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

Wednesday, 14 October 2020

(The hearing starts in open session at 10.02 a.m.)

THE COURT USHER: [10:02:08] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE MORRISON: [10:02:42] Good morning, everybody.

Court officer, will you please call the case.

THE COURT OFFICER: [10:02:50] Thank you, Mr President.

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.

For the record, we are in open session.

PRESIDING JUDGE MORRISON: [10:03:05] Thank you.

Are there any new appearances? Any changes from yesterday or the day before?

No. Thank you very much.

MR SUPRUN: [10:03:22] Mr President.

PRESIDING JUDGE MORRISON: [10:03:22] Yes.

MR SUPRUN: [10:03:24] Apologies. For the records update, Anne Grabowski, associate legal officer, has joined my team. She is attending remotely. Thank you.

PRESIDING JUDGE MORRISON: [10:03:35] Thank you.

I'm now going to invite my colleagues on the Bench to ask any questions they may have. There's going to be two of those sessions today. The first is for 30 minutes. I'm going to ask first whether either Judge Bossa or Judge Hofmański, who are attending remotely, have any questions of any of the participants.

JUDGE HOFMAŃSKI: [10:04:05] Hello, good morning, everyone. I am attending remotely from the external location.

Mr Presiding Judge, I have no questions at this stage. Thank you.

PRESIDING JUDGE MORRISON: [10:04:19] Thank you very much.

Judge Bossa.

JUDGE BOSSA: [10:04:22] Good morning, Mr President, your Honours, and everybody in the courtroom. At this stage I have no questions. Thank you.

PRESIDING JUDGE MORRISON: [10:04:30] Thank you.

Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [10:04:39] Thank you. This is a question for the parties.

It is regarding the issue of organisational policy to commit an attack and as a contextual element of Article 7 of the Rome Statute.

This article includes organisational policy to commit an attack and this is a crucial element to differentiate this crime from ordinary crimes. But the question here is, according to the submissions I have heard from the Defence and also from the Prosecution, do you think - especially this last part is for the Defence - do you think that to demonstrate that there was an organisational policy, it is required that this policy to be expressed, or it is required that this policy shows an express encouragement to commit such attack against civilian population?

Thank you.

PRESIDING JUDGE MORRISON: [10:06:00] Perhaps anyone from the office of the OTP would like to start and then we'll revert to the Defence, if there is anybody who would like to deal with that question.

MR COSTI: [10:06:14] Good morning. Good morning, your Honours. I think I will have to take this question.

The answer is no, your Honours. As you read in our written submission and as the case law has established, we submit that the policy doesn't have to be bureaucratic, formalised or expressly declared. So the short answer to your question is no, your Honours, that's not necessary.

And I'm happy to further develop what is our position on policy if you need me to.

JUDGE IBÁÑEZ CARRANZA: [10:06:50] Yes, I would like to hear you about that. Thank you.

MR COSTI: [10:06:56] Your Honours, in our view, the policy requirement should be read and should be interpreted in what we define a modest way. The importance of the policy is to screen out, let's say, crimes that, although they were committed as a course of a flow of events, they are not connected by or through the encouragement of an organisation or a state.

In order to prove the existence of a policy, in our submission, it's sufficient to show that they were connected and that the state or the organisation encourage it.

In order to prove so, there is no need of evidence of an express policy, a formalised policy or a policy adopted at the highest level of a state or the organisation. That's why we submitted in our response that in this case the argument of the Defence that the UPC had a parallel, legitimate goal doesn't undermine the Chamber's finding that there was also a policy to attack the civilian population.

This would be -- this is my answer to your question, but I'm here at your disposal.

JUDGE IBÁÑEZ CARRANZA: [10:08:26] And also because you just mentioned civilian -- attack to civilian population, do you think that this attack to civilian population in terms of crimes against humanity needs to be the primary object or you need to show only that the civilian population was intentionally targeted?

Thank you. You can answer.

MR COSTI: [10:08:53] Thank you, your Honour, for your question because clearly this was something that I was sure it would have been discussed today.

We, as I said yesterday at the end of my submission, we don't want -- we don't want to suggest to depart from the traditional primary object -- primary target test. We believe that the assessment should be an objective assessment and we think that by inserting an intentional requirement, which is -- could be read as a subjective requirement, that would bring us to some sort of confusion. So we do think it has to be primary object.

However, * how I submitted yesterday we do not think that primary means -- is an assessment that can be only based on numbers or proportion. So primary also has to do with the way which the attack and should be understood as non-incidental.

Primary, in our submission, consistent with the jurisprudence of this Court and other courts, should be read as non-incidental.

Now, I fully understand why one could argue that non-incidental means essentially intentional. However, given that, as I said, this should be an objective assessment, we would caution against the use of this term.

We agree that should be deliberate, that is an *adjective that we believe better characterise the objective nature of the chapeau element. So primary in the sense of non-incidental is, in our submission, the standard for the attack to be directed against

the civilian population.

PRESIDING JUDGE MORRISON: [10:10:47] Either the office of the victims or anyone from the Defence wish to add or subtract from that submission?

MR BOURGON: [10:10:57] Mr President, with your leave.

Thank you very much for your question, Judge. It is indeed a very important question and a critical question in this appeal.

The existence of an organisational policy is straightforward written in the Statute. The Statute requires that there exists an organisational policy pursuant to which the attack was directed against a civilian population. And in the elements of crime or in Article 7 of the Statute there is exactly the words where it says that the organisational policy must be demonstrated in the sense of encouragement or promotion.

Now, whether the policy is express or not is a secondary question, but it must exist. In some cases the policy will be expressed openly. In some cases it wasn't.

What matters, Judges, is that the trier of fact must determine from the evidence whether the organisation had the policy. The underlying elements of Article 7 apply to the perpetrators. These are individual acts committed as a part of a course of conduct or as part of a campaign. But when you look at the policy requirement, it applies to the organisation. There was a debate earlier on that it was a state policy, but this has been -- this has been resolved by now and we -- everyone agrees in the case law that the policy can be that of an organisation.

Now, we say UPC/FPLC was an organisation. We have no problem with that. It was. It was an organisation with a political component and an organisation with a military component.

Now, the organisation together with all of its components must have that policy. Policy then has to be promoted, promoted in the sense that the members of the

organisation are encouraged to follow the policy. And in this case, that is completely absent. It doesn't exist in this case, because the encouragement that was being promoted to the members by disciplinary measures taken, by speeches taken by the military, by speeches delivered by the political, by actions from the political, all of those demonstrate that what was being promoted to the soldiers and to the members of the organisation - not only the soldiers, but to all the members - what was being promoted was not a policy to target a civilian population.

And that's very important because we are talking about what applies to the organisation. This is what makes the -- this is what makes the crime of crimes against humanity different.

I move to your second question, Judge, which is also of the utmost importance. When we say "attack" and when we say "primarily directed at a civilian population", this of course is derived from the case law. Whether it derived from one case and then evolved and was kept throughout, it certainly wasn't kept throughout for no reason. When I say "kept throughout", because it developed over and many cases have kept the idea that the attack must be primarily directed at a civilian population. Now, what do we need in terms to know that it was primarily directed? We cannot have a piecemeal approach to the acts that were committed during the attack. What we need to do is we need to do -- to look at the attack as a whole.

Now, the attack as a whole, I did not charge this case, I did not rule what was the -- what was the attack in this case. But what we find in the judgment is that we have one attack directed at a civilian population and we have a date, we have a time frame. We have a time frame that starts in August 2002 and that ends in June -- first in the Updated Document Containing the Charges it was June and then the Trial Chamber decided it was the end of May, or something like that. But it's a very long

period. It's a nine-month period. That's one attack directed against the civilian population.

So in order to know whether it is -- it was directed at a civilian population, we have to look, first of all, at the duration, then we need to look at everything that happened during that period. We can't just say because in September there was one war crime committed at a -- at civilians, that for this reason, because there was one attack directed at civilians, we have an Article 7 attack directed at any civilian population. That isn't correct. That's not the case. We have to look at all of the actions that took place during that seven-month period.

If the Prosecution wanted to charge a shorter period, it could have, but it did not.

In Katanga it's completely different. And Katanga really blurs the issue because in Katanga the Prosecution charged an article war crime attack on one attack on Bogoro and in parallel, or on top of it, an Article 7 attack. So we're looking at the same evidence for one event. We should not be mistaken to take that approach on other cases. This is really exceptional because the attack is a course of conduct.

And the only way we will find out whether it was primarily directed is by looking at all of the evidence. And even though some war crimes might have been committed during this event, it doesn't mean that the overall attack was directed.

And if, in addition, it wasn't promoted, then of course we do not have an Article 7 attack and we do not fulfil the purpose and the threshold of Article 7. So let's stay with war crimes and let's see if war crimes were committed.

Thank you, Judge.

JUDGE IBÁÑEZ CARRANZA: [10:17:49] For you, yourself, do you think, do you think this act of promotions -- acts of promotions or encouragement are the only features to show or to demonstrate that there was a policy, an organisational policy?

Couldn't it not be inferred, for example, from fact-findings of patterns, patterns not only of conduct but patterns, for example, in the use of logistical methods, in the use of the personal weapons from the organisation? Because to demonstrate an organisational policy requires not, I think, only from this act of encouragement. What do you think about, what could you develop about?

MR BOURGON: [10:18:47] Judge, I could not agree more with you. We have to look at everything and that's the key. That's what the Trial Chamber failed to do. The Trial Chamber looked at the few crimes committed during the attack, it selected crimes and charged some, then it selected other events which it did not charge but it called contextual elements, and then some of the -- some of the actions of the organisation it left out. It didn't charge, it didn't mention, it didn't rely on it. And the Trial Chamber, of course, followed the Prosecution.

