International Criminal Court

Appeals Chamber

Situation: Democratic Republic of the Congo

In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06

Presiding Judge Howard Morrison, Judge Chile Eboe-Osuji, Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa

Appeals Hearing - Courtroom 2/Interactio

Monday, 12 October 2020

(The hearing starts in open session at 10.05 a.m.)

THE COURT USHER: [10:05:03] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE MORRISON: (Microphone not activated)

THE COURT OFFICER: [10:05:45] Thank you, your Honour.

The situation in the Democratic Republic of the Congo, in the case of The Prosecutor versus Bosco Ntaganda, case reference ICC-01/04-02/06.

And for the record we are in open session.

PRESIDING JUDGE MORRISON: [10:06:07](Microphone not activated) Sorry. That was my mistake, my microphone was not switched on despite the red light.

May we have appearances, please, beginning with counsel for the Prosecution.

MS BRADY: [10:06:52] Good morning, your Honours. And good morning to everyone in the courtroom and those participating remotely. My name is Helen Brady and I'm the senior appeals counsel for the Prosecution in this case. And I'm appearing in this hearing this week with Ms Nicole Samson, senior trial lawyer; Ms Meritxell Regué, appeals counsel; Mr Matthew Cross, appeals counsel;

Mr Matteo Costi, appeals counsel, Mr George Mugwana, appeals counsel; and Ms Nivedha Thiru, assistant appeals counsel. And the Prosecution team is participating in this hearing remotely, from different locations, using the Interactio platform.

Thank you.

PRESIDING JUDGE MORRISON: [10:07:39] Thank you.

The Defence team, please, for Mr Ntaganda.

MR BOURGON: [10:07:44](Interpretation) Good morning, Mr President.

Representing Mr Bosco Ntaganda, who is present here today, there is Marie-Sophie Domont, Daria Mascetti, Maître Beaulieu-Lussier Mélissa, Ms Kate Gibson, from a remote location, and myself Stéphane Bourgon.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [10:08:17] Thank you. And I note, as has been said, that Mr Ntaganda is present in the courtroom.

May I have appearances, please, from the Legal Representatives of the two groups of victims.

MS PELLET: [10:08:31](Interpretation) Thank you, Mr President. The former child soldiers are represented by myself Sarah Pellet of the OPCD, and Ms Anna Bonini.

MR SUPRUN: [10:08:53](Overlapping speakers) victims of the attacks are represented today by myself Dmytro Suprun, counsel at the Office of Public Counsel for Victims. Thank you.

PRESIDING JUDGE MORRISON: [10:09:04] Thank you.

And the *amici curiae*, please.

MR HEYNS: [10:09:12] Good morning, your Honours, my name is Christof Heyns from the University of Pretoria. I'm appearing today as *amici curiae* with my

colleague at the University of Pretoria, Professor Stuart Malsen.

PRESIDING JUDGE MORRISON: [10:09:25] Thank you.

Mr Corn and Mr Jenks -- yes, Mr Newton.

MR NEWTON: [10:09:33] Good morning, your Honour. I'm Professor Michael Newton, appearing remotely from Nashville, Tennessee.

PRESIDING JUDGE MORRISON: [10:09:43] Thank you.

And now Mr Corn and Mr Jenks. So far nothing.

We were informed yesterday that Ms Yolanda Gamarra will not be able to attend the hearing, however, she may be observing remotely.

So we have taken appearances from everyone we can. Thank you very much. I hope everybody who has not appeared on the screen can nevertheless follow the hearing.

I welcome everyone to this hearing of the Appeals Chamber, which is being held partially in the courtroom and partially virtually, due the exceptional circumstances we all find ourselves in caused by the COVID-19 pandemic.

Present at the hearing today are the judges and several members of the legal staff of the Appeals Chamber, representatives of the Prosecutor, Mr Ntaganda and his representatives, the legal representatives of victims, *amici curiae*, and staff of the Registry.

This is a partially virtual hearing, which means that some people are participating from the seat of the Court, either in the courtroom or in meeting rooms, and others are appearing from separate locations outside the Court.

I would like to note that people appearing from the Court are properly distanced from each other in accordance with the relevant protocols.

I, Judge Howard Morrison, sitting in the courtroom together with

Judge Chile Eboe-Osuji and Judge Luz Ibáñez; Judge Piotr Hofmański and Judge Solomy Bossa are sitting remotely.

I now invite each judge to speak, if they so wish.

Judge Eboe-Osuji. No.

Judge Hofmański.

JUDGE HOFMAŃSKI: [10:11:31] Good morning, everyone. I speak remotely here. Thank you.

PRESIDING JUDGE MORRISON: [10:11:36] Thank you.

Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [10:11:38] Good morning, everybody. Thank you.

PRESIDING JUDGE MORRISON: [10:11:41] And Judge Bossa.

I'd like to note that some counsel may not be robed due to the circumstances of the COVID-19 pandemic, that is not an issue.

Moreover, a limited number of the members of the public have been allowed in the public gallery. This has been done in accordance with the strict safety measures put in place at the Court for hearings held during this pandemic.

In addition, the hearing will be streamed online on the Court's website with the usual 30-minute delay applicable to hearings at the premises of the Court.

We all hope this hearing will run smoothly and thank the parties, the legal representatives of the victims, and the *amici* for assisting with and cooperating in the preparations and trainings in which they participated to facilitate this hearing and to ensure the efficient conduct of proceedings in this case.

During this hearing the Appeals Chamber is convened to hear oral submissions from the parties, the legal representatives of the victims and the *amici* in the appeals of the Prosecutor and Mr Ntaganda against the decision of Trial Chamber VI on 8 July 2019,

to which I refer to as the "conviction decision", and the appeal of Mr Ntaganda against the decision of Trial Chamber VI on 7 November 2019, which I refer to as the "sentencing decision".

Before inviting the parties, the legal representatives of the victims, and the *amici* to make their submissions, I will summarise the background of these appellate proceedings.

The appeal from the Prosecutor arises from the Trial Chamber's decision not to convict Mr Ntaganda for the attack on the protected objects as a war crime on the Mongbwalu hospital and the church in Sayo. The Appeals Chamber has received written submissions on this appeal from the Prosecutor, Mr Ntaganda, the legal representatives of the victims and 12 *amici*. The Appeals Chamber has invited four of these *amici* to participate at the hearing.

With respect to Mr Ntaganda's appeal against the conviction decision, where the Trial Chamber convicted him for crimes against humanity and war crimes, the Appeals Chamber has received written submissions on this appeal from Mr Ntaganda, the Prosecutor and the Legal Representatives of Victims.

Mr Ntaganda has also appealed the sentencing decision where the Trial Chamber sentenced him to a joint sentence of 30 years' imprisonment.

The Appeals Chamber has received written submissions on this appeal from Mr Ntaganda, the Prosecutor and the Legal Representatives of Victims.

On 3 October 2020, the Appeals Chamber invited four *amici* to participate at the hearing. One may not be able to do so.

That is the background which leads to today's hearing. And I turn now to the substance of the Prosecutor's appeal.

The Prosecutor raises two grounds of appeal. Under these grounds, the Prosecutor

alleges that the Trial Chamber failed to acknowledge the principles underlying the protection afforded to objects, such as the church in Sayo and the hospital in Mongbwalu.

The Prosecutor claims that by doing so, the Trial Chamber misinterpreted Article 8(2)(e)(iv) of the Statute in relation to the protection it extends to cultural objects; in this case, the church in Sayo. And the protection it extends to hospitals and places where the sick and wounded are collected; in this case, the hospital in Mongbwalu.

With regard to Mr Ntaganda's appeals, he challenges the conviction decision and the sentencing decision where he alleges errors that materially affected those decisions.

I now turn to the conduct of these proceedings.

It is recalled that in the directions on the conduct of the hearing before the Appeals Chamber issued on 14 September 2020, the Appeals Chamber indicated both the order and the time allocated to victims -- the Legal Representatives of the two groups of victims and the *amici* to address the Appeals Chamber on each day of the hearing.

Due to COVID restrictions, the hearing today will consist of three sessions of one hour each in duration, divided by two breaks of 45 minutes. The Appeals Chamber will invite the parties and the Legal Representatives of the two groups of victims to complement their own submissions and/or address arguments raised by other parties and participants, and will invite the *amici* to present their submissions.

Moreover, the Appeals Chamber would like to stay as much as possible in open session during this three-day hearing, especially in the light of the fact that it is partly held on a virtual basis. For that reason, the parties and participants are invited to refrain from referring to information that has been classified as confidential unless absolutely necessary.

If there is a need to refer to such information, please alert the Chamber in advance in

order to allow enough time to go into closed or private session.

May I also remind counsel that they are expected to complete their submissions within the indicated time frame. The court officer will be monitoring the time and will indicate to the party or participant five minutes and then two minutes before the end of the allocated time.

Now I would like to invite submissions from counsel for the Prosecution concerning the Prosecutor's appeal.

And that starts now, with 20 minutes' duration.

MS BRADY: [10:17:20] Thank you, your Honour.

Mr Matthew Cross will be delivering the Prosecution's submission in the appeal this morning. Thank you.

PRESIDING JUDGE MORRISON: [10:17:28] Mr Cross.

MR CROSS: [10:17:29] Good morning, your Honours.

Today I will be addressing both grounds 1 and 2 of the Prosecution appeal.

We submit that the Trial Chamber erred, first, by requiring the term "attack" in Article 8(2)(e)(iv) to have the same meaning as it does in provisions of Article 8(2)(e), which solely relate to the conduct of hostilities. As a result, it excluded violent acts against specially protected objects - in this case, the church at Sayo and the hospital at Mongbwalu - because it considered them to be under the belligerent's own control.

This is a misinterpretation of Article 8(2)(e)(iv) and, in our submission, is contrary to the established framework of international law.

Second, the Chamber erred by imposing an arbitrary limit on the types of conduct which may constitute a prohibited act of violence against such objects. If the Chamber had not made these errors, it would not have acquitted Mr Ntaganda of these incidents.

For the benefit of those outside the courtroom, we emphasise that this appeal only relates to a confined issue arising from the trial judgment, which, in all other respects, we submit is careful, conservative in its assessments and wholly convincing. Tomorrow, and the day after, we will defend the correctness of the judgment in convicting Mr Ntaganda of multiple crimes against humanity and war crimes and imposing a sentence of 30 years' imprisonment.

The fact that this appeal is confined in its focus does not mean that it is not important. Quite the opposite. It addresses the capacity of this Court and the Statute to address two key challenges of contemporary armed conflict. These are, the importance of protecting cultural and religious objects, both to preserve the fabric of local communities and the heritage of peoples or indeed the world; and also the importance of adequately protecting hospitals, clinics and places where the sick and wounded are collected and cared for, which have been subject to an unprecedented rise in violence in recent years.

In non-international armed conflict, both of these concerns are primarily addressed by Article 8(2)(e)(iv) of the Statute, which is the sole provision to apply specifically to all these objects.

To put the question simply, therefore, our appeal is not about whether or not to apply the established framework of international law, including humanitarian law. Indeed, the Appeals Chamber has previously confirmed in this case that the chapeau of Article 8(2)(e) expressly requires this framework to be taken into account in defining the elements of the crime.

Rather, this appeal is about determining the content of the established framework, and the relevance of its different provisions to the specially protected objects which make Article 8(2)(e)(iv) unique.

For this reason, there can be no concern about the principle of legality or Article 22(2) of the Statute. The Statute has always required that the term "attack" in Article 8(2)(e)(iv) is interpreted - according to the chapeau - with reference to the established framework of international law. And that is all we are asking. There is, in our submission, no ambiguity in this framework and it can be strictly applied. Indeed, almost all the parties, participants and *amici curiae* in these proceedings are in agreement about some key points. We generally agree that, for all the provisions of Article 8(2)(e), which use the term "attack" - other than Article 8(2)(e)(iv) - this means an "attack" in the sense of Article 49(1) of the First Additional Protocol. In other words, this is violent action against the enemy and not against an object which is under the belligerent's own control. And, we may call this the conduct of hostilities regime.

But we also agree that certain objects - such as certain cultural objects, for example - are by contrast protected not only against attack, but also against any, and, I quote, "act of hostility" as described in Article 53 of the First Additional Protocol and elsewhere; that is to say, an act of violence against an object even when it is under the belligerent's own control. And finally, we agree that all these concepts also reflect customary international law.

Since we largely agree about the content of the established framework of international law, the question that remains is how that relates to the intent of the drafters in the Statute. In other words, the effect of this law on the term "attack" in Article 8(2)(e)(iv). Does the fact that this crime exists to give special protection to certain objects mean that the term "attack" must be given a special meaning? And we say that it does.

If the court officer can now place our visual aid on the screen.

THE COURT OFFICER: [10:23:57] The document is available on the evidence 2 channel.

MR CROSS: [10:24:09] Your Honours, I'm unable to see from my position outside the courtroom whether the visual aid is on the screen. If someone can indicate whether I can go ahead, I would be obliged.

PRESIDING JUDGE MORRISON: [10:24:21] Please do.

MR CROSS: [10:24:22] Thank you, your Honours.

Assuming you can see the visual aid on the screen, we should be able to see the legal framework within which Article 8(2)(e)(iv) should be interpreted and which, in our submission, makes it different in nature from pure conduct of hostilities crimes.

And copies of this visual aid should also have been provided to the Chamber and the parties earlier this morning.

Now on the left side of this table, your Honours, your Honours can see the various treaties which have outlawed harm to religious and other cultural buildings and monuments and which, we say, inform a special meaning of attack. While these instruments vary somewhat in the objects to which they apply, they agree in general terms that a belligerent may not commit an act of hostility - as it tends to be known - against a protected object, irrespective whether it is or is not under their control at the time.

Nobody in these proceedings has questioned that this is the state of the law. Indeed, we would particularly draw to your Honours' attention, the understanding of the ICRC from back in 1999, after the Statute was ratified, and this is cited in PILPG's brief, at footnote 16, which specifically cites all of these provisions as the IHL basis for Article 8(2)(e)(iv).

Likewise, on the right side of the screen, your Honours can see the various treaties

which apply directly or sometimes indirectly to hospitals and similar places and which, we say, also inform the special meaning of attack. These provisions reflect a greater variety of different terms and concepts, but read together, they reflect the duty of parties to the conflict to care for the sick and wounded, to respect and protect medical facilities which provide that care and to refrain from attacking or interfering with them, whether they are under their control or not.

As a result, while these treaties don't use the act of hostility language, the obligation they impose amount to a prohibition which, we say, is materially similar, and we agree in particular in this respect with the *amicus* submission from the University of Pretoria.

In this light, we submit that the chapeau of Article 8(2)(e) requires Article 8(2)(e)(iv) to be recognised as very different from pure conduct of hostilities crimes. They give effect to different protective values, have a different scope of application, and, as such, unsurprisingly, capture a different variety of conduct. And because of that, in our submission, it is erroneous to insist on the consistency of the word "attack" in Article 8(2)(e)(iv) with other provisions.

And nor is this interpretation so very novel, your Honours. After all, this position has already been accepted by various other Chambers of this Court; for example, at the Pre-Trial and Trial Chambers in Al Mahdi and the Pre-Trial Chamber in Al Hassan.

Now, I'd like at this point to address some of the key arguments which have been offered to counter this clear position.

And, we can stop displaying the visual aid at this point.

Some of the *amici curiae* - including perhaps Mr Newton and Mr Corn who I believe are joining us today - would seem to argue that since the word "attack" features in

Article 8(2)(e)(iv) at all, the special meaning that we propose would risk undermining and confusing the term in its general meaning for the purpose of the conduct of hostilities. And we entirely agree with the *amici* that this regime must remain clear and well defined.

But with respect, we do not see that their fear is a realistic one.

If your Honours were to accept the arguments in our appeal, you would not be ruling that the legal concept of "attack" for the purpose of the conduct of hostilities is anything different than that set out in Article 49(1) of the First Protocol. You would not, for example, be changing the definition of the conduct in Article 8(2)(e)(i), which prohibits intentionally directing attacks against civilians. And that's precisely why we responded to one of the victims' counsel, Mr Suprun, as we did, in the filing 2463, stressing that our appeal does not relate to the scope of an "attack" within the ordinary conduct of hostilities regime.

Instead, we simply argue that Article 8(2)(e)(iv) reflects a different legal framework altogether, which applies both in the conduct of hostilities and outside it. In prohibiting all acts of hostility, it includes attacks as they are otherwise understood - and this is precisely why Article 8(2)(e)(iv) retains an exception for military objectives - but it is not limited to them.

Nor is there anything problematic in embracing both these approaches. Indeed, they likewise exist side by side in the First Additional Protocol, which, just like the Statute, prohibits both directing attacks against civilians or civilian objects, and that's Articles 51 and 52; and, acts of hostility against protected cultural and religious objects, and that's Article 53. And the Second Additional Protocol is just the same in Articles 13 and 16.

While it is correct to say that the application of the targeting rules of IHL does not

vary according to the nature of the object targeted, this does not mean that certain objects may not also benefit from additional protections outside the conduct of hostilities. And that is all we propose.

Some of the *amici* seem to assume that Article 8(2)(e)(iv) must be interpreted only as a conduct of hostilities offence, notwithstanding the special protection of the listed objects, and thus that attack can only be understood in the sense of Article 49(1) of the First Protocol.

I will briefly touch on four points in response.

First, the use of a particular word in a treaty does not end the process of interpretation. Rather, treaty terms must be interpreted in good faith in accordance with their ordinary meaning, but also in their context and in light of the treaty's object and purpose. And this is the approach we ask your Honours to take.

Second, although it may be valid to presume that a term has the same meaning throughout a treaty, this is a rebuttable presumption. There is no doubt that the term "attack" already varies in different parts of the Statute according to its context - most notably, between Articles 7 and 8 - and, in our submission, also in Article 8(2)(e)(iv).

