figure out which piece of meat is good, if any of them now, because all of them have been

contaminated by the bad meat or should you say, "You know what, I'm going to put this dish aside, maybe I'll order something different -- or better yet, I'll go to another restaurant."

That's what they're asking you to do, your Honour. They're asking you to sift through and try to cherry-pick and decide what pieces of evidence a witness gave might be -- after being impeached or all over the place, might be good enough for you to latch on in order to find reasonable -- that they proved their case beyond a reasonable doubt. We submit that the witnesses were so corrupted in their own contradictions, that you cannot easily find what is good and what is bad. Like that beef stew. Better set it aside.

The OTP is misleading you into misapplying ICC jurisprudence on corroboration. Normally, I wouldn't lecture -- you know, I wouldn't dare lecture a court on what the law is, but -- and nor am I trying to lecture, but merely offer some -- my perspective on what I believe or we believe the law is on corroboration before the ICC -- based on the ICC jurisprudence.

And, of course, the Prosecution made a big deal about this -- about corroboration, corroboration. And they argue that corroboration is not required; that it is merely on occasional important factor. That's paragraph 32 of their brief.

Not required. Just an occasional -- an occasional important factor.

Well, in this case, I submit corroboration on all those witnesses was indeed an important factor, not on occasional one. And they are economical again with the interpretation of settled ICC jurisprudence. Here, I would submit we look at the Appeals Chamber in Bemba et al. paragraphs 1084; Gbagbo, appeals judgment, paragraph 357, they inform that corroboration may be required -- may be required to be convinced of the credibility of a witness and reliability of the witnesses' testimony.

The Appeals Chamber in Ngudjolo, paragraph 168, as well as in Bemba et al., trial judgment 204, further informs that where a Trial Chamber has reservations about the credibility of a witness -- has reservations about the credibility of a witness, it may rely on his or her evidence, quote:

"[...] to the extent that it is corroborated by other reliable -- other reliable evidence [...]",

noting that some witnesses may be, quote, impugned, may be impugned to such a degree that they cannot be relied upon even - even, I underscore that - if other evidence appears to corroborate.

Citing -- they cite an ICTR -- they cite ICTR case law. They argue that by -- in citing that, that witnesses corroborate each other when, quote:

"[o]ne prima facie credible testimony is compatible with another prima facie credible testimony regarding the same fact or a sequence of facts [...]"

Paragraph 33, footnote 64. So that's what they say.

Now surprisingly I went and looked at that, this fine Defence team, surprisingly, the OTP cites authority that has been rejected by the ICC Appeals Chamber. Now I'm going to give them the benefit of the doubt. I certainly don't think that they're trying to deliberately misrepresent -- to take an advantage, but merely it's just sort of the endemic sloppiness that we've seen throughout the trial in their failure of diligence at times. The Gbagbo Appeals Chamber summarily rejected the string of ICTY case law cited by the Prosecution for the very same proposition, finding that, quote:

"[...] there is need -- there is need for great care in describing the parameters of corroboration in terms so broad and uncertain."

Paragraph 358 of the Gbagbo appeal judgment.

They go on to say that they did not consider that the ICTR's description of corroboration, quote:

"[...] means, without more, that two pieces of evidence corroborate each other merely by bearing a relationship to the same fact."

A relationship -- so when we talk about compatibility, that's what they're talking about. Paragraph 358 of that particular appeal judgment, that may be of use.

They argue that witness corroboration -- that witnesses corroborate each other because their testimony is, quote/unquote, thematically consistent. It's thematically consistent. They have a theme. I'm going to talk about that in a bit as well. But this is an absurdity, we submit.

They -- first of all, they submit -- they cite no legal authority. Zero. Where does it say in the jurisprudence -- well, in their brief, they don't cite anything. Where thematically consistent is good enough, that means corroboration.

Judge Henderson who prior to coming to the ICC was -- had a distinguished career, a very distinguished career as a career prosecutor. So he wasn't one of these liberal defence lawyers. You know, he's a career prosecutor. In the Gbagbo trial judgment, it explained why the hearsay statements made by unreliable witnesses cannot -- cannot mutually corroborate each other. And here's what he says. Now, this is a former career prosecutor, now judge:

"Corroboration only occurs when two pieces of evidence independently confirm the same fact", quote/unquote.

And he goes on, quote:

"[...] requires the respective items of evidence to have some intrinsic probative value in their own right." End of quote.