And our argument is the Trial Chamber had to look at everything. If the Trial Chamber had looked at everything -- and what you're saying this morning, Judge, is indeed correct. Everything counts. And it's the sum of the evidence and all of the actions that determine whether there was.

We cannot say there were 10 Article 7 attacks during a campaign, I'm going to pick two, I'm going to charge for two, I'm going to say two more are contextual, and I'm not going to look at the others. That's incorrect. We have to look at everything. Now, if we want to look at evidence, the evidence was there, Judge. The evidence was in the logbook. The logbook begins before the first operation and ends after the second operation. The evidence was there to see what kind of organisation are we dealing with from a military point of view. We find nothing in there about attacking a civilian population. And when we look at the political component, we found only promotion of reconciliation and peace for all, including Lendus. In this context we

neither have an attack nor do we have a policy.

PRESIDING JUDGE MORRISON: [10:20:40] Thank you, Mr (Overlapping speakers).

JUDGE IBÁÑEZ CARRANZA: [10:20:41] (Overlapping speakers) I will defer my colleague. When I think I -- I need to make a disclaimer, I don't think that we are thinking on the same way, but I will come back later, okay? Thank you.

MR BOURGON: [10:20:48] (Overlapping speakers) It will be my pleasure to answer your question, Judge. Thank you.

PRESIDING JUDGE MORRISON: [10:20:54] Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [10:20:56] Mr Bourgon, on organisational policy, in answering Judge Ibáñez's question, you emphasised the element of organisation. Of course in a case where we have organisation, that becomes easy. You might say, okay, we see an organisation, the organisation question is does that organisation have policy? In other words, possibly looking here at maybe a JCE2 type situation, the variant kind. But could it really be said that you cannot have the crime against humanity unless you find an organisation behind it? That's not your submission, is it?

MR BOURGON: [10:21:59] Thank you very much for your question, Judge. This is an interesting question for one reason. Because, as I've mentioned earlier, Judge, the acts in Article 7(1) are committed by perpetrators and one perpetrator committing one act can have -- can be found guilty of having committed a crime against humanity. One perpetrator, one act.

But we need the chapeau. And the chapeau here, it requires -- if we read strictly at the text, the chapeau requires that it must have been committed, it's a course of conduct involving many multiple commission of acts.

Now, whereas one person, one crime is enough, but here we need to have multiple commission of acts and this multiple commission of acts must be directed. So

whoever committed the multiple commission of acts -- if you prefer to use another word, "an organisation", so be it, but it's not one person who committed those multiple acts which constitute the crime against -- the attack against a -- directed against any civilian population. It's a group of people together. And in this case we had a clear-cut organisation, as you mentioned, Judge, and that's what we have to look at (Overlapping speakers).

JUDGE EBOE-OSUJI: [10:23:31] Would that have been -- that element of multiplicity of the acts have been possibly satisfied by some other elements of definition of crimes against humanity, widespread or systematic attack? That's an essential element of a crime against humanity, it needs to be widespread or systematic. So if you -- that already, perhaps, doesn't it, speak to that multiplicity we are talking about? And then all you need is once you establish that there's been a widespread or systematic attack occurring, but an individual is caught doing any of those things listed, that individual can be charged and convicted of a crime against humanity without an additional requirement of proof that an organisation exists. Is that about it, or not?

MR BOURGON: [10:24:38] Again, Judge, thank you for your question. But again, to me the word "organisation" allows us to identify a group or entity that fulfils the elements of the chapeau.

JUDGE EBOE-OSUJI: [10:24:55] But isn't there some rule about the lesser -- or, rather, the larger including the lesser? Doesn't that sort of help us here? I mean, in -- it does not help?

MR BOURGON: [10:25:12] Not at all, Judge. Not at all.

What is important is that -- you mentioned earlier widespread or systematic, that's very important. It is indeed an essential element. The attack must be widespread, widespread meaning, of course, that all of the actions -- when we look at it, we

conclude that all of the actions -- what stems from all of the actions is that they were widespread and that they were systematic. But that is not sufficient. And I said that in my submissions.

Some commentators, and this was actually discussed when the -- in the draft -- by the drafters of the Statute, they asked the question, they say: Well, some people are saying if it's widespread or systematic - which refers, of course, to the question of the logistics that was referred to earlier on - then that means there must have been a policy. Some commentators do believe this. I disagree, but it's not my opinion that counts. What counts is that the drafters of the Statute decided to put in the Statute in wording that it has to be a policy that is promoted (Overlapping speakers).

JUDGE EBOE-OSUJI: [10:26:26] But the drafters of the Statute also must be presumed to not intend absurdity, mustn't they? And here is the issue there. Help me. Why would it be correct to charge an individual with genocide and you don't look for an organisation behind that as an essential element of the crime, but you cannot charge someone with the murder as a crime against humanity unless you find an organisation behind that? Do we -- do you think some people might think that there's something of an absurdity in there?

MR BOURGON: [10:27:13] Absolutely not, Judge. I believe that the crime of genocide is even more demanding in terms of proof than crimes against humanity. Whereas the crimes against humanity you have the chapeau and you have these requirements that were included in the Statute, to find someone guilty of genocide, the genocide first has to be proved.

JUDGE EBOE-OSUJI: [10:27:35] But look at it this way: Let's say, we've seen instances of attacks by one or two individuals that we can think here about, the Christchurch mosque attack, for example, it was an individual who did it. You can

also think about the Boston Marathon attack. Okay? In those scenarios, let's say the -- well, you had authorities that were able to and willing to prosecute promptly. That kind of thing may happen, might it not, in a society, in a country where there may be a question of ability or willingness to promptly prosecute someone, the weapon of - you're a former soldier yourself - weapon of mass destruction gets into the wrong hands and they use it to devastating effects, say a place where a racial group is having a celebration, or an ethnic group, someone uses that. Okay.

In that kind of scenario, that example, for instance, if the attacker had a blog post somewhere where they said, "Well, I hate this racial group and I want to wipe them out", you may have a charge of genocide, possibly. But if you don't have that blog that says that, what are you left with to proceed on in a scenario where there's a question that the authorities may be unable or unwilling to prosecute? Does it mean that that sort of lone wolf cannot be prosecuted at the ICC for that kind of crime because there is no organisation? Is that what we're looking at here?

MR BOURGON: [10:29:50] Well, the straight answer to your question, Judge, is I would fail to see the reasons why the ICC with prosecute a person like this who deserves to be in jail for the remainder of his life for genocide or for crimes against humanity.

We look at the object and purpose of the ICC. Why are we here? Why was this Court created? This Court was not created for lone wolves who throw a bomb at the Boston Marathon. That's not why this Court was created. This Court was created for specific purposes. It was created for -- and if we go back at all of the framework of the Statute, it wasn't created for events like this.

JUDGE EBOE-OSUJI: [10:30:31] Isn't it crimes that shock the conscious of humanity, isn't that why the Statute was adopted?

MR BOURGON: [10:30:40] Absolutely correct. Crimes that shock the conscience of humanity, crimes against humanity, but that fulfil certain requirements. The drafters got together, all the States got together and they looked at existing international courts and they looked at which crimes they wanted to prosecute and which ones they did not want to prosecute and they adopted elements.

JUDGE EBOE-OSUJI: [10:31:03] Another way -- let me give you another example. I'm trying to explore the extent, the limits of your objection to that.

In the Kenya cases, the casualty in that post-election violence of death was 1,300, thereabouts, and it was the events prosecuted at the ICC. And then back to the example I gave you, let's say the lone wolf committed what it did and the casualty count might be perhaps a football stadium or something, looking at probably 5,000 or more. So you're telling me that if there is no prosecution at the national level, that that should not be the business of the ICC to inquire as to what's going on here?

MR BOURGON: [10:31:55] I think, Judge, we are moving away from the topic of the day, but (Overlapping speakers)

JUDGE EBOE-OSUJI: [10:32:01] No, no, no, we're not. We're not (Overlapping speakers)

MR BOURGON: [10:32:03] The question, I will (Overlapping speakers)

JUDGE EBOE-OSUJI: [10:32:04] The question is -- no, no, we're not. The question is whether we must look for an organisation before we can have a charge of crime against humanity prosecuted at the ICC.

MR BOURGON: [10:32:14] No one person could have an organisational policy. Therefore, the quick answer to your question is no, we can't because the organisation policy is required.

If we want to do so, let's change the Statute, and we have mechanisms for this.

JUDGE EBOE-OSUJI: [10:32:38] Thank you.

PRESIDING JUDGE MORRISON: [10:32:46] I did not ask whether or not anyone from the Office of the Prosecutor or for victims has any input on these recent questions by Judge Eboe-Osuji. If not, we'll move on.

MR SUPRUN: [10:33:05] Thank you, Mr President. I don't have specific observations to make in addition to those I have made already in my written submissions and refer your Honours to my written submissions from paragraph 51 till 56, with all supporting references.

Thank you.

PRESIDING JUDGE MORRISON: [10:33:23] Thank you.

MR COSTI: [10:33:29] And, your Honour, we don't have further comment at this point unless Judge Eboe-Osuji wants us to comment about it.

PRESIDING JUDGE MORRISON: [10:33:34] Thank you very much.

There will be another question session later on. It's nominally 40 minutes, but I'm going to unilaterally extend that to an hour so that there will be many more questions, I have no doubt.

But for the moment we need to turn to the meat of today's participation by the parties, which is Mr Ntaganda's appeal against the sentencing decision.

Mr Ntaganda presents 12 grounds of appeal in which he raises issues regarding his participation -- his degree of participation in the second operation: The absence of *in concreto* analysis of his participation and mens rea for the crime of rape, errors regarding the second operation by not disciplining Mr Mulenda, aggravating circumstances, double counting - persecution and murder, and mitigating circumstances.