Accepting this argument, this does not, and, indeed, should not, mean that the term "attack" in other provisions may be interpreted more broadly. Our argument is a narrow one, applicable only to Article 8(2)(e)(iv) and its counterpart, Article 8(2)(b)(ix), based on the special --

THE COURT OFFICER: [10:32:33] (Overlapping speakers) Mr Cross, you have five minutes.

MR CROSS: [10:32:34] (Overlapping speakers) protection given to the listed objects - thank you - by the established framework of international law.

Third, to interpret Article 8(2)(e)(iv) narrowly would create a gap in protection for those listed objects, and thus divorce the Statute from the established framework of international law. In particular, it would mean that harm to those objects has a result requirement, requiring proof of their actual destruction, when they are under the control of a party to the conflict, but no such requirement when they are under the control of an adversary. It would also mean that there is no protection at all for objects which have always belonged to a belligerent as opposed to those over which they acquire control by force of arms.

And this is because the only provision cited by the Defence and some *amici curiae* as filling any potential lacuna in the Statute is Article 8(2)(e)(xii), which prohibits "Destroying or seizing the property of an adversary [...]"

This crime serves its own distinct function in regulating the conduct of a belligerent, once it has taken control over property, but falls short, for example, of giving effect to Article 4 of the 1954 Hague Convention.

Fourth, and finally, it cannot be right that Article 8(2)(e)(iv) was only intended by the drafters of the Statute to implement Article 27 of the 1907 Hague Regulations.

JUDGE EBOE-OSUJI: [10:34:13] Mr Cross, can you hold on a minute. You said that going by way of Article 8(2)(e)(xii) falls short of what? Can you repeat that, please.

MR CROSS: [10:34:33] It falls short, your Honour, of the protection, in particular, in Article 4 of the 1954 Hague Convention.

JUDGE EBOE-OSUJI: [10:34:43] How is that?

MR CROSS: [10:34:45] Article 4 of the Hague Convention requires that the listed objects are protected against all acts of hostility. And that means both when those objects are in the belligerent's own territory and in the territory which they may be occupying, which may belong to another State Party.

JUDGE EBOE-OSUJI: [10:35:05] Is it possible that the circumstances of this appeal and the submissions of the parties, including your own submissions, may be making the regime of protection more complicated than it needs to be?

Let me tell you what I mean. You rightly referred to Article 31 of the Vienna Convention on the Law of Treaties as more or less the beacon of interpretation of treaties, object and purpose.

That takes us, doesn't it, to the preamble to the Rome Statute; that's where that big beacon is located. And when we go there, we see, for instance, that the central object is the determination to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.

Now these crimes come in the form of unimaginable atrocities that deeply shock the conscience of humanity. And putting an end to impunity in respect of them is achieved by ensuring that those who perpetrate those crimes must not go unpunished, in other words, ensuring effective prosecution.

Now, would that central object of the Rome Statute be achieved if we passed, as it were, the interpretation of the meaning of "attack" to pass them into silos of understanding, if you will, between the different provisions of Article 8(2) itself -- perhaps 8(2)(e) and 8(2)(b). At some point, we may be talking as well about whether Article 7(2)(a) defines attack for purposes of crimes against humanity holds some lesson for us in this. Are we going to achieve the central object of the Rome Statute if we started having, as I say, these silos of understanding of the meaning of attack between all these various provisions?

Or could it be that the approach might be what you alluded to at some point, whether there is a gap of protection? So if I have a broad understanding of the meaning of attack, and that understanding I think we could all say, well, if we spoke in broad

terms, it may encompass a lot as a starting point. And then if we see any specific provisions in the Rome Statute that deals with discrete conduct, then the indictment is brought on grounds of those specific conduct, but then without prejudice to the default position.

Do you understand my drift in this long question?

MR CROSS: [10:39:17] Thank you, your Honour. I think I do understand your drift. I think our position would maybe be in two respects. The first is that, of course, as is always the case with the law, there may be different paths of reasoning to a certain outcome, which are -- seem more convincing from different perspectives. So we've put forward one path today. We wouldn't necessarily say it was the only route by which your Honours might reach the conclusion that we ask for.

Our path has been put forward on the basis, in particular, of the chapeau of Article 8(2)(e) and also the chapeau of Article 8(2)(b) which, following on from the last appeal heard by this Appeals Chamber in the jurisdiction decision in this case, we understand to be controlling by asking for each war crime in (e) and (b) specifically, to then look to the established framework of international law.

And we would concede, your Honour, the established framework is somewhat nuanced in this respect and that's why we've put our arguments in the way that we have. But in terms of the interpretation of the Statute, of course that is this Appeals Chamber's domain and your Honours may find that in interpreting the Statute, for example, the preamble may be given more interpretive weight in this respect than maybe other aspects of the context. And that is a matter, of course, for your Honours.

JUDGE EBOE-OSUJI: [10:40:52] If I may, Presiding Judge, have one more go at it. Does -- you may well -- does the approach taken by the Appeals Chamber of the ICTY

in the Tadić jurisdictional appeal hold any lesson for us? Again, I know counsel and the *amicus* would also react to this question, so I'm asking you.

In the Tadić appeal, we saw that tendency towards the Appeals Chamber saying, well, let's not be creating all these compartmentalisation of things. Let's look at, you know, what humanitarian purpose directs to be done.

So in that case, the jurisdictional appeals, the Appeals Chamber more or less did away with the strict dichotomy between the regimes of international law in non-international armed conflict versus international armed conflict, saying, look, let these things inform one another, after academics for a long time had been arguing for compartmentalisation of the regimes.

The question is, should that inspire us in the way to look at this appeal?

MR CROSS: [10:42:27] Thank you, your Honour. Again, on that point, of course we are instructed by the approach in Tadić. But the ICTY, throughout its jurisprudence, was also careful to make sure that in setting out and clarifying the rules required by international criminal law, at the same time it did not confuse the rules of international humanitarian law.

And we are mindful in the context of this appeal that we are touching on an issue in terms of what is an attack for the purpose of the conduct of hostilities, where clarity is of vital practical importance, and our appeal is not intended to disturb that clear definition in Article 49(1) of the First Protocol. Rather, the reason why we get into the question of silos is in trying to explain that this crime, in fact, is deemed with a different category of conduct, which is not limited to that narrow definition. But it's that care about the precision of IHL, which may be why the parties - and, I suspect, probably the Defence and the *amici curiae* as well - will tend to address your Honours in quite specific terms today. But of course that is without prejudice to how your

Honours ultimately decide to interpret the Statute of this Court of which you are the primary guardians.

Now, your Honours, if may move just to conclude my submissions. I had, I think, about two and a half minutes left of my prepared remarks. Would I have permission just to finish those two and a half minutes now?

PRESIDING JUDGE MORRISON: [10:44:01] Yes, of course, Mr Cross.

MR CROSS: [10:44:03] Thank you, your Honours.

So I believe at the time of Judge Eboe-Osuji's helpful question, I was discussing the fact that it might be said that Article 8(2)(e)(iv) was only intended by the drafters to implement Article 27 of the 1907 Hague Regulations. And we would say that this position is not only contradicted by the drafting history and the clear understanding of the ICRC, again, in 1999, but it defies common sense.

Why would the drafters have been so selective? After all, Articles 27 and 56 of the 1907 Hague Regulations were designed to work together to establish a seamless protection, both inside and outside the conduct of hostilities, and even if one were to ignore the subsequent effect of the 1954 Hague Convention and the first and the Second Additional Protocols, the practice of the ICTY has demonstrated - as in the Strugar case - that customary law likewise draws on both Articles 27 and 56 of the 1907 Hague Regulations and surely the Statute cannot be interpreted differently.

I'll turn very briefly now, your Honours, to the second legal error that I mentioned, and this particularly relates to ground 2 of our appeal, concerning the appropriation of medical equipment from the hospital at Mongbwalu.

The Trial Chamber seemed to find that such an appropriation simply cannot be an attack however that may be defined.

But in our submission, the legal definition of an attack does not prescribe the manner

in which the requisite violence may be inflicted, provided it meets the necessary threshold. And this Court has already recognised as much; for example, in paragraph 46 of the confirmation decision in this case and in footnote 236 in the Yekatom and Ngaïssona confirmation decision. And this principle is important to ensure that IHL continues to remain relevant in controlling all the ways in which hostilities may be carried out.

Today, for example, it is possible - as PILPG has pointed out - that violence to the adversary may be caused simply by deleting or changing lines of code in a computer programme or by throwing a switch and cutting off the power.

If we accept this, it's hardly a great stretch to imagine that the functionality of a hospital can be harmed or destroyed by removing the medical equipment, which defines its very functionality. What matters is the context in which the conduct occurs and its anticipated effect.

After all, we would not find it problematic to accept that a building may be slowly demolished by removing brick from brick or stone from stone. By removing these essential features by this means would destroy the Peace Palace or the Taj Mahal just as surely as a pickaxe or a cruise missile.

In this context, whether the bricks are then taken for the private use of an individual or the benefit of a group is immaterial. What is material is the intentional damage caused to the object. And depending on the context, this conduct might properly be charged as an attack against that protected object or the seizure or destruction of property or pillage.

And consequently, we say, the Trial Chamber was wrong to halt its analysis of the incident at Mongbwalu hospital simply because it appeared to involve the appropriation of medical equipment. If it had looked more closely at the

circumstances and the likely effect of the appropriation, it would have and should have qualified it as an act of violence sufficient for Article 8(2)(e)(iv).

For all these reasons, your Honours, and those in our brief, we ask the Appeals Chamber to grant the appeal and to grant relief accordingly.

And unless I can assist your Honours any further at this time, that concludes my submissions.

PRESIDING JUDGE MORRISON: [10:48:20] Thank you very much, Mr Cross.

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

MR BOURGON: [10:48:30] Thank you, Mr President.

Good morning, Mr President. Good morning, Judges, honourable Judges of the Appeals Chamber.

This morning, I will focus mainly on one issue and that is the interpretation to be given to the word "attack" in Article 8(2)(e)(iv). I will then, of course, apply this interpretation to the facts in this case.

Allow me to begin by addressing the Prosecution's admission at paragraph 29 of its appeal brief, where the Prosecution acknowledges that:

"[...] international humanitarian law has generally come to define the term" - attack - "as an 'act of violence against the adversary'", in offence or defence, "as articulated in article 49(1) of Additional Protocol I [...]" to the Geneva Conventions, which, in turn, defines this term as "combat action".

I refer the Appeals Chamber to the commentary on the Additional Protocol.

Now this is what we've heard this morning. The Prosecution is basically acknowledging "attack" is generally used in Article 8 of the Statute as combat action. In fact, now it says it's not generally used. Now it firmly says there are eight Article 8 provisions where you find the word "attack". They all mean combat action, except

for one.

Well, Mr President, this is -- simply cannot be so, and this is -- our written pleadings explain in detail why.

Mr President, the word "attack" in the Statute must be interpreted at least so that it is -- the internal coherence of Article 8 is important. And, above and beyond the article, the coherence of Article 8, it is the overall coherence of international humanitarian law.

Mr President, the word "attack", of course, is not defined in the Statute, at least in respect of Article 8. We don't find the definition. The word "attack" is used in Article 7, yes. Granted. But the definition of attack in Article 7, "Crimes against humanity", is of no assistance here simply because of the major differences between war crimes and crimes against humanity. The word "attack", by the way, is not found in the -- in the different acts in Article 7(1). However, the word "attack" is found in the contextual elements of crimes against humanity only.

And, of course, the major difference is that in Article 7 crimes can take place either during an armed conflict or not, and crimes against humanity address a completely different scenario altogether. More will be said about this during our submissions on grounds 4 and 5.

So we are left with "attack" in Article 8. And the Prosecution would like to say for 10 times it means this, but for one time, it means that.

Mr President, Article 31(1) of the Vienna Convention is clear; that we need to use the ordinary meaning of the term, of course, and it must be interpreted in good faith and in accordance with the object and purpose.

The word "attack" as a war crime means combat action. It means -- which can be borne out by just simply by using or looking at the words where it is used, such as,

directing an attack. It is not something that takes place after the attack, but it is in the direction of the attack.

Now when we look at Article 8, what is it meant for? Article 8 is meant to provide a comprehensive set of prohibitions that will apply to all phases of an armed conflict. Directing an attack, where the word "attack" is used, and, an attack, in and of itself, is but one phase of an armed conflict. It would be wrong, Mr President, to try and attempt to have all provisions of Article 8 apply to all phases of the conflict. This would deprive the word "attack" of any substantial meaning.

The Court's case law - and I will speak later about the Al Mahdi decision - demonstrates that attack has been defined and used pursuant to Article 49(1) of Additional Protocol I and that this is the meaning that should be given to the word throughout acts of violence against the adversary, whether in offence or defence. And, as mentioned in the commentary, it is clearly explained as meaning combat action. It is also significant that this word "attack", as defined in Article 49(1), because of course this is drawn from Additional Protocol I. But if we just look at the commentary for Article 13 of Additional Protocol II, we find that the term "attacks" also applies to non-international armed conflicts, which is exactly the case in 8(2)(e)(iv).

Mr President, we need to remain practical over and above the interpretation of the word "attack". The moment an attack begins and the moment combat action begins and the moment an attack ends and the moment combat action ends is highly relevant.

When you have civilian persons, the attack begins when the -- the attack begins when it is launched and it ends when the persons are either -- have fled or are in the hands of the attacking force.

If you look at objects, the attack begins when the attack is launched and it ends when the place or object being attacked is now under the control of the attacking force. Once the attack has ended, then we are no longer in a regime of Article 8(2)(e)(iv). Now that is not to say, Mr President -- and that's what I said earlier, it's not to say that crimes cannot be committed after the attack has ended. It's simply that the crimes committed after are covered by other provisions, and this is supported by the chapeau referred to by my colleague from the Prosecution.

JUDGE EBOE-OSUJI: [10:56:06] Mr Bourgon, what provision then would cover the attack against the church and the hospital? Let me, to make it neutral - you don't like the word attack for now - what provisions then would cover what happened at the hospital and the church?

MR BOURGON: [10:56:34] Very clearly, Mr President, without -- beyond any doubt, 8(2)(e)(xii). 8(2)(e)(xii) covers what happened at the Sayo church.

With respect to the Mongbwalu hospital, I beg to differ with my colleagues from the Prosecution because looting is not understood, in -- the word, it is different from the word attack or destruction. And looting is different. And looting in combat action will be covered by pillage. It's -- we have two provisions, and if it's not in combat action, then it will be covered by 8(2)(e)(xii).

So there is no gap and that's the main -- that's the gist of our argument this morning.

JUDGE EBOE-OSUJI: [10:57:22] So your point being that the indictment was brought under the wrong provision?

MR BOURGON: [10:57:29] Well, that's not for me to say, Mr -- Judge. What I'm saying is that, the way it was meant, it doesn't apply and the Trial Chamber was right in finding so. Why the Prosecution did so and why the Prosecution changed its approach in Yekatom and say, Well, we're not so sure, so we're going to charge it both

ways in Yekatom and we'll see what the Trial Chamber says and then -- or the Pre-Trial Chamber. And then the Pre-Trial Chamber answers this -- the Prosecution's question by saying, oh, no, no, no. You cannot have it both ways. But when they look at the reason why they say you can't have it both ways, they say, and, I need to quote this, they say, because some buildings do not constitute the property of an adversary within the meaning of Article 8(2)(e)(xii).

So that's basically what the Yekatom Pre-Trial Chamber says. But that's entirely contrary to what we find. For example, in the commentary by my learned colleague, Knut Dörmann, where he says in his commentary to Article -- (2)(e)(xii), in terms of property "[...] concerns all kinds of enemy property", both public and private. That means that any property, once the attacking force has taken hold of that territory, has become the enemy -- the property of the enemy and is covered by Article 8(2)(e)(xii).

Mr President, what is very important is that in terms of looking at the established framework of international law, a colleague referred something to -- earlier, which is -- I found very funny. He says, Well, the established framework is new. I see something wrong in saying the established framework is new. The established framework is very clear in this case. It's international humanitarian law, which includes many -- of course, many different instruments.

But the right instruments that applies and that works with the object and purpose of war crimes is definitely Additional Protocol I and II to the Geneva Conventions. And that's why when we look at the established framework, we need to look to Article 49(1) and not to some exception.

Now, is the 1954 a cultural property also included? Of course, it is. It is in the framework of international humanitarian law. It is. But between the two, the one that really applies and matches the object and purpose is Additional Protocol I to the

Geneva Conventions.

Now, when we look back at the drafting of Article 8, my colleague says that the drafting -- the drafters intended to look to a variety of instruments. That Article 8(2)(e)(iv) comes from the interpretation of many different instruments.

Of course, the drafters considered many instruments. But as mentioned in our brief, I invite you to read the drafting history, and they pushed aside Article 56 of the Regulations to the fourth Hague Convention and they said, What we want is Article 27, a combat provision. And that should be the end of the matter, Mr President. The drafting history makes it clear; it was meant to address an Article 27 scenario.

In conclusion, Mr President, as I try to sum up. I mean, the Prosecution wants you to -- wants the Appeals Chamber to depart from the ordinary meaning of attack. The Prosecution wants to give a meaning to the word of attack depending on where it is used in Article 8(2)(e), and then the Prosecution would like you to say that, Don't forget, don't -- don't worry about Article 41 -- 49(1) of the most relevant text of IHL. Go to The Hague cultural property convention and use 56, which has been rejected. All these steps, it's just a leap too much. And the Prosecution has failed cogent reason to justify such a marked departure.

Mr President, in this case, there is no gap. As I've mentioned, the Sayo church was damaged after the end of the attack and, therefore, was not covered by the provision. Now, the Prosecution says, Well, it's not really Ntaganda that's important. It's the future. The future of the Statute. Well, the future, Mr President, requires coherent interpretation and internal coherence within the Statute. And, if the conduct that was -- if the Prosecution's aim is to protect hospitals at all times, they are. If the Prosecution's aim is to protect cultural property having a special protection, they are.