And he illustrates, quote:

"[...] if two items of evidence -- if two items of evidence assert the same fact based on anonymous hearsay, the combined evidentiary weight remains negligible, even if

there are grounds -- even if there are grounds to believe that the respective anonymous sources are independent of each other." And you can find that in the trial judgment of his reasons, paragraphs 47 and 49.

In rejecting the ICTR case law on corroboration cited by the OTP, the Gbagbo appeals judgment -- the Appeals Chamber, paragraph 358, also said -- considered that mere consistencies or compatibilities in a witness's testimonies are not sufficient for corroboration explaining, quote:

"The mere fact that items of evidence may have a linkage does not" - I repeat - "does not mean that they are corroborative of one another [...]"

This is ICC jurisprudence.

So corroboration is not just merely a factor that you occasionally look at, especially when you've got witnesses that have been extensively impeached, and we submit that the case law that we provide is -- provides ample guidance to you, your Honour.

Now the OTP is misdirecting you to speculate -- I'm not going to go into too much of this, but just hit some highlights and I will try to go rather quickly. Whether the Defence question all the witnesses, because they make a big deal of it, one witness was not questioned. Ah, therefore, what that witness said, that's proof beyond a reasonable doubt. No. I'm sorry. That's not how it works.

Whether we question a witness or not is irrelevant. And it's irrelevant because they have the burden of proof. We decide whether we are going to question somebody or not.

Now, on that particular witness, which we didn't question, what could that witness have offered? Never met Mr Gicheru. Never knew Mr Gicheru. Never heard Mr Gicheru. But the Prosecutor speculates -- testifies essentially, Ah, it was Mr Gicheru on the line. Whether the Defence dispute the reliability of the phone

data or process of extraction is irrelevant. We're not saying that these experts were not experts, but what does that data tell us? It doesn't tell us anything. The Prosecutor today testified a little bit telling us what inferences you should draw. Well, that's not in the reports. They can't tell us when those numbers were actually in at the time.

Whether the Defence dispute the authenticity or reliability of the bank records is irrelevant. You can bring all sorts of bank statements. That doesn't solve the issue, where did that money come from?

We provided some alternative plausible explanations, there may be more. He says, "Well, 25 dependents, that's how it normally works." Well, what he omits to say is that that gentleman wanted him and his 25 dependents to be taken to Canada. That's what that was all about.

As for the other gentleman, we know that when he left his house, as it was being burnt, the one thing they took with them were the land titles. Did the Prosecution ever investigate what he had to see whether any sales were made? Did they investigate? No.

They say, "Well, the Defence should come in and investigate." That's not my job. That's not my job. My job is not to solve. They don't talk about that. His job is to prove. Whether the Defence disputed expert evidence on enhancement of audio recordings, that's irrelevant. What's relevant is the veracity of what is being said and the ability to test that -- to test what is on that.

Whether the Defence disprove what was said by witnesses in audio recordings -- the same thing. Whether the Defence disproved what was said by P-0397 in that scripted conversation, well, you have Mr Gicheru's statement and he does give an explanation. Now, they make a big deal, and say, "Well, you know, he denied

knowing them." Well, if one person is missing and is well known and another one is dead, and that's well known, someone being questioned as a suspect and being asked about those two individuals, might be hesitant.

Here, again, I normally wouldn't say this in front of an international judge, but I'll use one of my examples that I would in front of a jury.

Mr Gicheru is only human. Now St Peter denied Christ three times and he was told in advance, "You're going to deny me." He said, "No, no, no, don't worry about me. I'm solid. I'm there. I'm with you." He denied Christ three times.

Now, that was St Peter. Are we going to hold Mr Gicheru to a higher standard? It's not possible that under stress, under fear of maybe being implicated in the disappearance and murder of two individuals that the natural reaction would be, "No, I don't know these people."

But then he did discuss his involvement. As far as what was said on the tape-recorded conversation, there are a number of reasons why somebody might not answer or might not interject, especially when it's obvious from listening to the conversation that the one side of that conversation is trying to engage and trying to inject information into the conversation because that's what was scripted for him.

But your Honour, you have that evidence. You don't need a lecture from me on how to evaluate it.

I'm almost there, I'm almost over -- good for my final remarks.

The OTP argues - and I quote:

Where the Prosecution has produced evidence that establishes proof beyond reasonable doubt, unless the Defence is able to present controverting evidence sufficient to raise reasonable doubt, the Accused must be convicted.

That's in paragraph 18.