I'd now like to invite counsel for Mr Ntaganda to present his submissions as to

sentencing. And you have 30 minutes.

MR BOURGON: [10:34:41] Thank you, Mr President.

Mr President, honourable Judges of the Appeals Chamber, as was the case for the trial judgment, it is our respectful submission that the Trial Chamber committed many legal and factual errors in imposing a manifestly excessive sentence of 30 years' imprisonment on Mr Ntaganda.

This morning we will focus on grounds 1, 4, 6 and 10.

Regarding ground 4, it's quite straightforward. The Trial Chamber, in our submission, committed a legal error in finding that Mr Ntaganda's participation in the second operation murders - now, this includes, by the way, the infamous Kobu massacre with more -- almost 50 victims - was enhanced by two things: His failure to punish Salumu Mulenda, who commanded the second operation on behalf of the UPC/FPLC along with Kisembo; and because Mr Ntaganda purportedly expressed approval from Mulenda's involvement in that massacre.

Now, to reach as their finding two things were required. First, it was necessary to show that Mr Ntaganda could or had the ability to punish Mr Mulenda. And the Trial Chamber should have at least, if it wanted to increase the sentence, say: Well, this is what he could have done and he didn't do it. Trial Chamber didn't say that. But on the contrary, there is evidence on the record that Mr Ntaganda could not.

Now, as for Mr Ntaganda expressing his support for the operation, well, the problem here is that an expression of approval for a crime does not increase the participation of the accused in the crime. Even more so if it's after the fact and it's a crime where the accused was not even present.

Now, the intent also does not impact Mr Ntaganda's intent if only because the intent must animate the actus reus.

I move quickly to ground 1.

The Trial Chamber erred in law by failing to distinguish Mr Ntaganda's degree of participation in the crimes of the first operation from Mr Ntaganda's degree of participation in the crimes committed in the second operation.

The key word here, Mr President, is "crimes". Whether a crime was committed during the first operation, whether a crime was committed during the second operation is not the issue. The issue, rather, is Mr Ntaganda's degree of participation in each of the crimes that were committed according to the judgment.

Now, let's say -- let's take an accused charged with having committed 10 murders. Well, then what we say is that the trier of fact or the sentencing Chamber must analyse the degree of participation of the accused in the 10 murders. If the degree of participation of the accused in the 10 murders is different, then this must be somehow reflected in the sentence that will be imposed. It's not a blanket approach. This is what was found by the sentencing Chamber in the Bemba case. It said there's 14 incidents, but Mr Bemba did not play the same role in each so we can't have a blanket approach.

Now, the sentencing decision -- or Chamber cannot take 10 murders, look at three murders and say degree of participation is high so therefore we find that degree of participation in 10 is high. This is not a conclusion that is open to a sentencing Chamber. Yet, in this case, that's what the Trial Chamber did. It concluded that Mr Ntaganda's degree of participation in certain murders, those committed in the first operation, was high, and then it said because of that, Mr Ntaganda's participation -- degree of participation in all murders was high. And that's even though his degree of participation from a factual point of view is entirely different. This, Mr President, is legally incorrect and constitutes a reversible error.

To arrive, of course, at this conclusion, what did the Trial Chamber look at? Well, the Trial Chamber find -- made this very interesting finding where it says Mr Ntaganda's degree of culpability first or second operation is not important. It's the same, it's high and then - this is paragraph 36 - "... irrespective of whether he was in close physical proximity to the locations where the crimes were ... [committed], and even in instances where he ... [had no] previous, contemporaneous, or subsequent knowledge of the specifics of the crime ..."

So for the Trial Chamber, all of these is beside the point. And we say that that was an error.

Physical presence at the location is neither a precondition for liability - we discussed this already - nor is it the only criteria to look at for sentence or degree of participation. But it is, however, informative of the degree of participation and culpability and that depends on the circumstances of the case.

Now, I referred the Appeals Chamber to other decisions. There was the Katanga sentencing decision, paragraph 153; the Al Mahdi sentencing judgment, paragraph 53; and the Bemba sentencing appeals judgment, most important one, at paragraph 140.

In this case this is highly significant. Mr Ntaganda was not found to have been anywhere near the second operation when the crimes took place.

Now, the fact that Mr Ntaganda wasn't there is one fact, but it's the tip of the iceberg that shows that his involvement and his degree of participation in the crimes, again, I focus on the crimes committed during the second operation, was at best minimal.

The Trial Chamber appears to have proceeded on the same basis that is argued by the Prosecution, which is to conflate second operation with crimes committed during the second operation. Those are two different things. There is evidence related to both, but it is two different inquiries.

Now, what do we have in evidence quickly. We have Mr Ntaganda's involvement in a planning meeting; no crimes are discussed or envisaged. We have information available to Mr Ntaganda. The Trial Chamber referred to three logbook messages and one Thuraya conversation based on hearsay. From that, all we hear of is legitimate military nature information and none of it evince that crimes were being contemplated.

We do -- the Trial Chamber did not find that Mr Ntaganda had briefed the troops before the second operation.

The Trial Chamber looked at one message from Mr Ntaganda related to a commander refusing to advance, but there is no information in that message, nor can it be attached to crimes.

Mr Ntaganda -- the Trial Chamber said Mr Ntaganda was generally in contact with commanders in the field and was monitoring the second operation via the radio network. The problem is we have no details of what type of overseeing or what type -- what he was doing to monitor. Was he listening? We don't know. Was he speaking? We don't know. Did he issue anything? We don't know. Why? Because the Trial Chamber did not look at much of the evidence. The Trial Chamber could not identify any examples of communications between Mr Ntaganda and the commanders during the second operation. And that is crucial.

Mr Ntaganda, by the way, was not heard on the radio network. Nobody heard him. Even the witnesses who tried to say that he's the commander, he was high, he should, he must -- no. No finding of knowledge of crimes.

If the Trial Chamber wanted to increase his degree of participation, surely it must have said, well, he knew about those crimes. No. No finding.

Lastly, the conversation with -- between P-55 and Bosco Ntaganda, which would have

happened later at some point in March - we can date this conversation to before 2 March but after the second operation - then it's after the fact and it does not help in finding a degree of participation.

So when we look at everything in the second operation, clearly it was different from the crimes committed in the first operation, and the Trial Chamber should have taken that into account and it did not. And that's what the reversible error is all about.

One last point before moving to the individual sentence -- sorry, to ground 6, which will be addressed by my colleague Maître Mélissa Beaulieu-Lussier, and that's the individual sentence determined by the Trial Chamber for counts 1 and 2.

Pursuant to the Statute, the -- before imposing a sentence on an accused, a Trial Chamber must first determine an individual sentence for each separate crime for which the accused was found guilty.

Now, we say that was an error to impose one individual sentence for counts 1 and 2 together because murder as a war crime and murder as a crime against humanity are different crimes, and this was acknowledged by the Trial Chamber. They each contain distinct elements.

Therefore, the Trial Chamber had to impose something for count 1 and a sentence for count 2 and then move to the overall sentence. It did not.

Now, did the Trial Chamber have in mind 30 and 30? 15 and 15? 10 and 20? We don't have any idea of this. And when we look at the sentencing framework, where the Trial Chamber is bound to impose a sentence that is minimum the highest individual sentence, that reversible error takes all of its importance.

I now hand the floor to my colleague. Maître Mélissa Beaulieu-Lussier will address you with respect to ground 6.

PRESIDING JUDGE MORRISON: [10:46:25] Thank you very much.

MS BEAULIEU-LUSSIER: [10:46:26] Good morning, Mr President, your Honours.
The main question for the Trial Chamber to resolve in relation to ground 6 is what constitutes double counting and how the Trial Chamber heard in imposing the sentence for -- on Mr Ntaganda for the crime of persecution and it was -- how it was disproportionate.
When the Trial Chamber considered the discriminatory intent in assessing the gravity of the crimes in count 1 to 5, 7 to 8, 11 to 13, and 17 to 18 pursuant to indirect co-perpetration and the discriminatory intent as an aggravating circumstance for the crime of murder as a direct perpetrator, and then imposing an individual sentence for the umbrella crime of persecution of 30 years --
THE COURT OFFICER: [10:47:12] I'm sorry, Ms Beaulieu, could you please slow down.
MS BEAULIEU-LUSSIER: [10:47:18] Yes.
And then when the Trial Chamber imposed an individual sentence for the umbrella crime of persecution of 30 years, as for the underlying crime of the -- of murder, the Trial Chamber punished Mr Ntaganda twice for the same conduct. This is a textbook case of double counting. Double counting does not arise solely when the same factual conduct is considered twice in the calculation of an individual sentence imposed for an individual crime. This is not a concept that has to be understand by compartmentalising factors taking into consideration in each individual sentence. Rather, fairness requires double counting to be understood in a broad sense to include any factor and not merely constituting elements of the crime.
The Prosecution's position oversimplifies the issue by stating that, first, it was necessary and appropriate to determine the appropriate penalty for each crimes Mr Ntaganda was convicted of; and second, since the Trial Chamber was entitled to

enter a conviction for persecution as a crime against humanity, the Chamber could hardly fail to take into consideration the discriminatory nature of the crime in setting the appropriate individual sentence for it.

By adopting this position, the Prosecution incorrectly limits the rationale behind the term "double counting" to factor taking into consideration as aspects of the gravity of a crime that cannot additionally be taken into account as separate aggravating circumstances and vice versa.

But the Prosecution provides no basis for such a limited and restrictive definition which only prohibits the double counting as between the consideration of gravity and aggravating circumstances, when in fact its application is much more broad than that.

In this case what is surprising is that the Trial Chamber had the correct reasoning all along until its legally incorrect conclusion in paragraph 177 for -- of the sentencing judgment.