As it stands. So there is no gap.

And the situation is different from the ICTY. Completely different.

Now it must be borne in mind that the ICC has a Statute with an exhaustive list of crimes, completely contrary to ICTY, which was open ended. The ICC -- of course there is some room for interpretation, but there is certainly no room for the jump that the Prosecution would like the Appeals Chamber to make. If the Prosecution is advocating such a jump, well, they know what to do. There are provisions in the Statute for legislative amendments and that's what they should use.

The Al Mahdi case. Well, the Al Mahdi case, Mr President, first of all, arises from a guilty plea which, in and of itself, is an interpretation, not irrelevant, but certainly of limited value.

But more importantly, when we look at Trial Chamber VIII's reasoning for expanding the scope of 8(2)(e)(iv) to cover a situation of occupation, its reasoning is rather limited.

It ignores the well-established meaning of attacks in the case law and fails to address the inconsistencies that would result in Article 8. And, it would also impact the coherence of IHL.

I'm not sure if I should stop or ...

THE COURT OFFICER: [11:04:36] You have five minutes left, Mr Bourgon.

MR BOURGON: [11:04:41] Thank you very much.

So the reasoning of the Trial Chamber is by no means convincing and should be of course not followed because it simply stands apart from the meaning given to the term by other Trial Chambers.

And the same applies to the hospital. The hospital and the looting of the hospital, first of all, it happened after the attack. But one thing my colleagues on the

Prosecution misses in his argument is that whenever we address looting in the Statute, there is always in all the provisions - and I refer to 8(2)(e)(iv), 8(2)(b)(xiii), 8(2)(e)(xii) - whenever we speak about property and looting, we have the words that refer to military necessity. That is very important. Because it is a possible justification for the appropriation of property.

Now, if the appropriation of property happens in combat, then we can refer to 8(2)(e)(v) for pillage. And it is in Article 8(2)(e), so it is covered. And looting is not an attack, and looting is separate from an attack. And depriving the hospital, as the Prosecution is saying, does not amount to an attack. It is looting and it is covered by other provisions.

Mr President, I end quickly by -- six questions were posed to the *amici curiae*. I can answer these questions very quickly in ending my submission.

"Attack" for us, question A1, attack is defined under Article 49(1) of Additional Protocol I. And it applies, of course, to both international armed conflict and non-international armed conflict, acts of violence against the adversary or combat action. And the word "attack" must keep the same meaning, whether we are dealing in the context of cultural property and hospital.

In question A2, attack in combat are synonymous, but conduct of hostilities is different. Conduct of hostilities is a different term. I refer the Appeals Chamber to the glossary of the how to -- "How does law protect in war", an ICRC, a very well-known instrument. In the glossary, where it's defined as a means and methods of warfare employed by belligerents in armed conflict. It is not a provision that will influence the interpretation of Article 8(2)(e)(iv).

Question 3. The word "attack" is definitely different from act of hostility. Act of hostility is much wider. Applies to other phases of the conflict. Applies to and

is -- does not necessarily mean an act of violence or the use of force. So it is completely different from the word "attack". There's just no support or no -- nothing in the Statute that allows us to make this jump. Certainly not the new established framework of IHL.

The question B1. Of course, the attack, it refers to combat action and, as I mentioned earlier, the attack is launched when it begins and when it ends, with the persons being in the hands of or the objects or territory being in the control of the attacking force.

And pillaging, question B2, is certainly not included in Article 8(2)(e)(iv). It is specifically included in the pillage, if it's in combat, and if it's not in combat, it is in 8(2)(e)(xii).

As for destruction, if the destruction does happen during combat, then it would be covered by 8(2)(e)(iv).

A ratissage operation, now that's the part that I like, and, I think, only one of the *amici curiae* really referred to the operational importance of a ratissage. This is a reality of warfare. Once you take over, once you take control of an area, you perform a ratissage operation after. It is not the attack. You want to control that the area is safe for your men.

A mopping-up ratissage is a clear-cut phase of an armed conflict or of the conduct of hostilities, but after an attack.

Mr President, in all respect, when we look at the facts of this case and when we look at the interpretation to be given to 8(2)(e)(iv), we ask you, Mr President, respectfully, to reject the Prosecution's appeal, both grounds 1 and 2.

And I will be glad to answer any questions you may have.

Thank you.

JUDGE EBOE-OSUJI: [11:10:09] One question for you, once more, Mr Bourgon. You urged internal coherence, which no one would dispute as valuable. Now, you argue that attack needs to be understood in the context of a combat operation. Once you move out of a combat operation, then you look at Article 8(2)(e)(xii).

Now when you look at Article 8(2)(e)(iv), there seems to be a certain assumption -- I don't know if that's the case, but I think there seems to be that. The argument tends to be that cultural property is protected by that provision.

Is that really the case?

When one looks at that, I see nothing there, unless I'm misunderstanding something that deals with cultural property as such. Art, yes. But is it always cultural? Or could there be something cultural that's not quite art, a cultural property?

Now, the reason I ask that, is this: If one looks at 8(2)(e)(iv), and, if I'm correct in wondering that perhaps cultural property as such may not be protected under 8(2)(e)(iv), it would seem to me that the place to find it may be in 8(2)(e)(xii), perhaps, according to you.

But what does that do to the thesis that 8(2)(e)(iv) must be limited to combat operation? If a cultural property, an item of cultural property is attacked, but you cannot charge it under 8(2)(e)(iv) and you must deal with it under 8(2)(e)(xii), do we not have an internal incoherence in the system?

You can think about it and take it up when we come back.

MR BOURGON: [11:12:46] (Overlapping speakers) I can certainly answer this question immediately, Mr President --

JUDGE EBOE-OSUJI: [11:12:48] (Overlapping speakers) Fair enough, please.

MR BOURGON: [11:12:50] -- because I see absolutely no incoherence 8(2)(e)(iv) and 8(2)(e)(xii). Actually, they are -- they complete one another. One is the attack.

The cultural property attack during the attack, it's covered. But after the attack, the cultural property falls under 8(2)(e)(xii) (Overlapping speakers)

JUDGE EBOE-OSUJI: [11:13:13](Overlapping speakers) Where is --

MR BOURGON: [11:13:13](Overlapping speakers) Why --

JUDGE EBOE-OSUJI: [11:13:14] What provision tells you that 8(2)(e)(iv) deals with cultural property during combat operation?

MR BOURGON: [11:13:26] In terms of -- well, the definition itself of 8(2)(e)(iv) makes it clear that --

JUDGE EBOE-OSUJI: [11:13:32] (Overlapping speakers) It is about cultural property, though. Cultural property as such.

MR BOURGON: [11:13:35] Well, historic monuments is certainly a reference to cultural property.

JUDGE EBOE-OSUJI: [11:13:43] But if a cultural property is built today, would you call it an historical monument?

MR BOURGON: [11:13:51] Then I would call it, "It's good for education." And it's in there. But the real question, Mr President, is the following one: In 8(2)(e)(xii), it says the enemy of the property. They're referring to the property of the enemy, sorry.

So can we think, I'm the attacking force and I take the whole -- and, and, I manage to launch an attack in The Hague and the attack is over. Is there any property in The Hague that is not the enemy's property? No. All of it is. All of it was the enemy's property and now I'm in control of it, if I damage it, I can be charged pursuant to 8(2)(e)(xii) and that's what the Statute was meant to do and that's in accordance with the established framework. Not the new one, but the real established framework of international law and it goes with the coherence of the Statute.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [11:14:49] Thank you, Mr Bourgon.

The schedule originally envisaged that the Legal Representatives would now have 10 minutes, but we're running substantially over time and I'm very mindful of the interpreters who now need a break. So what we will do is, we will take the 45-minute break now and hear from the Legal Representatives immediately after the break.

Thank you very much.

THE COURT USHER: [11:15:16] All rise.

(Recess taken at 11.15 a.m.)

(Upon resuming in open session at 12.03 p.m.)

THE COURT USHER: [12:03:12] All rise.

Please be seated.

PRESIDING JUDGE MORRISON: [12:03:43] May I now call upon the Legal Representatives of the two groups of victims who have 10 minutes.

MR SUPRUN: [12:03:55] Thank you, Mr President. At the outset, I would like to inform the Appeals Chamber that I will use the entirety of time accorded to both teams of the Common Legal Representatives, since my colleague representing former child soldiers will not make observations on the Prosecution appeal.

PRESIDING JUDGE MORRISON: [12:04:15] So be it.

MR SUPRUN: [12:04:15] Mr President, your Honours, I maintain my arguments exposed in my written submissions, and I will just provide some clarifications in light of the observations presented by the parties in response to my written submissions. I agree with the general principle that the same term should retain the same meaning within a single treaty, including the term of attack as used for the purpose of the

definition of war crimes under the Rome Statute. However, and in accordance with Article 31(1) of the Vienna Convention, terms shall be interpreted in their context and in the light of the object and purpose of the legal provision. Such interpretation does not deprive the terms of their ordinary meaning and is consistent with the principle of legality.

It seems not under dispute that the term of attack under Article 8(2)(e)(iv) of the Rome Statute should be defined as acts of violence against the adversary, whether in offence or in defence. The Trial Chamber found that the crime of attacking protected objects belongs to the category of offences committed during the actual conduct of hostilities and must be committed before such objects or civilians have fallen into the hands of the attacking party.

While the term of the conduct of hostilities is not defined in either the legal texts of the Court or more generally international humanitarian law, the Trial Chamber effectively equated the conduct of hostilities to combat action against enemy armed forces; in particular, the assault on Sayo and the takeover of Mongbwalu, meaning the moment when the enemy armed forces had been defeated.

It is respectfully submitted that the Trial Chamber erred in disregarding its own findings in the judgment on the relevant factual circumstances underlying the continuous nature and the very objective of the military operations carried out by the UPC/FPLC that was not solely to defeat RCD/KL or Lendu combatants, but to chase or otherwise destroy the Lendu, by any means, both combatants and civilians.

The Trial Chamber equally erred in disregarding its own findings on the nature and objective of post-assault ratissage operations in both Sayo and Mongbwalu, that were carried out in the immediate aftermath of the respective assault and takeover of the villages, with the same *modus operandi* and with the same objective to destroy Lendu

and to clean the area from Lendu.

The crimes committed during these operations were not collateral or incidental, but were part of the military objective of the overall operation.

In this regard, the Trial Chamber found in paragraph 854, that ratissage operations were carried out with the widespread commission of crimes against the targeted group of civilians as planned by co-perpetrators.

It also found in paragraph 695, that it could identify a repeated *modus operandi*, characterised by an initial assault and the taking of control over the town or village, followed by a ratissage operation, extending up to several days after the initial assault, aimed at eliminating any survivors, including civilians, and at looting.

To assume even that following the assault of -- on Sayo and takeover of Mongbwalu, the UPC/FPLC had taken control over a part of the area and/or over the enemy armed forces, the nature and extent of the ratissage operations seem to imply that at the time, the attackers had not taken control over all the adversary persons and objects, in particular, all targeted civilian persons and civilian objects.

Using the terms "assault" and "takeover" to define the parameters of the term "attack", the Trial Chamber restricted the scope of the term "attack" to acts of violence against enemy armed forces. However, even assuming that Article 8(2)(e)(iv) originated only from Article 27 of The Hague regulations, this article refers to the terms "sieges" and "bombardment" as possible forms of attack.

While "assault" alike "bombardment" are a one-off form of attack, "takeover" may take the form of an ongoing offensive attack similar to a "siege". This latter term is, in its nature, similar to ratissage operations carried out in present case.

The Trial Chamber erred in disregarding its own definition of the term adversary in paragraph 1160, consistent with international humanitarian law, as comprising of

individuals or entities aligned with, or in an alliance with, a party to a conflict that is adverse or hostile to the perpetrator. It even went further in finding that it can fall with adversary persons who had no stated or apparent allegiance to a party involved in the conflict.

Against this definition, the Trial Chamber erred in disregarding that, in light of the evidence before it, the adversary in the present case were not only enemy armed forces, but also all Lendu civilian persons and civilian objects and such.

Should the term of attack under Article 8(2)(e)(iv) be interpreted, as the Trial Chamber did, as being restricted technically to combat action against enemy armed forces without giving due regard to the context, nature and objective of military operations, and without taking into consideration the object and purpose of the provision, many objects concerned would be left with no protection under the Rome Statute, unless they are either located on the front line or being the primary object of military operations.

As a matter of common sense, providing some categories of civilian objects with special protection, as the drafters of the Rome Statute did, rather than equating them to other civilian objects, requires particular care and attention to the very sense and objective of such special protection.

In this regard, and contrary to the Defence argument, the Trial Chamber erred in ending its consideration of Article 8 after the analysis of the first component of the provision, insofar failing to give due regard to the object and purpose of the provision.

Post Rome Statute development of international law has further demonstrated the need for enhanced care and attention to the very sense and objective of the special protection to be accorded to this category of civilian objects. Contrary to what the

Defence argues, the Rome Statute is indeed a living instrument and should be interpreted in line with the principle of evolutionary interpretation of international law.

To support this argument, I refer in particular to separate opinion of Judge Ibáñez Carranza to the Appeals Chamber judgment in relation to Afghanistan. The reference is ICC-02/17-138, annex of 6 March 2020, paragraph 7, subparagraph iv). This is simply because, otherwise, the ICC would not be able to properly fulfil its very mandate to put an end to impunity for perpetrators of crimes committed in modern and more sophisticated conflicts.

Contrary to the Defence argument, protected objects under Article 8(2)(e)(iv) are not protected by other provisions of the Rome Statute, such as, Article 8(2)(e)(xii). Indeed, the latter provision protects civilian objects from destruction and seizure only, but don't provide for special protection from the very essential harm suffered by this specific category of civilian objects when attacked from harm to the very essence of the existence of these objects - a sort of moral or existential harm - which is far beyond the Defence assertion that an attack against these objects must mean an attack on their structural fabric rather than their content.

As explained in my written submissions, and, with due respect, I cannot agree with the Prosecution's interpretation of the term of attack as extending to the entire period of occupation, and I maintain my arguments in full.

While I agree with the Prosecution's assertion made in its reply, that it's generally the case that hostilities no longer continue in circumstances such as occupation, however, I cannot agree with the suggested equating of the term of attack under the article at hand with the entire continuation of the armed conflict. Should the suggested approach be adopted, the distinction between the protection of civilian persons and

objects during the conduct of hostilities on the one hand and periods of occupation on the other, would become redundant, as, in occupied territory, objects listed in the article at hand are protected by different provisions.

This concludes my observations.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [12:15:17] Thank you, Mr Suprun.

JUDGE EBOE-OSUJI: [12:15:22] Mr Suprun, the Defence counsel argued that as a matter of fact, there is no gap and that it's a specific issue on its own. That is one thing, isn't it, and, that's not necessarily inconsistent, is it, with your -- what I see is to be the train of your submission, which is that the Trial Chamber unnecessarily limited the meaning of attack? Is that the case? So do you understand my question?

So we can -- even if one agrees with you on that, it doesn't mean that Mr Bourgon is necessarily wrong in saying that there is no gap for purposes of this particular case.

MR SUPRUN: [12:16:15] Thank you, your Honour, for your question. My submission is that in line with the Defence submissions, the term of attack and the chapeau of Article 8 of the Rome Statute should be interpreted equally. However, the interpretation should take into account in all instances the object and purpose of the legal provision, which can only be made in light of the factual circumstances underlying the specific attack. Because as we know, attacks can take different forms and they should be interpreted, analysed in line with the factual circumstances. However, it's my submission, the fact to interpret the attack in light of the object and the purpose of the provision, and in light of the factual circumstances of the case, does not prevent -- or does not remove the ordinary meaning of the term.

This is my answer.

JUDGE EBOE-OSUJI: [12:17:13] Thank you.

PRESIDING JUDGE MORRISON: [12:17:14] Thank you, Mr Suprun.

Turning now please to the *amici*.

Mr Heyns, you now have the opportunity to speak for 13 minutes.

MR HEYNS: [12:17:27] Thank you, Mr President. Good morning, your Honours.

I will present our main argument and my colleague, Stuart Maslen, will respond to questions.

We would like to thank the Appeals Chamber for the invitation to participate in the deliberations this morning.

On Tuesday, 6 October 2020, we formally submitted our *amicus curiae* brief to the Court for its consideration. We would like to summarise for the Chamber the key points we raise in that brief and we look forward to your comments and questions.

For us, the central question is whether an "attack" - as the term is used in the Rome Statute - may occur under international humanitarian law outside the conduct of hostilities.

If the answer to this question in no, then the definition set out in Article 49(1) of the 1977 Additional Protocol I can be considered authoritative.

But as we observe, the term "attack" is also employed in an instrument dedicated to Geneva Law, and specifically in a provision that offers special protection to military medical facilities. According to Article 19 of the first Geneva Convention of 1949: "Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict."

What is clear from the *travaux préparatoires* of Article 19 of the first Geneva Convention of 1949 is that the term "attack" was introduced in 1947 during the elaboration of the convention with a view to broadening the protection afforded to

such facilities.

It was not enough, the commission responsible for drafting the first Geneva Convention stipulated, that the restraints on military operations be confined to a duty to respect and protect military medical facilities. Accordingly, the definition given in Article 19 to the notion of an attack is broad. Moreover, none of the 196 States Parties to the first Geneva Convention has made any reservation with respect to Article 19 seeking to limit its scope in some manner. This leads to the question of whether the interpretation of this obligation in Article 19, both within and outside the conduct of hostilities, should be limited to acts of violence against the adversary, whether in offence or in defence as defined by States in the First Additional Protocol 40 years later on? Or even, as has been suggested, that effectively it be reduced to a prohibition on bombardment? Rather, in our view, the evidence suggests that a broad interpretation must be accorded to the notion of an attack --

PRESIDING JUDGE MORRISON: [12:20:22] Mr Heyns, sorry to interrupt you, but could you just slow down a little bit for the interpretation. Thank you very much.