So, they produce their evidence, unless we rebut it, you know. Well, they either misapprehend how evidence should be assessed or they simply attempt to mislead. Either way, they're wrong. Whether the OTP has produced evidence establishing proof beyond a reasonable doubt is a question that can only be answered after -- and only after all of the relevant evidence is assessed. This includes the evidence adduced by the Defence. They claim we didn't put on a defence, well, we did. We put on a defence through cross-examination and everything that came in through cross-examination is evidence. So it's not, "Well, we put the witness on direct, what the witness said on direct is proof beyond a reasonable doubt. If the Defence didn't contradict it, it stands." It doesn't work that way.

It matters not whether the Defence opted to put on a defence by calling witnesses or not. Our witnesses -- our evidence came in through their cross-examination. And we submit that in assessing the evidence of each witness, you also have -- and whether that evidence was presented to a level of proof beyond a reasonable doubt, it is necessary, almost, I would normally say it may be necessary, but in this case I would say it is necessary for these particular witnesses to consider the assessed evidence of other witnesses and any other assessed relevant documentary evidence. So contrary -- contrary to the accusations lodged by my learned colleague that we somehow want you to piecemeal it, no. That's not the case. But you have to start somewhere and you don't start with a global picture. You start by looking at each statement individually, each witness individually. Then you have -- you look at the other evidence and how each witness is connected and all of them were connected in one way or another, and we demonstrated that, and only through that process will you be able to find where the truth may lie -- or, better yet, or, I should say, more importantly, whether the Prosecution has proved its case beyond a

reasonable doubt.

So contrary to what my learned colleague is suggesting, and maybe I got it wrong, but they seem to be suggesting that this is some sort of a competition between two competing narratives, and you are to decide which is the more attractive, persuasive, compatible, thematically agreeable, or possible, or even plausible.

And I submit it is not. It is not about selecting two competing narratives. They have a burden. They have to prove their case. I don't have to put on a narrative, but I can poke holes at their case. I can show that they have reasonable doubt. I can show that the witnesses are inconsistent; that they have among themselves planned and colluded. And it's not about weighing probabilities, which of the two versions is more, you know, probable. It's not about that.

It's not about beliefs, feelings, intuitions or suppositions. It is not about opinions formed through the media, from having been exposed to information during the confirmation process or even during the presentation of the evidence during the trial.

And let's be honest, we're all human. We are influenced to one degree or another by what we hear and what we may be exposed of, and there's nothing unusual or wrong with that. We're going to form opinions, beliefs, hunches, but -- and this is the big but, but when it comes to assessing the evidence at the end of the trial, these opinions, beliefs, feelings, hunches and suppositions must be set aside.

Not only that, but we submit that you must guard vigilantly and uncompromisingly from assessing the evidence through a prism of those opinions, beliefs, suppositions.

And there lies the danger, we submit. Far too often we form an opinion and then we begin to look at the evidence and the facts, but we're looking at it through the prism of that opinion that we've already formed, and that can misleading -- that can mislead us to the wrong assessment and we say that has to be set aside.

So what we're asking you, your Honour, we're asking you that you objectively assess the evidence - as we know you will - without passion or prejudice, by strictly adhering to and remaining within the contours of the ICC jurisprudence. And any opinions that might have been formed as a human being while the testimony was being heard, set that aside. Look at the evidence objectively, all of it, holistically, as the Prosecutor wants you to, but in the manner which we say it must be.

Now let me conclude with a few words of the burden of proof beyond a reasonable -- and the burden beyond a reasonable doubt.

Again normally, I wouldn't do this in front of a judge, but I feel compelled that in this instance this is one of those rare occasions in an international court, in front of a professional judge that I might be of some use. Especially, when you take up the task which only you can do, this heavy burden of assessing all of the evidence and determining Mr Gicheru's destiny.

So I think that the definition of proof beyond a reasonable doubt from my own national jurisdiction, this is, Alaska, is a rather good one and it's consistent with more or less the definitions used throughout the United States. And it's proof of such a convincing nature, such a convincing nature that you are willing to rely and act upon it without hesitation in your most important affairs. Rely and act on it without hesitation in your most important affairs.

Now, trying to explain that to a jury sometimes, it's pretty difficult. So the way I would do it, is, maybe by way of example. And in this particular case, I try to think what example might I give your Honour to sort of assist you as you and your staff are looking at the evidence to have in the back of your mind as you assess the evidence.

Well, let's just say, that this is not one of the most important affairs, buying a used car. Whether you're buying a new car or buying a house, or getting married, that's an

important affair, but let's just say just a used car.