Indeed, when discussing the adequate sentence for the crimes charged pursuant to mode of liability of co-perpetrator, the Trial Chamber was mindful not to take into consideration discriminatory intent as an aggravating factor because it had already done so as part of the common plan for the gravity.

When discussing the adequate sentence for the crimes charged under the mode of liability of direct perpetrator, the Trial Chamber was again mindful not to take into consideration discriminatory intent as aggravating factor -- it took it as aggravating factor and not under the gravity.

The Chamber -- the Trial Chamber carried on its analysis of the sentence to be imposed for the crime of persecution, and at paragraph 176 that I refer the Chamber.

At this point, the Trial Chamber acknowledged again its approach and notes that there was no additional elements to be considered in relation to persecution

committed by Mr Ntaganda for both direct perpetrator and indirect co-perpetrator. But then in its conclusion at paragraph 177 of the sentencing judgment, the Trial Chamber committed the error in holding that it had to pronounce a sentence for persecution equal to the highest sentence imposed. This requirement is nowhere to be found. Rather than recognising that the redundancy meant that an individual sentence for persecution was already fully reflected in the individual sentence for the underlying crimes, the Trial Chamber determined that the individual sentence for the crime of persecution had to correspond to the highest sentence imposed in this case for the crime of murder.

To avoid double counting, the only correct sentence for persecution was not a sentence equal to that previously imposed for the same conduct for murder, but rather a sentence of zero year. There was no room for any additional sentence to be imposed for persecution. This was a fatal mistake and it had a material impact on the sentence imposed.

Again, the Prosecution is wrong to argue that the Trial Chamber's error will not materially impact the joint sentence because the joint sentence would still be 30 years due to the sentence imposed for the crimes -- the crime of murder. This is incorrect. If -- only if the individual sentence for murder is modified as a result of Mr Ntaganda's appeal, Mr Ntaganda will nonetheless unfairly be sentenced to 30 years due to the crime of persecution.

What is more, the Prosecution's argument that the Trial Chamber could have imposed a joint sentence of 30 years, even if the sentence for murder and persecution was reduced, and that there is therefore no need for the Appeals Chamber to intervene, is nothing more than speculation.

Lastly, even if the individual sentence of 30 years is maintained for the crime of

murder, the Appeals Chamber must still intervene and play its role as gatekeeper. It is in the interests of justice to address this error of law that materially impacted the individual sentence for the crime of persecution.

Thank you, your Honours.

MR BOURGON: [10:53:11] Thank you, Mr President. I will now end our submissions this morning on our sentencing appeal by addressing the Trial Chamber's error in respect of the assessment as to whether mitigating circumstances were found to be -- were shown to be proved.

Now, the Trial Chamber in this case refused to accord any mitigating circumstances put forward by Mr Ntaganda. I refer the Appeals Chamber to grounds of appeal 7, 8, 9, 10, 11 and 12 of the sentencing appeal.

Allow me to begin with the applicable standard to establish the existence of mitigating circumstances, which applies of course to all of these grounds.

The Trial Chamber acknowledged that the correct standard was balance of probability. The problem is the Trial Chamber failed to apply this standard. The ultimate question to be answered pursuant to this standard is whether on the evidence the occurrence of an event was more likely than not. That's the balance of probability ultimate question.

Now, what the Trial Chamber did in this case is different, and the best example of this is found in ground 10, part 1 of our brief. Now, in ground 10, part 1, what do we have? Well, Mr Ntaganda claimed that he significantly contributed to peace and reconciliation and security in 2004 in Ituri.

Now, at paragraph 219 of the sentencing judgment, the Trial Chamber notes the evidence that is before it, evidence on the record. And this evidence is a very long paragraph and it includes things such as Mr Ntaganda delivering speeches about

peace and reconciliation in Sali, in Largo, in Mabanga, in Lopa; Mr Ntaganda having invited Lendu community leaders to pacification meetings; and Mr Ntaganda having been involved in the organisation of a highly symbolic rank giving ceremony in Largu in 2004, a ceremony that was attended by senior members of the UPC, senior members of the FNI, and also administrators from the Democratic Republic of Congo. Now the Chamber looks at this evidence and put this evidence in the left hand. Then, rather than looking for other evidence for the purpose of performing the required balancing exercise, the Trial Chamber looked for ways to undermine and downplay the evidence in the left hand. Moreover, the Trial Chamber did not consider the benefit for reconciliation of these events based on the evidence before it. That, Mr President, we say is a failure to apply the balance of probability standard.

Now I move to ground 1 -- to part 1 of ground 10 per se, dealing with the assessment of evidence in support of this one claim that Mr Ntaganda significantly contributed to peace and reconciliation with the Lendu community in Ituri in 2004.

Now, it is our submission that in assessing this evidence the Trial Chamber committed errors, including incorrect conclusions of fact and to such an extent that it constitutes an abuse of the Trial Chamber's discretion, warranting the intervention of the Appeals Chamber.

In fact, to us this conclusion is so unfair and unreasonable, that it forces the conclusion that the Trial Chamber failed to exercise its discretion judiciously. Of course this error materially impacted the sentence imposed, as we will see from the next few arguments.

Now, before I address the -- exactly the errors, it is paramount, in our view, to consider the context, and the context here I would like to illustrate by playing a video. Now this video will be played without sound as I address the Appeals Chamber.

The evidence number is DRC-OTP-0118-0002. And as this video is playing, then I will continue my submissions and if you might be interested in taking a look at what is happening because this supports my arguments.

(Viewing of the video excerpt)

MR BOURGON: [10:58:30) In short, Mr President, in terms regarding the context, in the trial judgment the Trial Chamber found that Mr Ntaganda and other leaders of the UPC meant the destruction and disintegration of the Lendu community. That's at trial judgment, paragraph 809. I mean, we referred to this earlier. This is a quasi-genocidal finding which applies to the period from 6 August 2002 to December 2003.

Now this is not benign. *En français, ce n'est pas banal*. This evidence, the evidence of Mr Ntaganda, contribution to peace and reconciliation with the Lendu that was submitted in evidence, covers the period immediately following the December 2003. Now, surely the Trial Chamber must, or at least should have been wondering what's going on. Until December 2003 the UPC/FPLC wants to erase the Lendu from the face of the earth. And in January, or a few months after, Mr Ntaganda is organising events with the senior leaders of the Lendu community, during which they are manifesting a common will to restore peace and security.

It appears that the Trial Chamber found the evidence to be not relevant, but that is at least surprising. More than that, the Trial Chamber failed to consider and to give weight or to give sufficient weight to highly relevant events, which clearly evince a palpable will of reconciliation between the Lendu and Hema communities.

Now, Mr Ntaganda's own words in some of his speeches: "You the Hema, you the Lendu, you are living together on the same hills. You are living together. Now it's time to make peace. Peace must be restored."

The testimony of * D-306, who volunteered to testify -- now, * D-306 was one of the (Redacted) at the time --

JUDGE EBOE-OSUJI: [11:01:06] Mr Bourgon, did you -- the quote you gave, is it part of this video?

MR BOURGON: [11:01:14] Sorry, I don't understand, Judge.

JUDGE EBOE-OSUJI: [11:01:16] There's something you said: "You the Lendu, you the Hema" --

MR BOURGON: [11:01:22] Yes.

JUDGE EBOE-OSUJI: [11:01:23] -- you must make peace. Are you saying that's part of the --

MR BOURGON: It is.

JUDGE EBOE-OSUJI: -- sound bites to the video?

MR BOURGON: [11:01:30] Not of the sound bites -- the sound bites, but it is part of the testimony.

JUDGE EBOE-OSUJI: [11:01:33] Okay.

MR BOURGON: [11:01:35] It is on the record. It is --

JUDGE EBOE-OSUJI: [11:01:37] I just wanted to make sure that -- what it means, what you just said. Okay, thank you.

MR BOURGON: [11:01:42] It is evidence on the record, Judge.

Now, the testimony of D-306, (Redacted), and he decided that he would come before the Trial Chamber, despite the antagonistic climate which exists between the Lendu and the Hema community then and now.

D-306 provided highly favourable evidence, concluding with: Mr Ntaganda really wanted to restore peace.

D-306, reconciliation efforts in Ituri could not have proceeded without the security

provided by Mr Ntaganda and his men.

The meaning of the July 2004 rank giving ceremony is immense. A year prior to this ceremony in the same area, the Lendu combatants killed hundreds and hundreds and hundreds of Hema. And yet a year later they are sitting together and Mr Ntaganda is organising the event.

The presence of the Lendu community at this event is important. The presence at the event and the words of the then president of the UPC, who also testified, and he highlighted the importance of the event and he highlighted Mr Ntaganda's role in organising the event, and he also said that Mr Ntaganda was central to peace and reconciliation activities.

Mr Ntaganda himself delivered a speech. The Lendu combatants and fighters from the Hema -- from the UPC were present. There was a highly symbolic speech delivered by Floribert Ndjabu himself, the FNI president, a speech delivered by the administrator of the territory, who is assigned or at least nominated by the government and not by either side.

The message that we can see on this video, I don't know if you saw this, but we see a Hema woman, member of the les Mamans de l'Ituri, or something like that, and she's a Hema and she's dancing with the leader, the chef of the Lendu community. Bosco Ntaganda is sitting at the head table. On one side he has the president of the UPC; on the other side he has the president of the FNI; right close beside he has the Djugu territory administrator.

Now, there was also another such event in Katoto, which is also in evidence.

Now, the Trial Chamber did -- also erred by giving weight to extraneous irrelevant facts such as the nature of peace and reconciliation and by saying that, well, it looks more like a strategic alliance than broader reconciliation. We say that was incorrect,

Mr President, for the Trial Chamber to consider such extraneous events.