MR HEYNS: [12:20:31] Certainly, Mr President.

So rather, in our view, the evidence suggests that a broad interpretation must be accorded to the notion of an attack when the protection of medical facilities and cultural property is concerned and that, moreover, an attack does not necessarily have to involve violence. After all, with respect to the treatment of the sick and the wounded, Article 50 of the first Geneva Convention makes extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, a grave breach of its provisions and therefore a war crime if committed against persons or property protected by the convention. Such a crime is subject to compulsory universal jurisdiction under Article 49 of the convention.

The special protection accorded by IHL under customary law to all medical facilities in all armed conflicts and in all circumstances, both within and outside the conduct of hostilities, is a recognition of the particular vulnerabilities of the patients. Destroying or appropriating drugs or medical equipment within a hospital, therefore, goes beyond the general war crime of pillage because of the human consequences those acts engender.

A similar principle applies to cultural property. Here, special protection is afforded not specifically because of the human consequences resulting from theft or wanton destruction. It is, rather, the loss to humanity of its heritage that is at stake. In its customary rule, number 38, entitled, "Attacks Against Cultural Property", the International Committee of the Red Cross determined that a customary rule applicable in all armed conflict was that:

"Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives."

This notion of military operations clearly encompasses action taken outside the conduct of hostilities.

The Al Mahdi case has been referred to by the Prosecution and the Defence and also other *amici* in their submission, and I won't go into that, save to point out that the ICC duly recognise the special status of religious, cultural, historical and similar objects. As with medical facilities, cultural property is protected in all armed conflicts and in all circumstances, both within and outside the conduct of hostilities.

Theft may occur without accompanying violence. Violence is not always required for conduct to constitute an attack. This is both a manifestation and a consequence of the special meaning attributed to an attack when a civilian object is subject to

special protection under IHL. And in the case of cultural property, as in medical equipment, the effects may ultimately be the same whether an object is destroyed by bombardment or stolen never to return.

We conclude that the customary war crime of intentionally directing attacks against historic monuments and hospitals and places where the sick and wounded are collected, as codified in Article 8(2)(e)(iv) of the Rome Statute, should be interpreted in accordance with customary and IHL treaty rules, which means it should be interpreted broadly.

Outside the conduct of hostilities, customary rules dictate that attacks are to be defined as encompassing all military operations in any armed conflict against cultural property or medical facilities. A violation of the prohibition on attacks against cultural property or medical facilities occurs where, in the course of such operations, either the buildings themselves are damaged or their contents are damaged, stolen or destroyed. Humanity demands no less.

Thank you for your attention and for the opportunity to present to you this morning.

PRESIDING JUDGE MORRISON: [12:25:11] Thank you very much, Mr Heyns. There's going to be an opportunity immediately after the next break of 30 minutes for questions to be asked of all -- of any participant and that's when it will be effective. Mr Newton, you now have the floor for 13 minutes.

MR NEWTON: [12:25:34] Mr President, and members of this honourable Bench, I rise with respect. It is an honour to appear before you again. I represent neither party and serve only the integrity of the law.

No party to this litigation seeks to preserve a legal regime that would unduly subject cultural property or other civilian objects to the effects of hostilities. Military forces may never intentionally launch attacks against such protected persons or places.

The briefs in this case, as have already been noted repeatedly, reflect the definition found in Article 49 Protocol I, revolving around acts of hostility. The ICRC commentary makes plain in paragraph 1882, that the term "attack" refers simply to the use of armed force to carry out a military operation. However, the Prosecution seeks to hijack the far broader concept of attacks out of Article 7 and artificially jam it into Article 8. Articles 8(2)(e)(i) to 8(2)(e)(iv) and the numerous analogues found in 8(2)(b) instantiate the core principle of distinction.

This tenet is the cornerstone of humanitarian law. In this context, it is very important to note that cultural property, civilians and civilian property are protected by an interlocking set of principles. Military forces must, of course, refrain from intentional attacks directed against protected persons and places. They must simultaneously take all feasible measures to minimise or eliminate foreseeable damage to those targets. They must warn when circumstances permit. They must refrain from launching attacks that would violate the precepts of proportionality.

That said, military forces around the world shift to a transitional phase upon taking power or possession over protected persons, places or objects following hostile operations against the enemy. During this consolidation phase, ammunition, food, fuel and medical supplies are restocked. Trenches are dug in preparation for potential enemy attacks. Security must be posted and fields of fire cleared to enable further combat operations. Such actions are lawful, provided that they derive from good faith assessment of military necessity. Subsuming all the aspects of hostilities under the prism of targeting law would reflect neither the position of the drafters nor the operational experiences of practitioners.

Actions taken during that subsequent phase - such as, clearing fields of fire or restocking supplies or digging trenches - comport with the dictates of discipline and

centuries of military practice. They are not attacks in the ordinary meaning of that term of art. In fact, they represent appropriate preparations for further military attacks. Failure to perform these actions when in power or possession or control of persons or property would be a fundamental dereliction of duty for a conscientious commander. By its very semantics, Article 8(2)(e)(iv) is inapplicable to locations where one force has established power or control because they no longer represent military objectives.

Does that mean that protections for cultural property or hospitals or schools ceases? Of course not. And no one in this litigation would argue otherwise. Rather, the locus of legal analysis shifts to the assessment of whether the force in power or control had sufficient military necessity to authorise its actions. The structure of Article 8(2)(e)(iv) in conjunction with Article 8(2)(e)(xii) and analogous provisions in other parts of Article 8 embody exactly this well-established mechanism for protecting cultural and other civilian property.

In this vein, there is no support whatsoever in paragraph 30 of the Prosecution brief for the notion that an expansive reimagining of the word "attacks" is necessary to fulfil the intentions of the drafters and align Article 8(2)(e)(iv) with the established framework of international law. Attacks on cultural property and protected persons are deterred and stigmatised during all phases of operations, but not by a monolithic and simplistic assertion that any interaction under any circumstances with such protected persons and places can properly be termed "attack".

I wish to conclude my time was making three specific points regarding the correct understanding of Article 8(2)(e)(iv).

First, the bifurcation between the attack phase of operations governed by the law of targeting and the larger set of protections found in Article 8(2)(e)(xii) embodies

protection for cultural property at all phases of operations. This bifurcated treatment reflects the framing found in Article 27 of the 1907 Hague Regulations. Under Hague law and targeting law, the focus should properly be on taking action against valid military objectives. By contrast, Geneva law as embodied in Article 56 of the Hague Regulations, and understood in light of Article 23(g) of those same regulations, in that context the essential focus is on whether the property is destroyed or seized pursuant to valid military necessity. Targeting provisions of Protocol I repeat exactly this bifurcation by linking the concept of "attack" to military objectives. Article 54 states further: "It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population ..."

Making "attack" synonymous with "destroy, remove or render useless" would denude those words of practical meaning. The law of targeting does not extend so far and, to be frank, I would give one of my students a very low grade for redundancy if the word "attack" necessarily incorporated all the other verbs in that sentence.

Secondly, I must be quite firm in opposing suggestions that the contrast between Articles 8(2)(e)(iv) and 8(2)(e)(xii) Signifies some latent position of the drafters regarding what the Prosecution terms in its brief the "insufficiency of mere residual protection" of civilian objects. With the greatest respect to my friends in the Prosecution, I know that this assertion is incorrect because I was deeply involved in those negotiations. Articles 8(2)(b)(xiii) and 8(2)(e)(xii) were carefully negotiated to align with state practice and the professional mandates of sensible commanders.

Other provisions of the 1907 Hague Regulations contrast with the concept of attack under the law of targeting. Article 23(g) of the Hague Regulations form the template for the text of 8(2)(b)(xiii) and 8(2)(e)(xii). And here's the key point: As we negotiated the Elements of Crimes, we spent a great deal of time in gaining ultimate

consensus agreement. I can personally attest that these provisions in particular were extensively discussed. Delegates agreed with our position that the beautiful, beautiful 1899 phrase "imperatively demanded by the necessities of war" in view of state practice and modern international law simply means "military necessity". Thus, you can readily verify that the consensus text requires proof only that the destruction or seizure against protected property were not required by military necessity. The elements of crimes for these offences did not offer any change to the pre-existing fabric of the laws or customs of war. However, the Prosecution argument would make these provisions redundant.

In my scarce time remaining, I wish to direct your attention to the parallel provision found in the pillaging offence of Article 8(2)(e)(v). The second element of the pillaging offences requires - and I use the plural, of course, because that provision is replicated in 8(2)(b) - the second element of those offences require proof that the perpetrator intended to deprive the owner of the property and appropriate it for private or personal use. Footnote 47 clarifies that "appropriations justified by military necessity cannot constitute the crime of pillaging." I can personally assure you that these provisions were carefully negotiated. The parallelism, the parallel structure between the two successive provisions is deliberate. It reflects state practice and the pragmatic realities of military operations. Commanders around the world would be shocked to learn that this Bench forbade the digging of defensive trenches. Pillaging or seizures of protected property absent military necessity constitute theft and should be charged accordingly.

In conclusion, as I said in my brief, attack means attack. The Prosecution argument would require a substantive shift in the law of targeting that would send shock waves throughout military doctrine around the world. The legality of attacks must be

assessed in light of the military objective and overall compliance with other applicable provisions. There are no lacuna in the existing structure that warrant revision of that core approach. Consideration of the ordinary meaning of the term "attack", in light of the overwhelming evidence of state practice, indicates that the Prosecution appeal should be denied on these facts. The established precepts of international humanitarian law juxtaposed against the *in dubio pro re* principle found in Article 21 warrant the finding that the Trial Chamber ruled correctly on these facts in this case.

Thank you for your time.

PRESIDING JUDGE MORRISON: [12:36:50] Thank you, Professor Newton.

I think there is a question from Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [12:36:59] Yes, indeed.

Mr Newton, I think it's better if you had concentrated on giving us substantive submissions rather than shock waves around the world, and commanders, as well as your student's grade. There was a time when professors of geography would think that anyone who argued the earth the round would get an F grade.

But moving on, there isn't -- I want to understand what the concern really is here. From your perspective, you have clearly argued the -- made your submission from the perspective of soldiers and what they would welcome.

Here is the thing: Isn't the concern, effectively, that in armed conflict soldiers should be able to fight their battles according to international law, fight it fairly, and they should not attack civilians and civilian objects? In other words, military objectives fair game, military necessity could permit certain perceived aberrations. Do we have that fear here that that essential purpose is in jeopardy? If it is the case that every provision that we're looking at here has striven to preserve military objectives, as well

as military necessity, if that is the case, does it matter then whether attack is conceived of as something that happens immediately in the zone of combat as well as something that happens in the understanding of the law as laid down in the Kunarac case? If you remember, Kunarac tells us that a violation of laws of customs of war may occur at a time when, in a place where no fighting is actually taking place. Does that tell us then that we are talking here about the word "attack" having a spectrum of application, a dynamic application if you will, that spans in operation from the point of military operation, actual military operation up to period after that?

Did I lose Mr Newton?

PRESIDING JUDGE MORRISON: [12:40:14] I fear that the link has broken.

MR NEWTON: [12:40:55] Judge Eboe-Osuji, can you see me now?

JUDGE EBOE-OSUJI: [12:41:00] Yes, indeed, we can see -- I can see you. We can see you now. Did you get my question?

MR NEWTON: [12:41:03] I did. I did. And as soon as I began to answer -- I could not see you when you asked, nor can I see you now, so there's something. It's like I stare into a blank screen, but knowing I'm talking to you (Overlapping speakers)

JUDGE EBOE-OSUJI: [12:41:13] But we can hear you, we can hear you. We can also see you.

PRESIDING JUDGE MORRISON: [12:41:16] Mr Newton, can you move -- it may mean sitting down - if you could move slightly closer to the microphone, because you're very faint. But we can see and hear you.

MR NEWTON: [12:41:29] Okay. I think Judge Eboe-Osuji put his finger on exactly the issue in this case. The Prosecution argues that there are gaps in the law that need to be addressed by a fundamental reinterpretation of the concept of attack. And my argument is exactly the opposite, that activities directed against enemy forces

constitute attack. As he pointed out, activities directed against civilians would always constitute an unlawful attack because they are not lawful military objectives per se.

The Prosecution argument, however, would necessitate a fundamental re-altering in the established contexts of the laws and customs of war. Think of it this way, 8(2)(e)(iv) prohibits an attack directed against a military objective. When persons or places are within my custody or under my effective control they are, by definition, not a military objective. And yet we know - and I think all parties to this litigation agree - that some action based on military necessity is permissible in that other context, whether it be digging trenches, or resupplying, or clearing fields of fire. If I have to, in support of my defensive position, knock down a steeple from which I believe that enemy snipers are using and I need to do that in order to clear my field of fire, that's an activity governed by military necessary. The Prosecution argument would make that provision of 8(2)(e)(iv) into, essentially, a strict liability offence because that activity would never constitute a valid military objective and that's the fundamental problem here.

And I'll restate what I said in writing and what I tried to say in oral presentation, that there is no gap here. Any conceivable activities directed against cultural property or religious property or other civilian property are covered at all times and in all phases of operations. The shift is in the requisite legal test, was it directed against a military objective during the attack phase or, when something does not constitute an attack, is there a prima facie good faith argument of military necessity? And there's the challenge.

Essentially, what the Prosecution argument is doing is rewriting all of international humanitarian law, the targeting aspect, and I would disagree that there's a gap in

Article 8 -- between Article 8(2)(e)(iv) and Article 8(2)(e)(xii). And as I said, I know this because I was there, I negotiated these provisions in the elements. And nobody at the time saw a gap, what we were trying to do was to accurately reflect state practice.

And I hope that's responsive to your question, your Honour.

JUDGE EBOE-OSUJI: [12:44:35] I think is does, to an -- to just make it -- it's possible, in fact, to -- under 8(2)(e)(iv), to -- that a scientific building can be object of -- can be a military object, for instance, if that is where research is being done to manufacture new weaponry, that sort of thing. So, the point is, I think we agreed on that issue. Thank you.

PRESIDING JUDGE MORRISON: [12:45:05] Thank you, Mr Newton. There may of course be further questions later in the proceedings, if you can stay attached.

I now turn, please, to Mr Corn and Mr Jenks. You now have the floor for 13 minutes.

MR CORN: [12:45:26] Mr President and your Honours, on behalf of my co-authors, thank you for this opportunity to contribute to your deliberations on this appeal.

Our submission reflects the consensus of a group of experts with more than 100 years of combined experience as military officers and legal advisers of every level of command, tactical operational, and strategic.

As our submission indicates, the meaning of attack is specific and does not extend to every act of hostility or every combat action during armed conflict. While all attacks are acts of hostility, not all acts of hostility are attacks.

This is an important dichotomy in IHL for it directs legality assessment into the domain of IHL rules developed for distinct activities. Accordingly, only those acts of hostilities that qualify as attacks trigger the IHL targeting framework or targeting rules.

To assist this Court, we sought to identify what we believe are the essential components of an attack.

First, an attack must involve an act reasonably expected to produce physical injury or damage to persons or objects.

Second, the motivation for executing the act must be to cause harm to the adversary, whether the target is the armed forces of the enemy or the civilian population in the conduct of hostilities.

These two elements are essential requirements for an act of violence or a combat action to qualify as an attack. However, this attack assessment is applicable only when the persons or objects subjected to the act of hostility are not under the full control of the belligerent engaging in that act.

As noted in our submission, if persons or objects are under that level of full dominion and control of a belligerent, meaning subjected to the complete power of the belligerent, an act of violence will not qualify as an attack, although it will be subject to other IHL rules. In this regard, it is important that we emphasise our use of the term control in this context does not refer to the control over territory but over a specific object or person. It is not analogous to other uses of the term in relation to international criminal law, such as the effective control test or the law of belligerent occupation.

Indeed, we believe attacks may occur in areas under the overall control of a belligerent when the object of attack is not subject to the belligerent's complete power and dominance. This emphasis on actual physical control aligns with IHL's dichotomy of the structure as it functions to mitigate the suffering of conflict.

This is why we believe, as noted in our submission, quote:

"An interpretation of IHL that categories every act of violence resulting in damage,

destruction, or loss of property as an attack, therefore requiring the application of targeting rules, is inconsistent with IHL and would undermine the law's practical application to military operations."

This is the consequence of an expanded definition of attack, a consequence we believe will attenuate the meaning of that term in Article 8 of the Rome Statute with the pragmatic and long-standing understanding of IHL as reflected in state practice, IHL treaties, scholarly understanding and exploration, military manuals and decades of operational military experience.

We fear this will ultimately have the negative effect of diluting the regulatory clarity of the law, and undermining the established rules of IHL, and potentially contributing to a proforma application of critically important targeting rules and processes. And potentially indicting the lawfulness of a vast array of activities traditionally assessed as lawful pursuant to other more appropriate IHL regulatory norms.

Thank you for my opportunity and I will now pass to my colleague and friend, Professor Jenks.

PRESIDING JUDGE MORRISON: [12:50:22] Thank you.

MR JENKS: (Microphone not activated)

THE COURT OFFICER: [12:50:48] Mr Jenks, if you could please click on the speak button.

MR JENKS: [12:50:57] Sorry, is that -- can you hear me?

THE COURT OFFICER: [12:51:03] Yes, we can. Thank you.

MR JENKS: [12:51:06] Okay. Sorry, I'm not sure where it cut off.

THE COURT OFFICER: [12:51:16] We didn't hear any of your submissions.

MR JENKS: [12:51:19] Then that's easily enough, I apologise. Thank you,

Professor Corn.