Now, you're like me, you don't know too much about engines. So you're going to bring somebody along with you who knows a little bit, who's going to be able to ask some questions of the used car salesman because at least in the United States -- I don't know how it is anywhere else, but at least in the United States, used car salesmen are slick talkers, and half the time or most of the time they're sort of embellishing the facts.

So you bring this fellow along to help you out buy this used car. You see the car. It looks shiny. It's been washed, the wheels look good, the rims are shiny. You pop up the hood or bonnet -- as the Brits say -- and you see this clean engine. So -- and you hear this gentleman say, "Well, this is a new engine", and he's talking and talking and then, all of a sudden, your friend starts asking some questions. And as he's asking questions, he's catching this car salesman in little lies, and then, more lies, and then contradictions. And after each contradiction or lie, there's a clarification, "Well, what I actually meant to say was this." And this goes on for some while.

The question is, you want a used car so you can take you and your family, your loved ones, your friends, from point A to point B, go on the highway and be safe. In that circumstance -- in that circumstance, where the used car salesman is telling you all these inconsistencies and lies and is unable to keep his story straight, would you, without hesitation, buy that car from that salesman?

I dare say no. But let's just say, lo and behold as this is going on, somebody else shows up and he knows the used car salesman, maybe he's also a used-car salesman, and he starts chiming in and echoing the same things that the first one is saying. "Oh, yes, this is a new engine."

Of course your friend is pretty savvy. So he starts asking questions of this fellow

and, sure enough, the lies keep coming, the inconsistencies, the contradictions, and, all of a sudden, another one comes and the same thing goes on and on for about six to eight witnesses, eight ones of these fellows.

Would you buy that used car? Because now you've had eight people or five people, or six people or three people come and say, "This is a new car, it's got a new engine in this used car. Believe what we're telling you."

Would you be comfortable? Would you without hesitation? Would you be certain? Because that's what proof beyond a reasonable doubt means, certainty. Would you be certain that this is the car that I must buy - without hesitation - and put my life and the life of my loved ones in the hands of this particular car? I dare so no.

And that's how the Prosecution's case is and we submit, your Honour, that in assessing the evidence, keep this in mind. Because you should only find proof beyond a reasonable doubt if you are certain.

We submit that in this particular case, the OTP has failed to meet its burden of proof. The only appropriate, fair and just verdict is a not guilty verdict on all counts.

I notice I have a couple of minutes left, so I just want to thank everyone who made this trial possible, starting with the stenographers and the interpreters, the IT folks, the guards, the legal officers for the Registry, your legal officers and, of course, you.

With all due candour, I can say that this is one of the best tried cases I've had in my career, and it's a testament to everybody involved in this process, but especially you for presiding over what I would call a very efficient, fair, balanced proceeding.

I want to thank the Prosecutor. As cases go, this was not very contentious. In fact, I was almost comatose most of the time compared to some of the other cases that I've been involved with. And it's a testament to Mr Steynberg and his staff. They have been professional and we appreciate their hard work and we know that they have

a job to do -- we disagree fundamentally with what they claim, but nonetheless we appreciate and we respect their efforts.

Lastly, I want to thank and give credit basically -- to give credit to Ms Tomanovic, Mr Al-Malt, Ms Mascetti and Ms Amann-Lasnier. Without them, the Defence would have faulted. Any mistakes of course that were made or they're in the briefs or otherwise are entirely of my own making. And if -- if during the course of these proceedings, in any way I may have offended you or anyone else, hold it against me, but not against Mr Gicheru. Thank you very much.

MR STEYNBERG: [11:46:37] Thank you. Your Honour, I'm constrained to request leave to respond to one or two points, conscious --

PRESIDING JUDGE SAMBA: [11:46:45] No, I'm afraid not, Mr Steynberg. I'm sorry.

MR STEYNBERG: [11:46:48] All right.

PRESIDING JUDGE SAMBA: [11:46:49] Thank you very much, Mr Karnavas, and thank you very much, Mr Steynberg. I thank both teams, the Prosecution and the Defence.

This concludes the closing statements. The Chamber wishes to thank also the Registry for the support and help throughout this trial, and that would include everyone in and outside of this courtroom. I appreciate the interpreters, I thank you very much; the transcribers and court officers, but I also do greatly appreciate the VWU and many more.

I thank my officers, my legal officers, my team of legal officers for support to this trial. I must say it's a trial which I enjoyed very much, so I thank you all very, very much.

The Chamber will now retire and -- retire to do our deliberation as required of us under Article 74 of the Rome Statute.

So the hearing is adjourned.

THE COURT USHER: [11:47:58] All rise.

(The hearing ends in open session at 11.48 a.m.)