PRESIDING JUDGE MORRISON: [11:04:38] Mr Bourgon, you're actually over time now, but can you conclude in the next two minutes?

MR BOURGON: [11:04:47] Absolutely. One minute, Mr President, I'm done. These events clearly evince the fact that the characters who appear before the Chamber or the evidence that the Chamber had comes directly from central characters who dealt directly with Mr Ntaganda at the time. And the Chamber saw videos like the one that was played before you and the Trial Chamber had the transcript of these videos. And we simply say that when you look at all of this evidence and if you look at the context and if you look at the findings in the judgment, that's where we say the conclusion that I said earlier, that it was simply so unfair and so unreasonable that it constitutes an abuse of the Trial Chamber's discretion.

For the other events, I invite the Appeals Chamber to look at our brief for the other evaluations which also contain numerous errors denying Mr Ntaganda the value of any mitigating value in this case.

Thank you, Mr President. This concludes our submissions on the sentencing appeal of Mr Ntaganda. Thank you.

PRESIDING JUDGE MORRISON: [11:05:55] Thank you, Mr Bourgon.

We're now going to take our first break for today, which will be 45 minutes.

I remind everyone that the second break will be increased from 45 to 60 minutes.

After the break, the Office of the Prosecutor will have 30 minutes to address the Court as to sentencing, followed by the Legal Representatives of the Victims.

So we'll break now for 45 minutes.

THE COURT USHER: [11:06:23] All rise.

(Recess taken at 11.06 a.m.)

(Upon resuming in open session at 11.55 a.m.)

THE COURT USHER: [11:55:16] All rise.

Please be seated.

PRESIDING JUDGE MORRISON: [11:55:44] We now hear from the Office of the Prosecutor, has 30 minutes to address on the sentencing issue.

MS THIRU: [11:56:01] Your Honours, my name is Nivedha Thiru and I will respond for the Prosecution on grounds 1 to 4 of the sentence appeal. My colleague *Mr Mugwanya will address you on grounds 7 to 12, and Mr Cross will address you on ground 6. As for * ground 5, we rest on the written arguments in our response brief. We are, of course, happy to answer any questions your Honours may have on ground 5 this afternoon.

Your Honours, Mr Ntaganda asks you to find that the Trial Chamber erred in reaching a joint sentence of 30 years of imprisonment. Before I address why his arguments fail as they relate to grounds 1 to 4 of his appeal, I want to first put this sentence into perspective.

Mr Ntaganda has been sentenced for 18 counts of crimes against humanity and war crimes. He and the UPC forces under his control perpetrated these crimes targeting Lendu civilians, on a significant scale and geographical spread, resulting in scores of identified victims and an unquantified additional number of victims.

In addition, he and his troops committed crimes against vulnerable children caught in the conflict by using them as child soldiers and subjecting them to sexual violence.

The scale of his criminality was unprecedented in this Court. As the UPC commander in charge of military operations, his contribution to these crimes was vast and decisive.

The sentence of 30 years reflects the extreme gravity of these crimes and

Mr Ntaganda's substantial degree of culpability for them.

He fails to show that the Trial Chamber committed any errors leading to a disproportion sentence, or that its weighing and balancing of the relevant factors was unreasonable. His appeal fails, therefore, to meet the well-established standard of appellate review for sentencing and discretionary decisions, as set out in the authorities at A1 of our list filed this morning.

Turning to Mr Ntaganda's first four grounds of appeal. In these grounds, he claims the Trial Chamber erred in assessing his degree of participation in certain crimes.

In ground 1, as you heard this morning, he challenges the finding that he participated substantially in the crimes of the second operation.

In grounds 2 and 3, he claims that the Chamber should have found his participation in rape and sexual slavery to be lower because he was more removed from or had less knowledge of the specific criminal incidents.

And in ground 4, he challenges the assessment of his participation in murder in the second operation.

Your Honours, there are two main reasons why we say these grounds should fail.

First, Mr Ntaganda downplays his essential contributions to the crimes as an indirect co-perpetrator.

But these contributions cannot be downplayed on the facts of this case.

Mr Ntaganda's counsel said this morning that the Chamber should have examined his participation in each individual criminal incident. Now, while that might be appropriate for a physical perpetrator, including one who commits 10 murders, it is manifestly inadequate to cover the multifaceted ways in which Mr Ntaganda, with his senior role, responsibility and authority within the UPC, was able to contribute to the crimes.

Yesterday your Honours heard my colleague Ms Regué set out some of the Chamber's findings as to his contributions which had a collective impact on the crimes of the first and second operations. They included that he planned and issued operational instructions for the second operation. That is in paragraph 522 of the trial judgment. And that he was in contact with commanders and overseeing the second operation. That is at paragraph 565 of the trial judgment.

Moreover, he was responsible for training recruits, where they were taught that the Lendu was the enemy. He had disciplinary power and ensured that the chain of command was followed, yet he did not punish crimes against Lendu civilians, he ordered his troops to commit crimes and he himself committed murder. And, with his authoritative presence before his troops as their senior commander, he demonstrated with his own actions and directives how he intended them to behave when it came to Lendu civilians and showed them that he endorsed their criminal conduct.

The Trial Chamber was correct not to artificially isolate only his direct involvement in specific incidents when sentencing him.

And the Chamber reasonably assessed his contributions holistically where they collectively impacted the crimes of the first and second operations, just as it had done in the trial judgment. This is because the two operations formed part of the one course of conduct encompassed by the one common plan.

Mr Ntaganda this morning again challenges that finding of the trial judgment, but his sentence appeal is not the appropriate forum to do so.

Coming to the second reason why Mr Ntaganda's first four grounds of appeal should fail. He wrongly contends that his degree of participation could not have been substantial if he was not physically proximate to or had no specific knowledge of the

individual crimes.

He singles out individual crimes such as the Bambu hospital murders, the Kobu massacre, and a specific number of rapes and sexual slavery.

Your Honours, the Chamber did not need any further indicia of his participation in these specific crimes. There was already a strong factual basis to conclude that his participation in them was substantial.

Defence counsel this morning misstates the record as to the evidence that the Chamber relied upon. Not only did it rely on the evidence of his broad contributions to these crimes, some of which I've just mentioned, but it found that he and his co-perpetrators meant for these crimes to be committed against civilians. And they knew that in implementing their common plan, crimes against child soldiers would occur in the ordinary course of events. It found he knew and intended that the crimes which his troops committed in the first operation would continue to be committed with the same *modus operandi* in the second operation, which culminated in the particularly violent Kobu massacre that he approved of. He knew that UPC troops were raping civilian women, as it occurred around him when he was in Mongbwalu. He knew that child soldiers were raped and sexually enslaved, because this was generally known and discussed in the UPC and he himself contributed to creating the circumstances that allowed these crimes to occur.

Mr Ntaganda effectively denies that these mens rea findings were of any significance in sentencing him.

The Chamber was not required to set aside these and other relevant findings and, instead, * hypothesise how his degree of participation might have differed if he had been closer to, or had what he calls advance or contemporaneous knowledge of the individual crimes. Nor was it required to differentiate between Mr Ntaganda and

some other hypothetical indirect perpetrator to determine where he sat on the scale of participation. It had only to take the concrete findings in this case to assess his participation. And, your Honours, that is what the Chamber did in reasonably concluding that his degree of participation in the crimes was substantial.

Finally, a brief word on ground 4 of Mr Ntaganda's appeal.

The fact that Mr Ntaganda expressed his approval of the Kobu massacre in its aftermath and did not punish anyone for it, were relevant factors for the Trial Chamber in assessing his participation in the crime of murder.

Mr Ntaganda's counsel now claims that Mr Ntaganda had no power to discipline his commander yet, back in his sentencing submissions before the Trial Chamber, he asked that it be taken into account in mitigation that he did discipline his troops.

In any event, the Chamber found he had such disciplinary power. This is at *paragraphs 323 and 639 of the trial judgment.

And his approval of the Kobu massacre and his failure to punish it were also relevant in demonstrating his enthusiasm for the crimes and the moral support he leant to his troops as their senior commander.

The Trial Chamber reasonably exercised its discretion to take these into account when assessing his participation.

Your Honours, Mr Ntaganda's first four grounds of appeal fail to demonstrate that the Trial Chamber committed any errors and should be rejected.

Those are my submissions, your Honours. I will now hand over to my colleague *Mr Mugwanya.

PRESIDING JUDGE MORRISON: [12:06:11] Thank you.

*MR MUGWANYA: [12:06:26] I will address you on Mr Ntaganda's ground 7 to 12, in which Mr Ntaganda challenges the Trial Chamber's evaluation of his alleged

mitigating circumstances.

We have comprehensively addressed all Mr Ntaganda's arguments in our sentencing response brief, I need not repeat those detailed submissions today. Rather, I'll only focus on a few aspects, in particular concerning deficiencies that run through Mr Ntaganda's submissions, especially in his ground 10.

As you have heard from my colleagues, Mr Ntaganda was convicted of some of the gravest atrocity crimes in the Court's history. None of his alleged conduct, even if they had been established, would justify mitigating the 30-year sentence imposed on him. In a nutshell, his alleged saving of 64 enemy soldiers was to recruit them into his armed group with the purpose of implementing a common criminal plan. It was not a humanitarian act, contrary to his ground 7.

His crimes cannot be justified by a generalised reference to his traumatic experience during the Rwandan genocide, ground 8.

The evidence did not show that Mr Ntaganda protected civilians or punished perpetrators of crimes, ground 9.

Mr Ntaganda not only played a limited role in peace, reconciliation and disarmament efforts, but indeed he was a stumbling block to those efforts, ground 10.

Mr Ntaganda's alleged cooperation with the Court was not exceptional, ground 11.