Mr President, your Honours, as applied to Article 8 of the Rome Statute, the definition of attack is the same throughout that Article as well as under IHL. In considering Article 8 offences, the term attack is only properly understood when considered through its traditional IHL or *jus in bello* origins. Importantly, interpreting the meaning of attack for the purposes of Article 8 offences is not properly informed by reference to the *jus ad bellum* or crimes against humanity under Article 7 of the Statute, or through novel interpretations of terms which were not included in Article 8.

This conclusion is indicated by references to the Rome Statute and the Elements of Crimes and this Court should observe that the word "attack" is identically listed, without qualification, in multiple offences enumerated in Article 8. This supports only one rational inference, the word "attack" is understood the same manner throughout Article 8.

The consistent meaning of attack throughout Article 8 is further evidenced by reference to Article 7, crimes against humanity, which may occur in peace time. The drafters of the Rome Statute clarified in the elements of crime that attack under Article 7 has a different meaning than the meaning of attack for war crimes under Article 8.

There is no comparable clarification or qualification of the word "attack" anywhere within Article 8. Again, that's because attack has the same understanding throughout that article, an act of violence against an adversary during the conduct of hostilities. As was discussed, while all attacks are acts of hostility, not all acts of hostility are attacks. This is reflected in the elements of crime for Article 8.

The commission of some war crimes, including attacking protected objects, requires

in the first element that the perpetrator direct an attack. The commission of other war crimes, including pillage and destroying enemy property, does not depend on the existence of an attack and the elements of crimes for those offences do not mention attack.

This is not surprising. Pillage is different -- is a different concept factually and legally than attack. In terms of destroying enemy property, the legal rules governing unlawful destruction of property are different than those applicable to attacks, including in respect to the motive for the act.

If all acts of hostility were intended to qualify as attacks under Article 8, it seems illogical that the State Parties would have specifically enumerated other offences resulting from such acts.

These other offences not only align with an understanding of IHL, but confirm that the term "attack" as used in Article 8 has the meaning we ascribe to it.

This conclusion is reinforced by considering that the third element of the crime of attacking protected objects makes reference to military objectives. Military objective refers to the Additional Protocol I test for determining what may be made the lawful object of attack. If the drafters intended an abnormal meaning of attack in regards to protected objects, they would have so indicated, as was done in Article 7. And if an abnormal meaning of attack was intended, the drafters would not have included a reference to military objectives, a term clearly linked to the normal understanding of attack.

The elements of crime for the offence of attacking protected objects could have clarified or qualified a different understanding of attack was intended. It does not. Similarly, the offence itself could contain different broader terms than the term "attack", but it does not.

This is why our submission concludes that there is no different meaning for the term "attack" depending on the nature of the object. Ultimately, the treatment of a combat action as an attack depends on the action taken, not on the object selected. And there is no special meaning to the term "attack" in the context of protected objects.

In closing, we encourage the Court to recognise that the meaning of the term "attack", as used in Article 8 of the Statute, is synonymous with the IHL understanding of that term and that there is no basis for adopting a different definition of attack for specially protected objects.

Thank you.

PRESIDING JUDGE MORRISON: [12:56:39] Thank you, Mr Jenks.

JUDGE EBOE-OSUJI: [12:56:46] Thank you very much.

Mr Jenks, one question for you, possibly two.

In these submissions, there seems to be this effort made to distance, as it were, definition of attack under Article 7(2)(a), that's for purposes of crimes against humanity, distance it from the war crimes definition for understanding of attack. And you made that point.

How far should we -- confident, rather, are we with that attempt at distancing? We know, for instance, of the Martens clause, for example, that always at the -- in the preamble to international treaties, or from international humanitarian law treaties, always signals that what was provided in the code may not be complete and, to that extent, that inhabitants and belligerents remain under the protection, an empire of the principles of international law, as they result from the usages established between civilised nations from the laws of humanity, from the laws of humanity and the dictates of public conscience. That is Martens clause. Now, my emphasis there is on -- from the laws of humanity, part of that understanding of Martens clause is

telling us. Martens clause is the great gap filler, as it were, of international humanitarian law. Are we really sure that we can press that argument that our understanding of crimes against humanity may not inform how we may view certain provisions of the Rome Statute that deal with war crimes for purposes of the internal coherence that Mr Bourgon spoke about this morning?

Now keep Martens clause in mind and think about another angle to my concern here -- or my question, rather. Until not long ago there was a certain understanding that there was a linkage, necessary linkage, if you recall, between armed -- sorry, crimes against humanity and armed conflict, but the jurisprudence of ICTY made it clear that that was not the case. Wasn't it the case that the reason why people thought that there was that necessary linkage was because of the difficulty of separating understandings of crimes against humanity from international humanitarian law? That is to say, are we sure that we can truly, confidently ignore what Article 7(2)(a) of the Rome Statute tells us, for purposes of construing what attack may mean in its broader context under Article 8?

That's my question.

MR JENKS: [13:00:46] Thank you for that.

To perhaps clarify the -- my primary point in regards to Article 7 - well, twofold - one is, Article 7 provides an example of when the drafters intended a nontraditional or abnormal understanding of attack, they indicated. And they did so in Article 7 and they did not do so in Article 8. So the first point is that the absence of any qualification or clarification of attack in Article 8 should be interpreted as reflecting that the term means the same thing throughout the article and it means the same as under international humanitarian law.

My second point in terms of regarding referencing Article 7 was just merely that, with

a different -- I'm not sure the utility of referring to a different definition or understanding of attack in Article 7 in helping the Court understand the parameters of that -- of the term attack in Article 8. I think the Court is better served by referring to its traditional IHL origins.

JUDGE EBOE-OSUJI: [13:02:08] The utility is this, the utility is, it engages the concern - Mr Suprun, I think that was the substance of his argument this morning - that the Trial Chamber might have been too restrictive in its reasons as to the meaning of attack, that attack can have a broader meaning. And when you begin from that broader perspective of -- general default perspective, as it were, of the meaning of attack, then you begin to see whether specific conducts are regulated under specific provisions of Article 8, in which case you charge your -- you bring your charge under those specific provisions under Article 8. But where there's a gap, genuine gap, then humanity is still protected, or humanitarian interest is still protected, because of the broader understanding of attack which Article 7(2)(a) can inform. That is a utility. Does that not work?

MR JENKS: [13:03:34] With respect, your Honour, I disagree that there is a gap. I think the --

JUDGE EBOE-OSUJI: [13:03:39] I did not say -- I did not say there's a gap. I did not say there is a gap. I'm saying if there is a case -- if that is the case, then you resort to broader meaning.

MR JENKS: [13:03:48] Apologies. So, I don't believe there is a gap, and one of the reasons why I think it -- I think it's important to recognise that we need to be clear on what attack means because attack triggers a whole set of targeting rules and portions of international humanitarian law. Where conduct does not constitute an attack, it is not that there is a gap or and it is not that there is no law, there is a host of other law,

whether from Hague, or I would refer the Court to the constant care obligation of Additional Protocol I. But there needs to be clarity about the bounds of the term attack and whether or not the targeting rules are implicated or we should be looking to other, other IHL in terms of how to consider the action in question.

PRESIDING JUDGE MORRISON: [13:04:55] Thank you.

There was a question from Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [13:05:00] Thank you, Mr President.

Professor Jenks, we all here are aware that under international humanitarian law charges hospitals, places dedicated to religion, among others, are protected objects.

So my question is, first, do you see no difference between these protected objects and any other property of the adversary?

And the second question is, how can this Article 8(2)(e)(xii) protect better those objects than Article 8(2)(e)(iv)?

Thank you.

MR JENKS: [13:06:02] Your Honour, I apologise, you cut out or the audio cut out for the first half of I think you were asking a two part question and I missed the first half.

JUDGE IBÁÑEZ CARRANZA: [13:06:11] Maybe I can repeat, because the first one is a necessary premise.

I ask, do you see no difference between these protected objects and any other property of the adversary? And the second question -- because those are protected objects not only for treaties by customary law.

The second question is how this Article 8(2)(e)(xii) could protect better these objects than Article 8(2)(e)(iv)?

Thank you.

MR JENKS: [13:06:52] Thank you.

In terms of the first part of the question, it's not clear to me that the property was property of the -- property of the adversary, so in terms of that is a threshold predicate. I would also -- but as a general proposition, there is no special status, there is no special status in terms of the application of attack based on, based on the object itself so, in that way, these are civilian objects. The drafters have separated them out in -- in the article about -- in the offence of attacking protected objects, but as the Prosecutor has acknowledged in their brief this is much broader concept than cultural property. And in their brief the Prosecutor makes reference that States will determine what constitutes cultural property in this context and that that could be tens of thousands, up to a million, items of moveable and non-moveable objects. So I would respectfully suggest to the Court that it consider the ramifications of a different understanding of the term "attack" that could potentially be applied tens of thousands, up to million, within the confines of a State. That is, frankly, highly problematic and disruptive, it's a military doctrine and understandings of IHL. And, with respect, your Honour, I will concede my -- that I'm not well qualified to answer your second question in terms of how to improve the destruction of property article of the Statute. I apologise.

PRESIDING JUDGE MORRISON: [13:08:53] Thank you very much for your assistance, Professor Jenks.

We now turn to the office of the Prosecutor and you have the floor for five minutes to respond.

MR CROSS: [13:09:07] Thank you, your Honours.

I'd like to address a couple of remarks made by Mr Newton and Mr Corn and Mr Jenks.

First, to go to a point made by Mr Newton, and notwithstanding Judge Eboe-Osuji's

questions about the broader significance potentially of the Martens clause or the concept of humanity in Article 7, the Prosecution has founded this appeal on quite a narrow, we would say even a conservative basis, and that is that in the established framework of international law, in international humanitarian law as its exists, there is a basis to require that attack in 8(2)(e)(iv) is given a special meaning. And so for that purpose and within those limits we say it is not necessary to consider anything that may be emanating from Article 7.

And just when we talk about the established framework of international law, I would like to briefly correct the record from a comment made earlier this morning. I think my learned friend Mr Bourgon suggested that I described the established framework of international law as being new in some way. In fact, if your Honours look at the transcript on Transcend, I think at page 19, at lines 22 to 23, I think my learned friend may have misunderstood or misheard me when I said that the established framework may be, and I quote, "somewhat nuanced in this respect." And this stands to reason, first of all, because obviously there is nothing new in the treaties upon which we seek to rely for the interpretation of 8(2)(e)(iv). They date from 1906, 1907, 1929, 1949, *1954 and 1977. The most recent of them is 43 years old, which is to say it's older than I am, and all of these treaties predate the drafting of the Rome Statute by a considerable margin.

Recognising the nuanced nature of the established framework of international law is, however, important and on this point I'd like to touch the second concern raised by Mr Newton and maybe make a brief clarification of something which was not so apparent from our brief.

Mr Newton refers to imperative military necessity, which is a concept, for example, in Article 8(2)(e)(xii) and suggests that in some way this would not be taken into account

for relevant objects if the act of hostility concept was used to elaborate the meaning of attack in 8(2)(e)(iv). But on that note, your Honours, I'd briefly like to draw your attention to Article 4(2), for example, of the 1954 Hague Convention, which does recognise a waiver for, and I quote, "imperative military necessity". And, of course, in our contention all parts of the definition of act of hostility are imported into the meaning of attack in 8(2)(e)(iv).

Caution is, however, necessary with the notion of military necessity in the concept -- in the context, I beg your pardon, of the Hague Convention because, of course, the 1999 Second Protocol to the Hague Convention introduces additional heightened requirements for its parties to raise military necessity. So there is some care needed in that respect, but it is not a consideration to which we are blind and it is part of the established framework of international law which we say is already incorporated in 8(2)(e)(iv).

On the facts of this case, of course, your Honours, Mr Newton spoke in broad terms about building trenches and preparing defences and clearing fields of fire. Those are not * the facts of what happened at the church at Sayo, nor the hospital at Mongbwalu. And so, on the facts, we do not think that consideration is pertinent to this case.

Finally now, if I can address a point made by Mr Corn, and I cannot emphasise this point strongly enough. Mr Corn seems to suggest that it is our argument that simply because a protected object such as a church suffers damage, then we say that damage must be an attack in the general meaning of the conduct of hostilities and, therefore, we are in some way expanding that accepted meaning. That is simply not our position, as we've tried to make clear in the brief and as I have tried to make clear this morning.

Rather, we are saying that, if an object is subject to violent action in the conduct of

hostilities, i.e. against the enemy, then of course it is the orthodox definition of attack which is relevant and, therefore, there may be an exception if it is a military objective. But beyond that, we are saying when it is no longer in the context of the conduct of hostilities, i.e. when there is no enemy to be targeted, we are saying that protected objects have special protection against other intentional forms of violent act. So, in the case at hand, once the conduct of hostilities has ceased, if forces go into a church and intentionally damage that church, that is a prohibited act of hostility even though it may not be an attack in the meaning of Article 49(1) of the First Additional Protocol.

Finally, your Honour, just to conclude, we've heard a number of participants say that the Statute adequately covers all the potential forms of conduct about which we raise concerns from the established framework of international law by reference to Article 8(2)(e)(xii). But again, with respect, we would remind your Honours that nobody has addressed the fact that that provision only applies when the property is actually damaged -- in fact, actually destroyed, I beg your pardon, whereas 8(2)(e)(iv) applies when the property is merely subject to an attack directed against it.

And secondly, 8(2)(e)(xii) only applies, as Mr Jenks noted, to the property of the adversary and, therefore, it does not cover the belligerent's own property which may, nonetheless, be a specially protected object in the meaning of Article 8(2)(e)(iv).

And I think on that point, your Honours, that probably concludes my time and I'd be happy to address any questions you may have this afternoon.

PRESIDING JUDGE MORRISON: [13:16:05] Thank you.

And can we move to counsel for Mr Ntaganda for a five minutes' response.

MR BOURGON: [13:16:12] Thank you, Mr President.

I would make a few brief comments, beginning with the submissions of Mr Heyns, I believe. Now, Mr Heyns was about to concede, or at least to recognise, the

authoritative value of Article 49(1) of Additional Protocol I, but then in his submissions he makes a step back because the word "attack" in Article 19 of the first Geneva Convention, which addresses that:

"Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict."

Mr President, I respectfully, with all due respect for my colleague Mr Heyns, I do not think that this issue addresses the concerns that we have today, that we have the issue that we have to determine in this case.

However, I would like to point out an issue that was raised or observations made by Mr Newton, Mr Jenks and Mr Corn in a different way, but they address a very important issue, and that is that the Prosecution's approach or the Prosecution's argument here fails to consider a core IHL principle of distinction. And that is a key issue here. And I really like the observation when I heard that, subjecting what happens after an attack to targeting law is contrary - I mean, I'm paraphrasing - is contrary to the coherence of international humanitarian law and, more particularly, its two components, law of Geneva and the law -- and Hague law.

So, that's all I have to say on the submissions of the *amici curiae*, but I do have a few submissions in respect of my colleague CLR2.

Now, my colleague CLR2, first of all, he disagrees that attack should be given a different meaning, so on this point we agree. But then my colleague basically explains that combat includes the aftermath of the combat. So then he tries to explain what he means by aftermath. Aftermath would be after the attack but before taking control. So, if we follow CLR2's argument, we now have three difference phases; we have the attack, we have the in-between and we have when control is

exercised by the attacking force. We respectfully submit, Mr President, that this is even more complicated than the Prosecutor's approach.

With respect to the gap for the protection of cultural objects, the way I understand my colleague's submissions this morning, he says a concern is after the attack, so, one, I guess it answers the concerns of the honourable Judge that the protection of cultural property is covered by 8(2)(e)(iv) during the attack. But, more importantly, is the fact that there is no gap. Counsel for Prosecution is saying that nobody has explained that what goes beyond the enemy's -- or, the property belonging to enemy, that is incorrect. All property belonging to the enemy is covered by 8(2)(e)(xii).

A quick comment about CLR2 was saying that the Statute is a living instrument. Well, yeah, all legislative texts are in some way a living instrument and there is room all the time for some interpretation, but in this case we are dealing with a criminal provision, we are dealing with the ICC Statute, which has an exhaustive list of crimes, we are dealing with the established framework of international law, which is clearly identified in this case, and we are dealing, of course, with the fact that criminal statutes must be given a restrictive interpretation.

Mr President, we say that there is no gap. If there is any gap, the only way to resolve it is to go by amending the Statute, and we say that this is not necessary.

Now, to the issue as to whether 8(2)(e)(xii) or 8(2)(e)(iv) gives better protection to certain objects, we respectfully submit that this is not the issue. It's not a matter of better protection, it's whether there is protection, and protection during the attack is given by 8(2)(e)(iv) and protection after the attack is provided by 8(2)(e)(xii).

This concludes my submission, Mr President, thank you.

PRESIDING JUDGE MORRISON: [13:21:51] Thank you very much.

Because we've significantly exceeded the time the interpreters were expecting to be

occupied, we'll take the second break now and hear from the Legal Representatives for the Victims immediately after the break.

Can we shorten the break slightly and resume again, please, at 1400 hours, at 2 o'clock.

THE COURT USHER: [13:22:16] All rise.

(Recess taken at 1.22 p.m.)

(Upon resuming in open session at 2.01 p.m.)

THE COURT USHER: [14:01:48] All rise.

Please be seated.

PRESIDING JUDGE MORRISON: [14:02:11] Thank you.

May I now invite representatives of the two groups of victims to respond for five minutes.

MR SUPRUN: [14:02:22] Thank you, Mr President. Since in the present proceedings 12 *amici* submissions were presented, I will take this opportunity to briefly address some of these *amici*, also those invited to attend the hearing. But given the time -- limited time frame and in line with my previous both written and oral observations, I will simply refer to those parts of some *amici's* submissions I either agree or disagree with.

Regarding *amici* 2588, I agree with the following parts:

That the term of attack under the article at hand includes both the heat of battle and actions taken after the heat of battle has subsided but during continuous activities serving the military objectives of the attackers, paragraph 13.

Second, this term should recognise the continuous nature and the duration of acts of violence carried out in continuing pursuit of an overall military operation, paragraph 7.

Furthermore, I agree with 2588 that the purpose of the special protection under the article at hand is not for the building itself, but rather for the function and purpose of the building and its content, for which it is granted a special level of protection, paragraph 11; that human elements of this article must be taken into account, paragraph 12; and that the term of adversary does not imply that only violent operations against enemy forces qualify, paragraph 3.

However, I respectfully disagree with 2588 that attack under this article has a special meaning, paragraph 4.

Regarding *amici* 2594, I agree with the following parts:

First, the object and purpose of the Rome Statute --

THE INTERPRETER: [14:04:16] Mr President, sorry to interrupt, but Mr Suprun is way too fast.

MR SUPRUN: [14:04:24] (Overlapping speakers) supports an interpretation of attack in the article at hand that includes ratissage operations, paragraph 8.

PRESIDING JUDGE MORRISON: [14:04:25] Can you slow down a bit for the interpretation.

MR SUPRUN: [14:04:27] Apologies to the interpreters.

Second, the shift from "sieges and bombardments" in Article 27 to "attack" in the article at hand represent a conscious choice to expand the scope of protection beyond the conduct of hostilities, paragraph 7.

Third, sieges and ratissage are conceptually similar, both of which connote continuous action in areas where hostile forces have assumed elements of effective control not necessarily amounting to an occupation, paragraph 6.

And fourth, a broader interpretation of attack is required to avoid leaving a chronological gap in international humanitarian law protections for hospitals and

cultural property during the intermediary phase of conflict - during which ratissage operations frequently occur - between the conclusion of the conduct of hostilities and the formal onset of occupation, paragraph 9.

Regarding *amici* 2592 corrected, I agree with the following parts:

First, the term of "attack" under the article at hand should be considered beyond classic methods of warfare such as shelling and sniping, page 7.

Second, ratissage operations fall within an attack, given the nature and because directly endangering the civilian population, page 7.

And third, the term "adversary" includes both combatants and civilians, page 6.

On *amici* 2587, I agree with the following parts:

First, attack must be conducted as part and within the context of the conduct of hostilities, paragraph 7.

Second, ratissage operations can qualify as an attack if being part of military operation to seize control over a certain location regardless of the level of control that the party to the conflict has over the town, paragraph 13.

Third, the term "adversary" includes combatants, civilians, military objectives or civilian objects, paragraph 4.

However, I respectfully disagree with this *amici* that combat action is wider than an attack, paragraph 10.

This concludes my observation. Thank you, Mr President.

PRESIDING JUDGE MORRISON: [14:07:05] Thank you.

We now turn to questions from the Bench. Because Judge Hofmański and Judge Bossa are, as it were, remote, it may be that I have missed any desire by them to ask questions hitherto. So I will ask them first if they have any questions at this stage.

THE COURT OFFICER: [14:07:37] Judge Bossa, the floor is yours.

Judge Hofmański, the floor is yours if you want to.

JUDGE HOFMAŃSKI: [14:07:44] Thank you very much.

No, thank you. I would like just to mention that I have no questions at this stage.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [14:07:50] Thank you.

And Judge Bossa?

JUDGE BOSSA: [14:07:53] Thank you, Mr President. I don't know whether you can hear me.

PRESIDING JUDGE MORRISON: [14:07:58] Yes. Yes.

JUDGE BOSSA: [14:07:59] Okay. I have one question and it relates to what one of the *amici* stated and this question goes to the *amici* in the court.

I'm quoting what he said - I don't remember whether it was a he or she - they said that whether ratissage operations would constitute an attack would depend on the circumstances.

What would the *amici* have to say about this, and I think the motive behind the ratissage operations?

PRESIDING JUDGE MORRISON: [14:08:42] Well, two of the *amici* that were here this morning cannot be here now. Thomas Probert, from the same group as Professor Heyns is available and I believe that the other *amici* are available. So can I ask any of those who feel able to assist, to respond to Judge Bossa's question.

THE COURT OFFICER: [14:09:20] Mr Corn, you have the floor.

MR CORN: [14:09:24] Yes, as we noted in our submission, the concept of attack, as we understand it, certainly could extend to an area where -- that was under the control of a belligerent party to the conflict.

For us, the key distinction in ratissage operations would be the motive for the employment of force or the act of violence. If the motive is to gain a tactical or operational advantage over your adversary by causing harm to the adversary, then I think it would fall within the scope of the definition of "attack". If the motive is to simply destroy property or loot or steal, property that's within your full control at that point in that area, then I don't believe it would -- we don't believe it would qualify as an attack.

Thank you.

THE COURT OFFICER: [14:10:20] Mr Newton, you are next.

MR NEWTON: [14:10:23] I would agree and that's almost exactly what I was going to say in terms of the motive. But I also want to clarify that it's not necessarily control over the wider area. The geographic focus is as a factor, and sometimes that's the key factor. But it's really about control or power over a particular person and a particular object.

And then the question is: Is it an activity conducted as a part of operations directed against the enemy? If it is, it's an attack. If it's not, it's -- and the facts of this case, when you steal hospital supplies, it's either pillage or a lawful appropriation based on military necessity. The key point being that the assessment, the substantive framework has shifted from a conduct-based offence to a qualitative analysis of the motive behind that. So the mere act of taking doesn't automatically constitute attack.

PRESIDING JUDGE MORRISON: [14:11:31] I don't know whether Mr Newton had finished or whether we have simply lost him on the link.

But Judge Bossa, do the responses so far satisfy your question?

JUDGE BOSSA: [14:11:46] Yes, Mr President. Thank you.

PRESIDING JUDGE MORRISON: [14:11:54] Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [14:11:57] Thank you, Mr President.

This is for the *amici*, especially for Professor Newton.

Bearing in mind the interpretation of the Trial Chamber in the Al Mahdi case that covers a situation of occupation, if one were to adopt a narrow interpretation of the word "attack" in Article 8(2)(e)(iv) of the Statute, could a gap be created in the Rome Statute in the sense that serious international humanitarian law violations such as attacks or acts of hostility carried out during periods of occupation against buildings dedicated to religion, education, science, charitable purpose, historic monuments, hospitals, et cetera, could be left unpunished?

Thank you.

MR NEWTON: [14:13:04] Thank you, Judge Ibáñez. That's an excellent question. And I don't think it's a problem at all because the ICRC made very clear that even in an occupation, that these obligations remain consistent. And the question -- and that's why I focussed, as I just tried to focus on the last question, between control over a geographic area, even in an occupation setting, there may well be places where the enemy is active, where they're -- and in that case you can obviously have attacks. But the broader protections of 8(2)(e)(xii) or the analogue in 8(2)(b) are also applicable.

So, no, I don't believe that there's any gap at all in the context of occupation, which is why I noted earlier that I don't believe -- you have to read 8(2)(b) -- or 8(2)(e)(iv) attack, which is broader than direct, narrow combat action, it means combatant activities, violent activities directed against an adversary. That can happen in the context of occupation. US forces in Fallujah would be an easy example. But, but not all activities in that occupation are also directed against the enemy and therefore the protections are multifaceted.

That's what I would say.

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

This is also for *amici*, especially Professor Heyns.

It was said today in this courtroom that the definition of the term "attack" only appears in Article 7 of the Rome Statute, yet it is also argued that the term "attack" has different meanings between Article 7 and Article 8 of the Rome Statute, such as that attack under Article 7 is considered as one of the contextual elements of crimes against humanity.

So my question here lies, where is the main difference between the term "attack" under Article 7 and Article 8 of the Rome Statute, besides that the former compromises the contextual element of crimes against humanity? Thank you.

THE COURT OFFICER: [14:15:45] Mr Probert, you have the floor.

MR PROBERT: [14:15:55] Thank you, your Honour. And apologies for not having been introduced by my colleague earlier. But if I can try to explain. I'm not sure that we were drawing a distinction between the meaning of attack in Article 7 and Article 8 of the Statute.

The point that we are trying to make is that within Article 8, so within the gamut of the elements of a war crime, it is not necessarily the case, especially when applied to protected -- or specifically wouldn't apply to protected objects, hospitals and (inaudible).

PRESIDING JUDGE MORRISON: [14:16:49] I think we have lost Mr Probert.

MR PROBERT: [14:16:56] I'm sorry, can you hear me now?

THE COURT OFFICER: [14:17:05] Mr Probert, we lost you for a while and we cannot hear you very well. Maybe if you could talk closer to the microphone.

MR PROBERT: [14:17:15] I'm sorry. I was trying to remark that the distinction that

we are drawing is not between Article 7 and Article 8 of the Statute, but rather to make clear that the definition of an attack in Article 8, when applied to hospitals and cultural property, is not limited to the conduct of hostilities.

So I'm sorry if that wasn't clear from our earlier remarks.

PRESIDING JUDGE MORRISON: [14:17:51] Thank you.

I think Mr Jenks has also asked for the floor.

MR JENKS: [14:17:58] Thank you. And, Judge, I believe it was Professor Corn and I that may have raised that earlier issue about comparing Article 7.

My point or our point on the reference in Article 7 to attack is that in the introduction to Article 7 in paragraph 3, the draft -- in the elements of crime, the drafters felt the need to distinguish or qualify the quote "The acts need not constitute a military attack." So that suggests that the default setting or the normal interpretation is of a military attack, and since that wasn't to be the case in Article 7, the drafters clarified that.

And I think when you extrapolate it and then look at Article 8, where there is no such qualification or clarification of the word "attack", I think the obvious inference is that's because the understood meaning is of a military attack, and it is consistent throughout Article 8.

PRESIDING JUDGE MORRISON: [14:19:09] Thank you very much for that intervention.

Now I turn to Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [14:19:15] Thank you.

Question first is to Mr Newton. In your last intervention on the matter of motive being more or less the key to separating what is an attack and what is not, and you actually said that the key point is the, quote, assessment of substantive analysis of the

motive behind, unquote, the conduct. I'm trying to understand what that means, assessment -- the key point being the assessment of substantive analysis of the motive behind the conduct.

For purposes of determining whether or not that is an attack, does that mean that conducts that have identical physical elements would have different meanings for purposes of Article 8(2)(e)(iv) and what makes that difference is the motive behind the conduct? Is that what you're saying?

MR NEWTON: [14:20:54] I wanted to make sure that I had time to re -- to get the (inaudible). I think that's an excellent framing, Judge Eboe-Osuji. That is what I'm saying because the key criteria between 8(2)(e)(iv) and 8(2)(e)(xii), 8(2)(e)(iv) revolves around the definitional concept of what is a military objective. 8(2)(e)(xii) focuses, as I said, on military necessity.

So 8(2)(e)(iv) is a conduct-based offence that is a completed offence at the exact moment that an intentional attack is made for an improper motive. So the motive being, I'm going to direct violence against something that I know is not a military objective, that is the criteria in 8(2)(e)(iv).

That raises something that I do want to correct from a slight inaccuracy in my brief, which is directly relevant to a question raised earlier by both you and Judge Ibáñez. And it's this issue in my brief, and I apologise for the inattention to detail, I reversed footnotes 13 and footnotes 12.

On the issue of can an attack be directed against property in your own territory, the ICRC has explicitly addressed that. If you look at paragraph 1890 of the ICRC commentary, it specifically says that "... destructive acts undertaken by a belligerent in his own territory would not comply with the definition of attack ... as such ... though they may be acts of violence, [they] are not mounted 'against the adversary'."

And again, that's the point. The motive is different. If I attack cultural property or schools on my own territory but not directing those attacks against an adversary, not using violence to try to win the war, that's an impermissible thing, but it's not an attack within the meaning of 8(2)(e)(iv) because the ICRC, and that's a quote, the ICRC goes on to say, "Moreover, such destruction is most often carried out by [a] ... different means from those used in ... attack[s]."

So the consideration of motive is critical to the question under 8(2)(e)(iv). Am I attacking a lawful military objective? If so, then it raises the substantive question of by what criteria do I assess that that property that I'm attacking is making an effective contribution to the military -- to the enemy object? Lacking that, that's the point of Article 8(2)(e)(iv), I may infer an inappropriate motive and therefore a violation of that offence.

And I do hope that's responsive, your Honour.

JUDGE EBOE-OSUJI: [14:23:47] Does it mean then that if you destroyed an old bridge that has value of historic monument and you do that while retreating from your own territory in order to prevent the enemy forces from crossing over, that that would not be an attack for purposes of 8(2)(e)(iv)?

MR NEWTON: [14:24:22] I believe that would be accurate, your Honour, with the slight caveat that it has to be not a theoretical military advantage. So in territory that I do control it has to be based on a valid military necessity, when I in fact control it, because then I'm 8(2)(e)(xii) destroying or seizing property. In that case destroy. The same could also be said for a location that is under my control during an occupation but that I intend to move out of the area at some future point and I know that a particular location isn't -- is being used by the enemy. I may lawfully destroy that provided that I do it based on a valid military necessity.

Again, the point you're raising is that the question of motive is at the heart of both of those issue -- both of the offences, just in a slightly different way.

PRESIDING JUDGE MORRISON: [14:25:19] Mr Corn has also asked for the floor to assist.

MR CORN: [14:25:26] Thank you, your Honours, for the opportunity to contribute to this question as well.

I would point the Court to paragraph 15 of our submission which discusses how we believe motive is a critical component of distinguishing attacks from other acts of violence in the conduct of military operations. We note:

"Accordingly, violent acts directed at harming the adversary (including the civilian population and civilian objects) through physical injury or destruction, are 'attacks' within the meaning of IHL. Conversely, without this motive the act is not an 'attack'."

An example, a useful example we would believe would be a situation where a force had conducted a raid against the enemy and before withdrawing decided that it was necessary to destroy enemy ammunition prior to the withdrawal or perhaps even destroy their own ammunition as they are withdrawing from an enemy advance. That would certainly qualify as an act of violence, but the motive would not be to cause harm to the enemy at that point and therefore it wouldn't qualify as an attack.

I think your question, your Honour, about the bridge, as Professor Newton noted, would really depend on whether you were assessing the destruction of the bridge to impede the manoeuvre of the enemy, in which case it would qualify as a military objective; or simply to eliminate the opportunity for the enemy to use it in some future situation or maybe your own use in some future situation, in which case it wouldn't be motivated by causing harm to the enemy.

Thank you.

JUDGE EBOE-OSUJI: [14:27:14] Is it possible here, I'm trying to understand from both you and Mr Newton, do I sense here a certain concern that -- concern that an attack, more or less, is something permissible in international law? So if you qualified it as such, it is permissible, but if it is not qualified as an attack, then it is not permissible? I don't know, but somehow I'm beginning to worry if that's the concern.

MR CORN: [14:28:08] Well, that certainly was not the concern of our group of experts, your Honour. The real question is which legal rule set would apply to deciding whether or not the conduct is permissible?

So if it's an attack, you would analyse it under IHL targeting principles and targeting rules, which is a well-established process that I believe, we believe is becoming increasingly more effective in professional armed forces.

If it's not an attack, then you would have to analyse the permissibility or the legality of the conduct by focussing on the question of military necessity and also by considering the constant care obligation that's reflected in the chapeau provision of Article 57.

JUDGE EBOE-OSUJI: [14:28:53] Please help me understand here, what is the -- what's the difficulty with the danger to the targeting rule? Why does it matter, the targeting rules?

MR CORN: [14:29:06] Well, I think there are a lot of answers to that question, your Honour. I think that we were motivated in large measure by our concern that an expanded definition of an attack would create a somewhat unrealistic expectation that every time a military unit or a military commander cleared a field of fire, destroyed ammunition that it couldn't retreat with, spiked artillery pieces that it had to leave

behind during a withdrawal, that that would be subject to targeting analysis. Is the piece of artillery that you're about to spike a military objective? Is there -- what is the military advantage of spiking it? Is there risk to the civilian population? Have you taken necessary precautions?

We believe there are -- when you have an attack in the traditional sense of IHL, those are critically important rules for the protection of humanitarian interests in armed conflict and the rules should be focussed on those traditional aspects of the military operations that qualify as an attack.

If we expand then (Overlapping speakers)

JUDGE EBOE-OSUJI: [14:30:14] But would, would those caveats, those questions you raised, if properly answered, would that not give the proper protection you're trying to maintain for a proper targeting?

MR CORN: [14:30:35] Well, as I understand your question, your Honour, it's if we were to apply the notion of attack to those type of activities, then you would have a rule set that you could analyse legality through. And we understand that and we acknowledge that; however, our concern is that it is a rule set that was never contemplated to deal with those type of acts of violence during the conduct of military operations and, therefore, in many ways the methodology of assessing the legality of attack when applied to an act of violence that's not directed at the adversary or the civilian population or civilian objects that you don't have control over will create -- it's a mismatch. There are, there are better ways to analyse the legality of those actions and to ensure the humanitarian protection that the law is intended to produce.

And then there's also a concern, we believe, that as we expand the notion of attack, it risks diluting the credibility of the law itself in the eyes of the commanders and the

soldiers and other operators who are responsible for embracing the law and implementing the obligations.

Preserving the clarity between conduct that qualifies as an attack and conduct that does not pushes the analytical process of legality into the rule set that was contemplated when the law was developed.

Thank you.

PRESIDING JUDGE MORRISON: [14:32:13] I understand that the OTP wishes to intervene and, after that, Mr Newton again.

MR CROSS: [14:32:23] Thank you, your Honours. If I may briefly touch on some of the discussion we've just had, and particularly on the question of, if you like, how we would define an attack.

The Prosecution would agree that whether or not a particular form of conduct should be regarded as an attack for the purpose of the Statute is of course a question of fact at which the Court can look at all the relevant circumstances applying the orthodox test from Article 49(1) for all parts of Articles 8(2)(b) and 8(2)(e) other than 8(2)(b)(ix) and 8(2)(e)(iv).