His alleged assistance to a certain individual was limited and the Trial Chamber thus correctly accorded it only limited weight, ground 12.

Mr President, your Honours, before I briefly comment on ground 10, the main deficiencies in Ntaganda's arguments and why you should dismiss all of them, can be summarised as follows:

Mr Ntaganda misunderstands the balance of probabilities standard applicable to assessing mitigating circumstances. He presents the evidence in a

compartmentalized manner or out of context. He offers his own interpretation of the evidence or merely disagrees with the Trial Chamber's reasonable evaluation of the totality of the evidence. Mr Ntaganda therefore does not demonstrate any discernible error and does not meet the standard of review to justify appellate intervention.

As an example, and given Ntaganda's submissions today, I will dwell on ground 10. The Trial Chamber correctly concluded that it was not satisfied on a balance of probabilities that Mr Ntaganda contributed concretely and genuinely to peace and reconciliation between Lendu and Hema, or to demobilisation of UPC soldiers. Mr Ntaganda's claims today, as well as those he made in his sentencing appeal brief, that the Chamber misapplied the balance of probabilities standard of proof, and that this standard is a flexible one, are wrong.

Before I turn to the specific examples Mr Ntaganda has advanced today, Mr Ntaganda misunderstands the law as a starting premise. The balance of * probabilities standard is not open-ended. Rather, it means that the circumstances in question must exist or have existed more probably than not. Therefore, if the evidence is such that the tribunal can say we think it is more probable than not, the burden is discharged. But if the probabilities are equal, it is not.

Moreover, this standard is not met by any evidence. For instance, courts have required cogent evidence and have found evidence that is equivocal to be insufficient. You can find those authorities in B2 of the Prosecutor's list of authorities.

Furthermore, contrary to arguments made by Mr Ntaganda's counsel today in assessing whether a mitigating factor is proven, the Chamber is entitled to assess all evidence before it in a holistic manner, rather than evaluate each item of evidence in isolation.

Thus, instead of examining the evidence led in support of Mr Ntaganda's alleged acts in isolation, the Trial Chamber correctly examined the rest of the evidence that contradicted that of Mr Ntaganda or showed limitations in Mr Ntaganda's alleged interventions to promote peace, reconciliation or disarmament.

Now I briefly turn to some of the examples counsel for Mr Ntaganda has addressed today.

As the Trial Chamber found, there was overwhelming evidence that Mr Ntaganda not only played a limited role in peace, reconciliation and disarmament, but that he was in fact a stumbling block. This was based on its assessment of all evidence before it.

I mainly focus only on his alleged reconciliation activities. They were deficient in many respects. They were not Mr Ntaganda's initiative, but those of the FNI. Nor were they aimed at broad reconciliation of communities. They were motivated at securing both strategic alliances between Ntaganda's UPC/FPLC and the FNI, and high positions at the national level. They did not involve any of the villages affected by UPC/FPLC atrocities.

The rank-giving ceremony that counsel for Mr Ntaganda relied on today, including in the video, is of limited utility.

First, the Chamber correctly found that it was not a reconciliation between ethnic communities. There was scant evidence that the Lendu population attended the ceremony.

Second, those receiving the ranks were only UPC officers of Mr Ntaganda.

Third, there was no evidence that the so-called state officials at the ceremony were representing the wider interests of the ethnic communities. Mr Ntaganda referred to that witness, *D-306, as supporting his interventions, but Mr Ntaganda ignores the limitations in *D-306's evidence. According to this witness, Ntaganda did not

collaborate in awareness-raising missions. Moreover, throughout 2004, the UPC continued to harass civilians in Ituri.

Furthermore, counsel for Mr Ntaganda also referred to some other alleged interventions by Mr Ntaganda, such as speeches and providing security. The Trial Chamber properly considered and found them to be limited interventions. Speeches alone, unmatched by concrete actions, to go out and promote peace and reconciliation of people that Ntaganda had harmed was very critical. It was a critical limitation. Speeches alone cannot suffice. Ntaganda played a leading role in brutalising the Lendu community. He cannot benefit from passive and limited interventions.

Similar limitations afflict Mr Ntaganda's alleged disarmament efforts. Ntaganda himself declined to integrate in the FARDC for a number of years. Indeed, MONUC considered Mr Ntaganda a potential obstacle in early 2004. The UPC/FPLC, with Mr Ntaganda as its deputy chief of staff, was uncooperative with MONUC and other institutions working for pacification in Ituri.

In conclusion, the Trial Chamber properly applied the balance of probabilities standard to find that these circumstances were not established. For all his six grounds, Mr Ntaganda merely disagrees with the Trial Chamber’s reasonable assessments without showing discernible error. They should be dismissed in their entirety.

Mr Cross will address you next, your Lordships. Thank you.

PRESIDING JUDGE MORRISON: [12:16:27] Thank you.

Mr Cross.

MR CROSS: [12:16:32] Good afternoon, your Honours.

In the last nine or 10 minutes I will address ground 6 of Mr Ntaganda's appeal. To answer this requires consideration of the Court's sentencing regime under

Article 78(3) of the Statute, which is the basis for our submission that the Trial Chamber did not err in the way it took into account the discriminatory nature of many of Mr Ntaganda's crimes.

As your Honours are aware, most international criminal trials charge multiple crimes and, if convictions are entered at all, it is generally the case that multiple convictions are entered and that punishment is imposed on this basis.

At the ad hoc tribunals, it was the practice to calculate a single global sentence reflecting the culpability of all the convictions entered, but without indicating a view as to how each crime would have been punished if the trial had been conducted on that basis alone.

For this Court, the drafters of the Statute preferred a more transparent approach. This not only serves to illustrate the stigma which is attached to each individual crime for which convictions are entered, but also helps to ensure that appellate review operates on a clearer basis.

Very simply, and as the Appeals Chamber has already recognised in the CAR Article 70 case, Article 78(3) requires the Trial Chamber to calculate a sentence by two procedural steps.

In the first step, the Chamber calculates the sentence which is merited for each crime for which a conviction was entered as if it were the only crime for which the person was convicted. Once this is done, the Chamber is left with a variety of individual sentences. But, importantly, these individual sentences are only significant as a step in the reasoning of the Chamber and not as a punishment in themselves.

In the second step, the Chamber calculates the joint sentence to be imposed, which is based on the individual sentences. As a matter of law, Article 78(3) requires that the joint sentence is not less than the highest individual sentence. At its discretion, the

Chamber can then increase the joint sentence from that legal minimum, up to a maximum of 30 years, or a life sentence if this is justified by the extreme gravity of the crime and the individual circumstances of the convicted person, according to Article 77(1)(b).

And with this legal framework in mind, we can now consider Mr Ntaganda's arguments.

Before I go on further, it is true, as Mr Bourgon pointed out this morning, that the Chamber may well have made a minor technical error by failing to distinguish between war crimes and crimes against humanity when imposing a single individual sentence for each of counts 1 and 2 together, counts 4 and 5 together, and counts 7 and 8 together.

But, in our submission, this error is harmless since the underlying conduct remains the same, and the Chamber clearly had this in mind. After all, it is the conduct which is important, as stressed by the ICTY Appeals Chamber in Tadić and Furundžija, for example, in paragraph 243.

Now, there are only two opportunities for the double-counting error claimed by Mr Ntaganda concerning his discriminatory conduct to have taken place, either in the calculation of one or more of the individual sentences, or in the calculation of the joint sentence. But, in fact, in our submission the Trial Chamber got it right both times.

When calculating an individual sentence, it stands to reason that the Trial Chamber must take into account all of the relevant circumstances for that purpose. It cannot discount any particular circumstance merely because it is also relevant to another individual sentence.

If it were to do this, this would be a legal error, since the Trial Chamber would no longer be calculating an individual sentence at all. Rather, it would be setting off

aspects of the culpability of one individual crime against another, and thus it would be preempting the analysis in the second step, the joint sentence. It would also defeat the purpose of the individual sentence, which is to show what penalty the individual crime would merit if all the convictions were to fall away, and this may prove to be important in light of any subsequent proceedings on appeal. Indeed, the very fact that we can have this sophisticated discussion today shows the benefit of the statutory approach.

Accordingly, it was no error for the Trial Chamber, as part of its gravity analysis for each crime, to take into account the discriminatory nature of the relevant conduct and thereby arrive at an individual sentence for each crime. This wasn't impermissible double counting, because Mr Ntaganda was not punished for the cumulative total of all the individual sentences. Rather, it just reflects the circumstances establishing his true culpability for each individual crime.

Nor can the Trial Chamber have been wrong to impose an individual sentence for the crime of persecution at all, which my learned friend emphasised this morning. This is because the Trial Chamber is obliged to calculate an individual sentence, and I quote, for "each crime" for which a convictions is entered, and this Court's established law on cumulative convictions permits and requires a cumulative conviction for the crime of persecution. Indeed, Mr Ntaganda has not disputed this and did not challenge this verdict in his appeal against conviction.

It follows that the only other place, therefore, that error could conceivably arise is in the Trial Chamber's assessment of the joint sentence. And the fact that the Trial Chamber was alert to the danger of double counting at this point is illustrated by paragraphs 176 and 249 of the sentencing judgment, where it expressly noted, first when it calculated the individual sentence for persecution, and then when it set the

appropriate joint sentence, the potential overlap. But on the facts of this case there can have been no double counting because the Trial Chamber only imposed the legal minimum joint sentence, which reflected just one of the individual sentences.

Thus, your Honours will recall that the Trial Chamber calculated an individual sentence of 30 years for persecution as a crime against humanity and 30 years for murder. Both of those individual sentences took into account the discriminatory nature of the underlying conduct. But Mr Ntaganda is still only sentenced to a joint sentence of 30 years, and thus the discriminatory nature of the underlying conduct was only taken into account in his joint sentence once.