Now, Mr Newton and Mr Corn have both emphasised the question of motive and suggested that the motive of the person carrying out the conduct which might be an attack is the dispositive thing. And we would gently remind your Honours that the question of motive is, * generally speaking, regarded with some caution in international criminal law. Motive is notoriously hard to discern, and if motive is required as an element for any crime, it's usually treated as such in the context of specific intent.

Now of course for none of the conduct of hostilities crimes or indeed any crimes -- well, for none of the crimes which are relevant to our discussion today, there

is no requirement of specific intent. What is required is what is set out in Article 49(1) of Additional Protocol I. And nothing in our appeal is either, from the Prosecution's point of view, intended to broaden that definition for the general purpose of the conduct of hostilities, nor should anything today be taken to narrow that definition. Both because that is not relevant on the facts before us today and also it is rather outside the scope of the matter as it has been briefed.

We would also say, and I think this was along the lines of Judge Eboe-Osuji's question, that the existing elements of the crimes tend to take care of this question. So, for example, whether or not there was a military objective, as defined in IHL, is a very pertinent question to whether or not it was a lawful attack. But it's worth bearing in mind on this point that even in Article 8(2)(e)(i) it's phrased as intentionally directing attacks against civilians without a military objective and that rather implies that the -- there can be such a thing as an illegal attack against something which is not a military objective, that that's implicit in the very notion of this kind of conduct of hostilities war crime.

So we would suggest that your Honours should consider all the circumstances and not just the motive as it may be perceived of the perpetrator when trying to look at this question. But it is now rather far away from the core of our point, in fact, which is: What happens outside the conduct of hostilities for specially protected objects as in this case?

Thank you, your Honours.

PRESIDING JUDGE MORRISON: [14:35:42] Thank you, Mr Cross.

Mr Newton.

MR NEWTON: [14:35:45] Thank you very much, Mr President. I shall be brief, but I do want to address that prior comment.

When we talk about motive, that's exactly what we were doing, was speaking about the subjective evaluation of the actor. In the context of an attack, was it about military objective? In the context of other interactions with protected property, is there valid, sufficient military necessity that's not theoretical, that's not speculative? But I would disagree with what was just said. Article 8(2)(e)(i) through 8(2)(e)(iv) is the very paradigmatic example of specific intent offences. That's why they're completed offences at the moment of the prohibited conduct, absent a result, intentionally any directing attacks against inappropriate places. That's the very definition.

And so again I think it's very clear and important to distinguish between motive and intent.

In this vein, I would go back to the earlier reference to Article 19 of Protocol I. It is true, of course, that the respect and protect obligation in -- I'm sorry, I said Protocol I and I meant the First Geneva Convention, the Article 19 of the convention with respect to hospitals says two different obligations: One, the obligation not to attack; two, the obligation to respect and protect medical facilities. If those were the same, then there would be no need for that language.

And, in fact, the Geneva Convention itself is, is implicitly recognising that every single interaction with a hospital or the other protected property or with other civilian property is not automatically lumped into the concept of attack and that's where the distinctive analysis of whether something is a military objective or, once I'm in possession of it, do I have a valid, sufficient military necessity in the larger context of the operation?

PRESIDING JUDGE MORRISON: [14:37:57] Thank you.

Mr Bourgon, could you intervene when you have the floor, which you will have for

40 minutes in a not too distant future. Or are we trespassing too much on your 40 minutes?

MR BOURGON: [14:38:16] Mr President, it would be very difficult to meet my 40 minutes as it is, but I would prefer to answer now. But if there are more pressing questions, I leave it to you, Mr President.

PRESIDING JUDGE MORRISON: [14:38:24] Well, the problem is that we are already well over time for the questions and Judge Eboe-Osuji still has one more. How long do you need for this intervention?

MR BOURGON: [14:38:33] Three minutes, Mr President.

PRESIDING JUDGE MORRISON: [14:38:36] Please go ahead.

MR BOURGON: [14:38:37] Thank you, Mr President.

I will leave aside the first issue that I wanted to respond and I will just respond to one when I initially wanted to take the floor. And it is concerning the Article 7 notion of attack which was raised earlier and I missed my chance to intervene.

But I want to make sure that we understand that Article 7 -- attack in Article 7 is not a crime. Attack in Article 7 refers to a campaign. It refers to a series of events involving the commission of unlawful acts which are defined in Article 7(1).

Article 7 goes way beyond armed conflict. We need not to prove the existence of an armed conflict, we need not to have crimes that even involve the use of violence.

Article 7, attack, the word "attack" in Article 7 has to do with the intent of the organisation behind the commission of the unlawful acts in Article 7(1), acts which because of this intent to direct these acts primarily at a civilian population will shock the conscience of humanity.

Now Article 7 may include one or more military attacks pursuant to Article 8, but it cannot be -- but it is different from Article 8.

The -- exceptionally you will have an Article 8 attack which corresponds to the commission of an Article 7 attack in the sense of having the intent. This is what happened, for example, in one of the cases before the Court, now I have a blank, but in -- where we had one very limited military attack which was also charged under Article 7.

Now, in such a case the same evidence will be used to -- in terms to determine the legality of the acts that were committed and the same evidence will be used to determine the intent of the policy of the organisation behind the commission of these acts. And that's a major difference, Mr President. And I think that's what we -- that's why the word "attack" in Article 7 should not be used for the purpose of Article 8.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [14:41:08] On that note, Mr Bourgon, still, is it a matter then of what provision of the Rome Statute a particular conduct is charged -- look at it this way: In the context of an armed conflict, you may well see a scenario where what had the facts of this case -- let's assume the Prosecutor had charged it as a crime against humanity, exactly the same, and argued, for instance, that if you looked at Article 7(h), for instance -- 7(1)(h), that prescribes persecution, persecution and argued that, well, these kinds of conduct, what happened here would fall into that category. Are we saying that it will be prima facie out of order? So we now have exactly the same conduct but just that in one instance it is charged under 8(2)(e)(iv), and perhaps the same conduct, just to be sure, someone proceeds to charge it, or under 7(1)(h). Is that what we will mean by internal coherence according to you?

MR BOURGON: [14:42:50] Absolutely not, Mr President, Judge.

With all due respect, Article 7 is different and addresses different situations and should not be used as an alternative for the sake of making sure that we charge an individual. Article 7 has a specific purpose. Crimes that shock the conscious of humanity because they were directed primarily at a civilian population and the attack there or the campaign or the series of events go way beyond one violation.

The Prosecution did charge persecution in this case, but the Prosecution can certainly not charge conduct of an attack pursuant to Article 7. It's not there. If the Prosecution wants to charge Article 7, it will have to charge one of the underlying acts in Article 7(1) and say that, why this specific act is a crime against humanity? Because of the overall intent of the organisation having a policy to direct an attack at a civilian population. If that chapeau is not proved, then none of the underlying acts can be -- can lead to a guilty conviction. Therefore, the Prosecution, if it cannot find that there was this overall intent primarily directed at a civilian population, then it will not charge these acts. But it's the acts that are charged. It's not the attack. Whereas in Article 8 they may charge an attack because they are charging the military attack. And this is where -- what the *amici curiae* is saying is so important. It is how the object was attacked. If the object was destroyed during a military attack, we need to assess the conduct of the military pursuant to the Hague law. If the object was destroyed in a different context, then the, the conduct of the military must be assessed pursuant to another -- different provisions.

Thank you, Mr President.

JUDGE EBOE-OSUJI: [14:44:59] What I'm trying to understand, really, help me, you and your colleagues, I want to understand what is the actionable interest of international law in relation to the interest of humanity that Article 7 or crimes against humanity seeks to protect, what is the actionable difference between that and

the humanitarian interest that Article 8 seeks to protect?

I'm trying to understand the actionable difference. You've been talking about a distinction that doesn't -- it doesn't work. It doesn't -- I'm trying to understand why really it doesn't work in terms of the interest of humanity, crimes that shock the conscience of humanity, we see in the preamble in the Rome Statute. What is the real interests that are different in both provisions?

MR BOURGON: [14:46:11] Thank you very much, Judge, for your question.

The interest of humanity is to ensure that any act -- any unlawful act committed is pursuant to a situation subject to the Rome Statute that if such acts are committed, that people are brought to justice and that people are tried.

Now, in order for people to be tried in accordance with an established system based on the Rome Statute, we need to identify the crime that best matches the acts that were committed by the forces in question.

When we do this, then we look at the acts. The acts of launching an attack is not in Article 7, so I'm not going to use Article 7 to charge an unlawful attack. I will use Article 8 and I will define why the attack is unlawful based on Hague law.

If I want to charge that there was an overall campaign directed at a civilian population, which goes way beyond the commission of one act or multiple acts, then I will look primarily at the intent of the organisation, that the organisation meant to direct all of these acts against a civilian population. And that's wholly different, Mr President. That's why we cannot mix the two. But the two of very important. They just address different concerns.

PRESIDING JUDGE MORRISON: [14:47:46] One last question from Judge Ibáñez, because we are actually grossly over time now.

JUDGE IBÁÑEZ CARRANZA: [14:47:53] Thank you, Mr President.

This is for the *amici*.

Indeed it's of crucial importance elements of the crimes, as highlighted by the counsel. In the same vein, I would like to highlight here regarding the legal elements of the crime that is in Article 8(2)(e)(iv). And I brought to your attention -- I bring to your attention that Professor Pearce Clancy and Professor Michael Kearney - that are not here in this courtroom but submitted as *amici* their ideas - they say, regarding this crime, that the acts took place in the context of conduct of hostilities is not a legal element of this crime and that humanisation of IHL is a key influence in the drafting of the Rome Statute, and they recognise that the justice required criminalisation and prosecution of war crimes perpetrated during an armed conflict, international, including occupation or non-international one.

Neither the Statute nor the elements of crimes make reference to conduct of hostilities, nor is there any indication as to positive category of conduct of hostilities crimes.

So the question is here: If it's so, then why do we need to assume that in the crime on the conduct described in Article 8(2)(e)(iv) we need the legal element that this crime has been committed during the conduct of hostilities if this legal element doesn't exist in the Rome Statute?

Thank you.

PRESIDING JUDGE MORRISON: [14:50:01] Thank you.

Can I, can I ask a volunteer *amici* to respond to that. It will have to be the very last response in this part of the proceedings.

Mr Corn, I understand you wish to.

MR CORN: [14:50:16] Yes. Thank you, your Honour.

In response, the question almost answers itself. The submission that was referenced indicated that there is no requirement for an attack to take part during -- or to occur

during the conduct of hostilities, but it's the conduct of hostilities that renders the act of violence in attack.

And that goes back to the very foundation of our submission. Not all acts of violence are attacks, but all attacks are acts of violence. So the conduct of hostilities, your Honour, is not, as you note, an element of the offence, but what is a requirement is that the offence alleged that what occurred was an attack. And outside the conduct of hostilities, when the act of violence is not directed against the adversary, then it cannot qualify as attack within the meaning of IHL, and we believe that that same meaning must apply to the definition in the article of this Court's Statute.

Thank you.

PRESIDING JUDGE MORRISON: [14:51:22] Professor Newton had, in fact, asked for the floor. Can I ask that you respond as succinctly as possible. Thank you.

MR NEWTON: [14:51:33] Yes, Mr President. One sentence. The characterisation by the *amici* is simply incorrect based on the structure of the elements. Every element of every offence in every article of the Rome Statute is organised based on conduct, consequences, circumstances, and the circumstances for every single one say in Article 8 the conduct was committed in the context of an armed conflict, either of an international or a non-international. So the notion that these crimes are not -- there's no nexus to the armed conflict is simply false based on the structural -- the structural way that all of the elements are built. The last two elements are those context elements and so these offences can only be committed in the context of an armed conflict. And you would note that those elements are different, of course, in Article 7.

Thank you.

PRESIDING JUDGE MORRISON: [14:52:31] We really have run out of time now.

We must move on if we're going to achieve anything like the timescale and indeed respect the interpreters' position.

So in his appeal, Mr Ntaganda presents 15 grounds of appeal, which he raises the following issues:

Unfairness of the proceedings, the lack of independence of Judge Ozaki, the scope of the charges, the existence of an organisational policy, the absence of an attack directed against a civilian population, the ordering of the displacement of the civilian population, the assessment of evidence, crimes committed during the first and second operations, and the participation of individuals under the age of 15 in hostilities and the rape and sexual slavery of those individuals, co-perpetration, and lastly, his mens rea for the first and second operations.

Mr Bourgon, you now have 40 minutes.

MR BOURGON: [14:53:39] Thank you, Mr President.

This afternoon we intend to address three grounds: Ground 2, myself for 10 minutes; ground 13, Ms Gibson for 15 minutes; and myself again for grounds 4 and 5 for 15 minutes.

Mr President, allow me to say -- to begin by saying a few words concerning Mr Ntaganda himself.

Mr Ntaganda is 46 years old. He joined the military at the age of 16. He is an experienced military officer. He was a member of various armed groups, culminating in his promotion to the very high rank of brigadier general in the armed forces of Congo.

Mr Ntaganda spent a significant portion of his military career teaching recruits, soldiers and officers about military skills and about military ideology.

Mr Ntaganda was a platoon commander in the forces that defeated the genocidaire in

Rwanda. Mr Ntaganda repeatedly claimed that he always fought for the protection of the civilian population without discrimination. Notwithstanding this claim, Mr Ntaganda is depicted on the internet as a warlord involving crimes against soldiers and civilians. Mr Ntaganda is very well aware of this.

When he surrendered in 2013, I truly believed that his trial before the International Court would prove these media reports wrong and reveal the true law-abiding officer he really is.

Now this is not what happened.

As a result of many legal errors and errors of fact committed by the Trial Chamber, Mr Ntaganda was convicted of 18 counts. Mr President, in our view, it's not over yet and we are confident that the Appeals Chamber will bring to light the Trial Chamber's error and order either a full acquittal or, if need be, a retrial for Mr Ntaganda.

In 2002, Mr President, Mr Ntaganda was a member of the *Union des Patriotes Congolais*, a political military organisation which succeeded in concluding an Ituri-wide peace agreement involving all ethnic groups. As I address the Appeals Chamber today, it cannot be ignored that the problems that were solved by the UPC then continue to exist in Ituri and make life unbearable today, 20 years later or so, for the civilian population. Even the United Nations say that crimes against humanity are being committed against the Hema population in Ituri.

In these circumstances, Mr President, by way of introduction, it is significant that the president of DRC today is calling upon Thomas Lubanga, former UPC president recently released, to return to Ituri to once again bring peace and reconciliation for all ethnic groups in Ituri.

This is the proper context, Mr President, in which this appeal should be adjudicated.

Moving on quickly to fair trial issues. The first issue deals with the Defence filing of 23 requests seeking leave to appeal various decisions of the Trial Chamber. Three were granted in part.

Systematic rejection of Defence requests for leave to appeal deprive Mr Ntaganda of a fair trial. Leave to appeal requests were rejected for the wrong reasons. They were rejected because they were what we call so-called not an appealable issue or because they allegedly mischaracterise the Chamber's decision.

It is our submission that decision -- that the criteria in Article 82(1)(d) of the Statute were applied arbitrarily by the Trial Chamber to avoid interlocutory appeals which affected some of the issues I'm about to speak about.

Second issue, Mr President, Mr Ntaganda's trial or proceedings were unfair due to the number of ex parte filings which were entertained by the Trial Chamber. This was highly prejudicial to Mr Ntaganda. I refer the Appeals Chamber to annex C of our written pleadings to which best illustrates this problem.

Now, speaking of ex parte hearings, I cannot omit raising the issue of the ex parte hearing that was conducted by the Trial Chamber without the participants or the parties being present with Witness P-55, something I have never seen. I have tried to look for a precedent, I could not find a precedent for a Trial Chamber meeting ex parte with an incriminatory witness. The fact that the Chamber even refused to grant the Defence access to what it discussed during its private conversation with P-55 is even more serious.

From the little we know, it appears that P-55 wanted to condition his testimony to his family being relocated with him. Now, just before granting P-55's request, the Trial Chamber -- the Presiding Judge said: The testimony of this witness seems to be very important so we are ready to do everything in order to get the testimony.

I come, Mr President, to the most important violation of Mr Ntaganda's trial rights, fair trial rights. 18 August 2015, Trial Chamber issues a decision that ends protracted litigation related to allegations of interference. Now further to this decision, the Prosecution, without informing the Trial Chamber, let alone the Defence, the Trial Chamber requests ex parte access to all of Mr Ntaganda's non-privileged conversation from the detention centre, past and future.

Mr President, the pre-trial Judge erred by granting the Prosecution access to all of this material without informing Mr Ntaganda or without putting in place a mechanism to safeguard his rights. There were no justifications to keep the Defence and Mr Ntaganda in the dark. Those conversations were clearly disclosable material pursuant to Rule 77.

Mr Ntaganda, having known about this, it would not have impeded the Prosecution's Article 70 investigation. And only 13 months later that -- the trial is ongoing, that the Prosecution informed Mr Ntaganda that it was in possession of the totality of his non-privileged conversations, past and future.

So what's the problem? Well, the problem is very easy, Mr President. In these conversations Mr Ntaganda discussed at length his defence strategy, names of potential witnesses to contact, information that could be obtained from these witnesses, reaction to Prosecution allegations in the Documents Containing the Charges.

The Trial Chamber acknowledged that this was the case in the conversation. What does this mean? It means, Mr President, that every day I came in the courtroom to cross-examine Prosecution witnesses and I had one hand tied behind my back and I didn't even know. This is as serious as it is. This is not a poker game. This is a trial. But can you imagine in a poker game one player having access to the hand of

his adversary and not even knowing about it, that the first man doesn't know. The Trial Chamber erred because it directly contributed to this whole -- to this absolute absence of fairness.

Initially the Trial Chamber wasn't aware of these conversations, that the Prosecution had everything, but on no less than three occasions the Trial Chamber became aware and it did not take the steps to protect Mr Ntaganda's rights or the fairness of the trial. This, Mr President, caused irreparable prejudice to Mr Ntaganda, which went on all the way to the end of the trial. When -- even when Mr Ntaganda is sitting right in this chair over there ready to testify, he still doesn't know, because of the ongoing litigation, whether the Prosecution will be authorised to use any of the conversations it obtained. All of this, Mr President, is explained in our written submissions.

Mr President, this -- regarding the conversations, it is our submission that the Prosecution obtained the conversations on purpose, it used the conversations on purpose, it intentionally kept Mr Ntaganda in the dark, all of which constitutes a flagrant abuse of process leading to only one possible remedy: A full acquittal, Mr President.

I will now turn the floor over to my colleague for the second issue this afternoon, ground 13 of our appeal brief.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [15:04:03] Thank you.

Ms Gibson.

MS GIBSON: [15:04:07] Good afternoon, Mr President and your Honours. I will address you on the indirect co-perpetration findings. So ground 13 of Mr Ntaganda's appeal.

Mr Ntaganda was found liable as an indirect co-perpetrator for 18 separate counts.

And indirect co-perpetration liability can give rise to personal culpability on that scale, but the counterbalance to this is a very strict and narrow path along which a Trial Chamber must walk to be able to put all those crimes at the feet of an accused.

And in linking Mr Ntaganda to these 18 counts, the Trial Chamber in this case made three legal errors.

And the first error was that it convicted Mr Ntaganda on the basis of a different common plan from the one he defended against.

Paragraph 1 of the DCC charges Mr Ntaganda with contributing to a common plan to assume the military and political control in Ituri, to occupy the non-Hema areas and to expel non-Hema civilians, particularly the Lendu through charged crimes.

In convicting him, the Trial Chamber found that the common plan was to drive out the Lendu by way of which the co-perpetrators intended the destruction and the disintegration of the Lendu community.

Now, this idea that the common plan encompassed the destruction of a community or the disintegration of the Lendu ethnic group hadn't be pled, but more than that, this new language of disintegration and destruction isn't clear on its face. Does the Trial Chamber mean the destruction of the Lendu ethnic group in Ituri? Does it mean the disintegration of a social unit in a particular area? These are questions that should have been the subject of argument at trial.

Mr Ntaganda had a right to know what was being alleged and to defend against it because on its face expelling a group from an area and intending their destruction are different things. And, presumably, had the Trial Chamber thought that expelling the Lendu community encompassed this idea of destruction and disintegration, it wouldn't have needed to add this language or to move beyond the language of the charges as they were framed. But it did because the Trial Chamber meant something

different. It meant something new. And in expanding the common plan to encompass these new ideas, the Trial Chamber exceeded the scope of the charges, and that, in our submission, is the first error.

Now this problem might not have arisen had there been any direct evidence of the common plan. So, for example, a witness to say "I was at a meeting with the co-perpetrators and we agreed to this plan" or minutes of that meeting or a manifesto, evidence setting out what was agreed to, when and by whom. There isn't any evidence like that in this case. Often there isn't, but a common plan for the purposes of indirect co-perpetration doesn't need to be explicit. When there is no direct evidence, a Trial Chamber can infer that a common plan existed. But, but if a Trial Chamber is going to do this, to infer the existence of a common plan, the jurisprudence sets out how. In the absence of direct evidence, the existence of a common plan can be inferred from the subsequent concerted actions of the co-perpetrators themselves. That's the path. And that's the only path.

And this standard was set in Lubanga and it has been restated and applied in exactly the same terms in Abu Garda, in Banda and Jerbo, in Katanga, in Ruto and in Bemba et al. If there's no direct evidence, a Trial Chamber can infer the existence of a common plan from the subsequent concerted actions of the co-perpetrators.

And that makes sense. If you're trying to figure out if a group of people made a plan, look to see if they went off and acted in the same way, in a concerted way after having made it.

The Trial Chamber didn't do this. And that's the second error. There are no findings on subsequent concerted action of the co-perpetrators, there is no discussion of this. The standard isn't even addressed.

What did the Trial Chamber look to? At the Prosecution's urging, the Trial Chamber

looked at the crime base. It looked to and gathered up any and all evidence of any and all crimes that it found were committed by anyone in the UPC during the first and second operation and from that inferred that there must have been a criminal plan.

The Chamber's reasoning comes perilously close to saying crimes occurred and therefore there must have been a plan to commit them. Look at all the crimes that took place, these co-perpetrators must have made a plan. And that cannot be enough. That isn't enough. That reasoning skips linkage. It's not the case that because there's a crime base there's necessarily a criminal plan.

And compare this complete void in the Ntaganda judgment to the painstaking care that was taken by the Trial Chambers and the Pre-Trial Chambers in Lubanga, in Ruto, in Bemba et al, who explicitly set out evidence of concerted action of co-perpetrators and labelled it as such. So, you know, here is how the co-perpetrators were working together and here's how they coordinated and here are all the occasions on which they met and here's a video of them together at a rally, and this is why these acts aren't random and this is why these acts aren't disconnected and this is why these co-perpetrators are always interconnecting, and then statements saying we are inferring the common plan from these concerted actions of the co-perpetrators. There isn't anything like that in this case. And that's what needed to happen.

And it's not correct that the Appeals Chamber in the Bemba et al case found that a Trial Chamber could look to any conduct, including prior conduct to infer the existence of a plan, as the Prosecution says in paragraph 225 of its response.

In the paragraph that the Prosecution cites, which is 1306, the Appeals Chamber is talking about the timing of a particular accused's involvement in the common plan and not the existence of the common plan itself. The issue that the Appeals

Chamber was deciding in that case was whether there's a general prohibition on the use of subsequent evidence to infer a co-perpetrator's involvement in a plan at an earlier point in time. It was a different issue, specific to one of the co-perpetrators and when he joined the plan.

When inferring the existence of a common plan itself, there is only one path and this Trial Chamber wasn't on it. It looked to wrong things. It got the law wrong. It was looking to the crimes instead of looking at the co-perpetrators and whether they were acting together.

The third error is that the Trial Chamber inferred the existence of a common plan on the basis of circumstantial evidence without considering whether it was the only reasonable conclusion available. This is essential principle of evidence. If the Trial Chamber is going to draw an inference based on circumstantial evidence, it must be the only reasonable conclusion available.

And the Prosecution seems to accept in its response that the Trial Chamber didn't make reference in any way to this standard in its reasoning about the plan. Instead, the Prosecution argues that there was direct evidence of the implementation of the common plan in paragraph 221 of its response. But this isn't enough. Direct evidence of a plan is just that, direct evidence of the plan, not evidence, which according to the Prosecution shows its subsequent implementation.

Secondly, the Prosecution argues that well, anyway, regardless, the Trial Chamber's conclusion was the only reasonable one available, and then it points to evidence that the Trial Chamber itself didn't rely on in which it says supports this being the only reasonable conclusion. But, of course, the Trial Chamber needed to carry out that assessment for itself and importantly turn its mind to the fact that it was drawing an inference, that it was drawing an inference based on circumstantial evidence on a

crucial legal element in the case and give reasons why, nonetheless, the conclusion that it reached was the only reasonable one available. And it didn't. And having failed to do that, the indirect co-perpetration convictions are flawed for a third reason and should be reversed.

There are other problems in ground 13, notably the finding that the indirect co-perpetrators used Hema civilians in the common plan. The evidence relied on comes nowhere near establishing the sort of automatic compliance by Hema civilians that's required by law. Similarly, the finding that the co-perpetrators all saw rape and sexual slavery as a virtually certain consequence of the plan is based, according to trial judgment, on nothing more than the circumstances prevailing in Ituri at the time. The Prosecution says this phrase is just shorthand for what the Trial Chamber meant to say and then itself points to findings which the Prosecution says the Trial Chamber was actually relying on. Again, it was the Trial Chamber that needed to carry out this exercise and this is a failure to provide a reasoned judgment.

But the last error, and I'll finish on this point, it's significant that for a common plan about which there was no direct evidence, the common plan found in this case was momentous, unparalleled in other criminal cases.

The Trial Chamber inferred that through this plan the co-perpetrators came together and agreed that civilians should be murdered, should be raped, should be persecuted, should be forcibly transferred, should have their property attacked and destroyed. Indirect co-perpetration can give rise to personal liability for a huge spectrum of crime, but the counterbalance to that is the plan. This mutual agreement on behalf of the co-perpetrators and their purposeful intent to commit the crimes charged, there's nothing that comes close to showing that these co-perpetrators came together and agreed to these crimes in this case.

And in response, the Prosecution points to what it calls the Trial Chamber's detailed analysis and assessment that the co-perpetrators agreed to each of these crimes, but if you look at the paragraphs cited by the Prosecution, indeed look at this entire section in the judgment, which is paragraphs 793 to 811, the Trial Chamber sort of marshals all this evidence of the crimes but never explains how it gets from the crimes back to this incredibly broad-ranging agreement between the co-perpetrators. That step in the reasoning, that evidence is missing. And the evidence in a criminal case needs to be more than just the crimes.

With your leave, your Honour, I'll pass the floor back to Mr Bourgon in the courtroom.

PRESIDING JUDGE MORRISON: [15:18:14] Thank you, Ms Gibson.

Mr Bourgon.

MR BOURGON: [15:18:17] Thank you, Mr President.

Mr President, we -- it is our submission that the Trial Chamber erred in law and in fact and finding that the UPC/FPLC directed an attack against a civilian population from August 2002 to May 2003.

Mr President, the Appeals Chamber has not yet had the opportunity of pronouncing on Article 7 of the Statute, which makes it all the more important. As mentioned previously, crimes against humanity are not just another crime that can be used to charge an accused in the alternative.

Allow me to begin my submissions by addressing a crosscutting issue which deals not only with crimes against humanity but throughout the judgment. And I refer to the Chamber's interpretation of a military expression known as *kupiga na kuchaji*.

The Chamber's interpretation of this term was not only wrong, it invalidates the Trial Chamber's findings, if not the judgment as a whole.

It is appalling, Mr President, that the Trial Chamber would use a common military expression referring to the handling of the enemy's property during an attack to find the existence of a genocidal intent, uncharged, in addition. The Trial Chamber misappreciated the evidence to such an extent that it constitutes an abuse of its discretion.

(Redacted) and Bosco Ntaganda, experienced military officers, (Redacted) (Redacted). They testified that *kupiga na kuchaji* was a military expression which meant to charge and to dispossess the enemy of its property.

P-50 -- 17 said that the expression was used in previous groups and he said in UPC it was strike and pillage.

Two witnesses who apparently, according to the Trial Chamber, used the expression to refer to something else, that it also meant get rid of everyone and everything, referring to all the Lendus, he did not say that when you look at the record.

P-963's evidence, in addition, uncorroborated, was completely misappreciated, in particular, concerning a meeting which supposedly took place in Mabanga where he would have heard Mr Ntaganda mention these words. Notably, the Trial Chamber itself found that 963 did not hear these words from Mr Ntaganda in Mabanga.

Another insider witness, P-907, according to the Trial Chamber said that it meant to kill everyone, but when we look at his testimony, it doesn't. When he refers to *kupiga na kuchaji*, he is also referring to property.

Now, what compounds the issue is that it is simply astonishing that the Trial Chamber would give any weight to the testimony of 907 regarding the time and place in which he would have heard the expression.

Now, the key question here is how was this expression understood by the forces? The soldiers, what did they understand? Well, not only did the Trial Chamber

misappreciate or ignore the evidence of the 11 witnesses who did not make a link between *kupiga na kuchaji* and killing everyone, there is no evidence on the record that shows anything other than their understanding, the soldiers, the real people involved, their understanding was it is related to property.

I move to the notion of attack directed at any civilian population. I've said some -- I've covered some issues earlier, so I will move on to the fact that the Trial Chamber concluded in this case on the existence of an Article 7 attack, focussing solely on crimes committed during certain UPC/FPLC military operations, leaving aside operations not included in the Prosecution's allegations. We say that this was an error.

The Trial Chamber was required, in our submission, to consider the totality of the evidence undertaken and that means that equally from the political side and from the military side of the organisation. The Trial Chamber failed to consider relevant evidence going beyond the crimes committed, which illustrates that the overall nine-months Article 7 attack was not directed at a civilian population.

Trial Chamber also committed an error in finding that, even though -- the Trial Chamber was clear, paragraph 665: Even though they conducted operations legitimately directed at good targets without attacking civilians, we don't care about that, we're only going to look at the crimes alleged by the Prosecution and we are going to make a finding for a nine-months period.

That was an error, Mr President.

The relevant case law provides that an attack against a civilian -- sorry. The relevant case law provides that the civilian population must have been the primary object of the overall nine-months attack. While some commentators have suggested that too much emphasis is placed on the notion of primarily directed at a civilian population,

we say that this is legally incorrect. A finding that the civilian population, which is also in accordance with the case law of both the ad hoc tribunals and the ICC, was the primary object of the attack cannot be replaced by the inquiry whether a civilian population was intentionally targeted. The two are completely different.

The fact that crimes against humanity were committed against civilians does not necessarily lead to the conclusion that the overall Article 7 attack was directed against a civilian population.

What is more, Mr President, the Trial Chamber erred in inferring that the UPC/FPLC attack was conducted pursuant to or in furtherance of an organisational policy, paragraph 689.

Now, although some commentators have argued that if you have a widespread and systematic attack, Article 7, that's enough and policy is implicit. Mr President, the wording of the Statute, elements of the crime and the drafting history makes it clear, the existence of an organisational policy is a distinct component of the chapeau which must be demonstrated.

Two things must be demonstrated, that the organisation itself meant to commit an attack against a civilian population and that the organisation actively promoted or encouraged the attack.

Now considering the duration of the attack, it was incumbent on the Trial Chamber to consider all of the evidence. It did not.

The Trial Chamber acknowledged nonetheless that the UPC/FPLC had a stated ambition or aim, was to defend the population as a whole. It also acknowledged that various UPC/FPLC documents promoted peace or denounced the crimes committed against the local population of Ituri. In fact, Mr President, you will not find any documents on the record that comes from the UPC that says otherwise.

Nonetheless, it went on to infer the existence of a UPC policy to attack and chase away Lendu civilians.

With respect to chase away -- it went on, and also to chase away those who were perceived as non-Iturians. I won't address this issue because it is in our brief, but the most significant error of the Trial Chamber was its failure to consider the totality of the actions of the organisation. On the political side, it failed to consider many speeches delivered by Thomas Lubanga. It failed to consider the creation of a truth and reconciliation commission involving all ethnic groups.

Now, these activities demonstrate the absence of an intent to commit an attack against a civilian population. But I referred to it earlier, the UPC succeeded in concluding an Ituri-wide peace agreement signed by all ethnic groups, including the Lendu, other than for a small majority. Now that begs the question:

THE COURT OFFICER: [15:28:33] You have five minutes left, Mr Bourgon.

MR BOURGON: [15:28:36] Thank you.

How can an organisation such as the UPC, who succeeds in concluding such an Ituri-wide peace agreement, could possibly have had the intent to commit an attack against a Lendu civilian population?

I move of course to the military side because the Trial Chamber we say erred in finding that internal communications and documents, as well as the military actions, show that in parallel to its good goal, it had another goal which was to chase away the RCD-K/ML.

Now, first of all, the Chamber does not even identify which communications and which internal documents it is referring to. Two, just reading the finding is problematic. How can the Trial Chamber move from a parallel goal to chase away RCD-K/ML, an organisation which has a military force, and then on this basis infer

that UPC/FPLC intended to attack the Lendu civilian population? No explanation is provided.

Fourth, the Trial Chamber erred by failing to attach weight or sufficient weight to Mr Ntaganda's logbooks. You will hear much more about logbooks tomorrow. Logbooks of Mr Ntaganda contained spontaneous, genuine, contemporaneous information which truly reflect the UPC/FPLC operations from November 2002, before the first attack, to the end of February 2003, after the second attack. The logbooks clearly evince the absence of any intent to attack a civilian population.

Fifth, the Trial Chamber also heard, of course, in *kupiga na kuchaji*, but the worst is the Trial Chamber's inference that the UPC actively promoted its policy to attack civilians.

Now, I wish to draw the attention of the Trial Chamber to the speech delivered by Lubanga, the president, to the recruits in Rwampara, and even more so to the powerful speech delivered by Chef Kahwa, who was the *chef adjoint* or *secrétaire national adjoint* to the military. He delivered a powerful speech in Mandro, saying "We will not tolerate crimes and we will kill you if you do." But, Mr President, they did. They did. They did execute, by firing squad, a member of the UPC in public in Mongbwalu because he killed a Lendu. The Trial Chamber yet said: Well, that speech does not really reflect what happened, so we're going to throw it away.

Mr President, in conclusion, although crimes were committed during the first and the second operation, there is no evidence to support a conclusion that the UPC/FPLC meant to attack a civilian population and even less so that it promoted such a policy to its members.

Consequently, we respectfully ask that Trial Chamber -- sorry, the Appeals Chamber to reverse all of the guilty findings for crimes against humanity.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [15:32:12] That brings the operations for today to a close.

Mr Bourgon, just one point. You are passionate in your defence, which is a notable asset in counsel, but it is wrong to describe the actions or decisions of a Trial Chamber as appalling, even if that's your personal view. I think you probably understand that.

MR BOURGON: [15:32:44] I apologise, Mr President. And I will not repeat a mistake like that again. Thank you, Mr President.

PRESIDING JUDGE MORRISON: [15:32:54] That being the case, the Court is adjourned for today. We will reconvene tomorrow at 10 a.m.

THE COURT USHER: [15:33:03] All rise.

(The hearing ends in open session at 3.33 p.m.)