It is true that, if the Trial Chamber had decided to increase Mr Ntaganda's sentence to life imprisonment - which would have been the only possible increase - it might have needed to explain the particular reasons on which it did so, in order to avoid the appearance of potential double counting. And it could have done so, for example, to take account of Mr Ntaganda's additional culpability emanating from his convictions for the crimes regarding child soldiers, which had nothing to do with persecution.

But the Trial Chamber instead chose the most conservative approach and imposed the legal minimum sentence on Mr Ntaganda, based on just one of the two highest individual sentences. And this eliminated any possibility of impermissible double counting. Mr Ntaganda's other individual sentences would only come into play - and even then, only theoretically - if your Honours were to disturb the individual sentences for persecution or murder, which each merited 30 years' imprisonment.

Now, if I understand correctly, the Defence seemed to concede this morning that Mr Ntaganda would only be prejudiced by the 30-year individual sentence for persecution if your Honours were to disturb the individual sentence for murder. But,

even in this respect, they overlooked the significance of the Trial Chamber's observation at paragraph 177 of the sentencing judgment, where it said that, in the circumstances of this case, the individual sentence for persecution should not exude any of the other individual sentences for related crimes. And, consequently, it made clear that, if the individual sentence were to be reduced, it would accordingly have reduced the persecution sentence.

Of course, we say that nothing in this appeal has demonstrated such a need.

Now, coming to the end of my submissions, your Honour, Mr Ntaganda's joint sentence of 30 years cannot be said to be disproportionate to the serious and manifold nature of his convictions, as demonstrated by the 13 individual sentences carefully calculated by the Trial Chamber.

As we have explained in our brief, Mr Ntaganda can only succeed in his appeal against sentence not only if he were to show error in the individual sentences for murder and persecution, but also if he can show many other errors in the individual sentences which have been imposed, for example, for rape, which was sentenced to an individual sentence of 28 years.

The Trial Chamber itself made clear that if the legal minimum sentence that it imposed had been any lower, then it would have considered an increase in the sentence up to perhaps 30 years, taking into account the range of individual sentences which it imposed and the gravity and variety of Mr Ntaganda's crimes.

And on that basis, your Honour, that concludes our submission and we ask the appeal should be dismissed and the sentence of 30 years' imprisonment should be affirmed.

Thank you very much.

PRESIDING JUDGE MORRISON: [12:27:32] Thank you, Mr Cross.

I now turn to the Legal Representatives for the Victims, and you have 10 minutes.

MS PELLET: [12:27:48](Interpretation) Thank you very much, your Honour.

Your Honour, honourable members of the Bench, on behalf of the former child soldiers I have submitted detailed written submissions in response to the Defence appeal against Mr Ntaganda's conviction carrying a 30 year prison term. I here maintain those submissions in full.

Your Honours have allocated very little time to the LRV's oral submissions, I shall therefore confine myself to a serious allegation made by the Defence in its response to our submissions regarding the appeal on the sentencing decision.

Your Honours, honourable members of the Bench, I reject firmly and categorically the thinly veiled suggestion, bereft of any foundation, put by the Defence that our written conclusions made on behalf of the child soldiers did not reflect the interests of the victims I represent.

Let me answer not for one second because I feel bound to offer any justification, but because it is time that the victims' voice be acknowledged as such at ICC proceedings and not minimised or even flouted.

The views expressed by my clients during our regular exchanges throughout this case, including the sentencing phase, form the very basis of all the submissions offered in their name. It was particularly on the basis of these discussions that I laid particular emphasis on the following points:

The former child soldiers want the penalty applied to Mr Ntaganda to reflect the gravity of his crimes and the suffering these crimes produced on them and continue to produce.

They also want the appropriacy of the penalty to deter not only Mr Ntaganda in committing any future crimes, but also to deter anyone in the commission of similar

crimes.

It also became apparent how crucial it was for my clients that separate penalties be applied for each crime affecting child soldiers, so as to reflect the victimisation suffered across all ethnic groups and to try to guarantee lasting peace and reconciliation within the affected communities in Ituri.

Your Honours, honourable members of the Bench, the Defence wonders why the former child soldiers believe that Mr Ntaganda deserves a 30-year prison sentence.

The answer is as clear as day, I fear.

Mr Ntaganda's crimes targeted numerous vulnerable children under 15 years of age.

These crimes remain a source of victimisation for my clients 18 years on.

Mr Ntaganda has never shown the slightest shred of remorse to my clients, nor has he attempted to compensate them. On the contrary, Mr Ntaganda insisted throughout the proceedings that there simply wasn't any child under the age of 18 in the UPC/FPLC and that his orders to not, and I quote, "sleep with" female recruits were followed to the letter.

For my clients, Mr Ntaganda is guilty of the crimes to which they have fallen victim.

More so than Mr Lubanga or any other influential members of the UPC/FPLC.

During our discussions, which should never have occurred if you listen to the Defence, one of my clients said something which encapsulates how they feel, I read:

"True, Thomas Lubanga was our leader, but within the UPC/FPLC was Bosco who held the pivotal role, controlling every movement, controlling training, new recruits, contact with families, weapons purchases, ammunition supplies, sending troops into combat, and the transportation of equipment and troops." End of quote.

Of course, all the reasons put forward by my 283 clients are in no way undermined by the categorical and entirely one of a kind testimony of D-0251, about which

Mr Bourgon fervently addressed you yesterday. Indeed, according to her, and I read: "In the UPC, we lived in a state of love and mutual understanding." End of quote. Your Honours, in the few seconds that remain, allow me to return to a very last point going to the third ground of appeal offered by the Defence. As said by counsel this morning, Mr Ntaganda's extent of contribution cannot be gauged solely in relation to his physical proximity to the specific incidents of rape and sexual slavery upon which the Trial Chamber relies, nor solely in relation to his knowledge of said events. Indeed, the extent of contribution of Bosco Ntaganda is significant due to his high-ranking position in the FPLC by dint of the essential nature of his contribution to the crimes and because he acted intentionally and knowingly.

Your Honour, honourable members of the Bench, I fear I must stop here so as not to overrun my limited allotted time. I call upon you therefore, your Honours, on behalf of my clients, to sustain the conviction of Mr Ntaganda to 30 years' imprisonment.

I thank you.

PRESIDING JUDGE MORRISON: [12:33:41] Thank you.

MR SUPRUN: [12:33:49] Thank you, Mr President, your Honours.

I will only address few topics, in light of the Defence response to my written submissions, and in -- I maintain my written submissions in full.

In line with my colleague's submission, and from my side, I -- in response to the Defence argument in paragraph 4 of its response, that there is no indication that the victims' view was sought on the particular sentence to be imposed, I respectfully submit that I clearly indicated in my submissions on sentencing that victims express a preference for a life sentence and that some of them expressed the view that a 30-year sentence would in their view be sufficient. The view of the victims did not change with the phase of the proceedings and the Defence argument is inapposite.

In relation to ground 7, in particular as regards the Defence contention in paragraph 18 that, as previously recognised as accepted in this case, actions that protect human life on a large scale must be acknowledged, it should be noted that the Defence support this contention in footnote 40 with reference to its own appeal brief rather than to any authoritative source.

The referred paragraph of the appeal paragraph in paragraph 77 concern the ICTY case of Popović et al with respect to the accused Vinko Pandurević. In my observations I have sufficiently addressed why the actions of Mr Pandurević are entirely distinguishable from those of Mr Ntaganda. Furthermore, the Defence fails to show, contrary to what it says, that it was previously recognised in the present case that the motives for protecting human life are not relevant.

Regarding the Defence argument in paragraph 18 of its response that Mr Ntaganda was not charged with compelling enemy soldiers to fight in his group, this is indeed correct and I did not say that he was. However, the point of this argument was to illustrate that contrary to being the humanitarian act the Defence wanted to make the Chamber believe, the conduct of using the prisoners to fight for the UPC/FPLC was conduct that under other circumstances would even qualify as a crime. Therefore, it cannot be counted in mitigation as a humanitarian act. There was an ulterior motive to using these persons as fighters and, each more so, to use them in the commission of further crimes. This does not deserve mitigation.

In relation to ground 10, in particular the Defence assertion in paragraph 29 of its response, namely that Legal Representatives wrongly claimed the Katanga sentencing judgment made results a precondition when assessing efforts undertaken to promote peace and reconciliation, I would like to clarify my position. As rightly found by the Katanga Trial Chamber, efforts can only be genuine if they are made towards a

concrete aim. If, as in the present case, reconciliation is being carried out either in Hema villages that have no connection to the crimes that were committed, or with Lendu groups that became political allies, then it is quite clear that the aim is not the reconciliation with the affected communities and, hence, these efforts cannot be deemed genuine.

In relation to ground 11, I maintain my position that the Trial Chamber was entitled to contrast Mr Ntaganda's good and respectful behaviour on the one hand, with his uncooperative behaviour of going on a hunger strike on the other hand. In fact, it was the duty of the Trial Chamber to consider Mr Ntaganda's behaviour in its entirety and the Defence merely shows its disagreement with the decision. The fact remains that the hunger strike disrupted the proceedings and were used to force the Registry to act. This was not cooperative, respectful behaviour, it constituted a lack of respect to justice as well as to the victims.

The Trial Chamber, in its discretion to weigh all relevant factors, clearly treated the hunger strike as an exception to good behaviour, in other words, as behaviour falling short of what is expected. There was nothing further the Chamber needed to plain in this regard, as it is clear from its overall reasoning that, but for this less than good behaviour, there may have been some credit in mitigation.

Turning to my last topic, in relation to ground 12, and in particular as regards the Defence argument in paragraph 61 of its response, on the non-admission of a document into evidence. I maintain my written submission that the non-admission of the document at hand did not deprive the Trial Chamber of any relevant factor or information it should have taken into account. The Trial Chamber was provided with the same information in form of the addendum to the Registry report. Therefore, it did not commit an error in not admitting said document.

And this concludes my observations. Thank you, Mr President.

PRESIDING JUDGE MORRISON: [12:39:29] Thank you.

Mr Bourgon, you now have 15 minutes to respond to the Prosecutor and the Legal Representatives.

MR BOURGON: [12:39:39] Thank you, Mr President.

I will address a few issues raised by CLR1, my colleague from the child soldiers.

First I'd like -- well, I'm not sure, but what I've heard was more akin to an argument on sentence rather than an argument on appeal, but nonetheless I will address some of the issues. And the first issue I wish to address, of course, is -- relates to Witness D-251.

My colleague mentioned that I raised that issue with passion yesterday. I did. And if I had to do it again, I would certainly do it again, because it is a significant aspect of this case when considering both the conviction, but also the sentence, because D-251 said much more than we were living in peace, or living in love, and be happy or everyone was happy together. It was much more than that.

D-251 was one of Mr Ntaganda's escorts. She arrived late in time, after the UPC had been thrown out or chased from Bunia in March, and later on only when Mr Ntaganda returned to the area, to Ituri, and first to Katoto and then to Bunia.

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

JUDGE EBOE-OSUJI: [12:42:14] Mr Bourgon, it might be better not to recall too much detail in this part of the submission.

MR BOURGON: [12:42:21] Thank you, Judge. I will stop here.

But the issue I wish to raise is that she highlighted a number of details regarding the conduct of Mr Ntaganda towards his escorts, that's the issue. So I -- that's the point I want to focus on. And she made it clear that Mr Ntaganda treated all female escorts with respect and treated all male escorts with respect, and that he had a relationship with his escorts where he would not allow for any deviation from discipline.

Now, why is this important? Because the Trial Chamber decided not to rely on the evidence of D-251. And why this is so? One of the reasons is that some -- many, many years ago when the facts happened, well, D-251 happened to be helped financially in a minor way by Mr Ntaganda and, on this reason, the Trial Chamber decided to disregard her testimony.

Now, my point yesterday is that D-251 made it clear that she was not raped and that other female escorts were not raped. And nonetheless, the Trial Chamber decided to reject her testimony. And not only did the Trial Chamber reject the testimony, but with it decided to rely on another witness, namely P-10, who lied on many occasions. And all this to find that Mr Ntaganda had improper behaviour with female escorts. And as I said yesterday, it was important to establish the mens rea, it was used by the Trial Chamber for this purpose. But in terms of sentence, it makes a big difference whether Mr Ntaganda, although he was not charged and was not convicted for any sexual event involving the escorts, while this event which was not part of the case, which had been put aside in some ways by the Pre-Trial Chamber, became an issue in this case.

A quick word on the last issue raised by my colleague CLR1, that Bosco Ntaganda,

she -- my colleague appears to be of the view that even though Bosco Ntaganda was not there when some rapes were committed, just by virtue of his rank it is enough for him to be guilty and to be punished because he was a high leader. We stand by our submission that this is insufficient, both for conviction purposes as well as for sentencing purposes. His rank alone is an important fact in the sense of indirect co-perpetration, we acknowledge that and we don't walk away from that, but it's one criteria and certainly insufficient in and of itself.

With respect to the arguments raised by my colleague CLR2, the first I'd like to raise is the -- his comments regarding the -- Katanga and the genuine aim.

Now, this has to do with ground 10, and the argument which was retained by the Chamber in its evaluation of reconciliation efforts was that Mr Ntaganda did not visit certain villages such as Mongbwalu and Kobu, I believe.

Now, my colleague says that because you don't visit those villages, that means that the aim wasn't reconciliation. Well, when we look at the Trial Chamber's approach that the Chamber was looking for broad reconciliation, and when we look at the events and the testimony of D-306, the (Redacted), with the testimony of D-47, the UPC president at the time, and the evidence related to what was happening between them and what they were trying to achieve and the speeches, when we look at the fact that it's not that one of the -- that the event was -- the event -- one of the comments, I'm not sure if it was mentioned by my colleague, so I want to make sure, that it was a purely military affair with only members of UPC receiving ranks. It was much more than that, as evidenced by the video and by the transcript. And it did show broader reconciliation. It did show that the aim of getting together was precisely to put an end to the war and the fighting and the animosity between them, as illustrated by specific words pronounced by Mr Ntaganda in many occasions.

A quick word on the -- my colleague raised the issue of the hunger strike. The hunger strike was put in our appeals brief for one specific reason, because it was a mistake for the Trial Chamber to rely on this without discussing in any way this event. But the hunger strike, nonetheless, is a significant event, because it is precisely related to ground 2 and the fairness of the trial. That's why it was put there, because there was an address made by Mr Ntaganda to the Trial Chamber which explains why he did it and the reasons he did it are important in assessing his state of mind at the time. And finally, with respect to ground 12, my colleague says that the admission of one document or the failure of the Chamber to admit one document in evidence did not cause prejudice to Mr Ntaganda. I'm referring to a document which we tried to put in evidence and my colleague argues today that the fact that this document was not admitted is not prejudice, because the information contained in that document would have been included in the addendum to the Registry report.

Mr President, we respectfully submit that it wasn't. The information in this document went beyond and allowed for further comprehension of this event. We are in public session, so I will not say any details, but I will say that what Mr Ntaganda did as described in ground 12 goes way beyond what a normal person, a normal person detained would do. And his actions did have large repercussions, positive, and we say that the Trial Chamber should have taken that into account. If not, I can't say any more because we are in public session.

JUDGE EBOE-OSUJI: [12:49:46] And you did understand that my earlier intervention was precisely because of that.

MR BOURGON: [12:49:52] Indeed. Indeed, Judge. Thank you very much. That concludes what I wanted to say. I could say much more, but all in all when I look at these submissions, they do not, in our respectful submission, affect our

submissions on the appeal on sentence and so we stand of course by our submissions. Now, the counsel for the Prosecution earlier on made some submissions in relation to ours. I will not respond because I'm not supposed to respond pursuant to the schedule, but I do note, however, that yesterday the counsel for Prosecution did intervene after the Defence and did make submissions, and we thought that was appropriate yesterday -- that should not -- it should not have taken place, and I will not repeat that mistake, I will not do this mistake today, but I do want to point that out, that we would have liked to have the last word on sentence because a lot of the arguments raised by the Prosecution, in our view, were incorrect.

And that concludes my submission, Mr President. Thank you.

PRESIDING JUDGE MORRISON: [12:51:00] Thank you, Mr Bourgon.

We have reached the stage where we're going to take what is effectively a lunch break.

But on the schedule, the first thing after the break was an opportunity, a further opportunity for the Prosecution to address the Court on sentencing, and I'm just simply wondering, bearing in mind what has been said already, whether or not the Office of the Prosecutor needs to take that time.

Can you assist?

MS THIRU: [12:51:39] Thank you, Mr President.

No, in fact, we don't intend to reply to what the LRVs have said. Just to make one quick clarification though, which is that, in relation to D-251 and why the Trial Chamber rejected that testimony, it's because it preferred the evidence of 18 witnesses, as set out in the trial judgment from paragraphs 409 to 411. So I just want to correct the record there for the Court in response to the submissions that were just made by Mr Bourgon.

That's all from the Prosecution. Thank you, Mr President.

PRESIDING JUDGE MORRISON: [12:52:13] Thank you.

In which case, after the break, we were going to go straight into giving my colleagues opportunity to ask questions. Originally, that was a 40-minute slot. I think it's going to be significantly extended and, at the moment, it is likely that the hearing will go on for longer than originally anticipated. We'll have to see how we go with that. Mr Ntaganda at the very close of the proceedings is going to have an opportunity to address the Bench if he wishes. At the moment that's detailed for five minutes but, allowing for interpretation, I think it's only fair to double that to 10 minutes should he wish to do so. It's entirely a matter for him.

We will now take a break for one hour.

THE COURT USHER: [12:53:14] All rise.

(Recess taken at 12.53 p.m.)

(Upon resuming in open session at 1.58 p.m.)

THE COURT USHER: [13:58:00] All rise.

Please be seated.

PRESIDING JUDGE MORRISON: [13:58:28] I'm now going to invite my colleagues to ask questions of any participant in these proceedings. I'm going to reverse the order from this morning. I'm going to start off with my colleague Judge Eboe-Osuji.

JUDGE EBOE-OSUJI: [13:58:49] I have some questions first for Ms Gibson and then Ms Samson later.

Beginning with Ms Gibson, are you there?

MS GIBSON: [13:59:17] Yes. Good afternoon, Judge.

JUDGE EBOE-OSUJI: [13:59:20] Yes, you are. I can see you now. Okay.

You complained that on the matter of the Trial Chamber's taking into account during

evaluation of the testimony of Mr Ntaganda, complained that taking into account his interest in the outcome of the case, as it were, amounted to reversal of the burden of proof.

Is it really that simple? The annals of criminal law are full of instances where accused persons were acquitted in a case, though they did not give evidence in the case. So when an accused person steps into the witness box to testify - and this seems to be what you were arguing, you're saying that he was treated differently from the Prosecution witnesses - is it so, if an accused person steps in, should he not be treated the same way as other witnesses? And treating them the same way would mean that where a witness has an interest in the outcome of the case, the trier of fact may take that into account in evaluating the credibility or the credit to be given to the witness's testimony.

And it seems to me that may be -- again, I'm laying it all out so you can help me understand what we do with this. Isn't that what you were driving at when you said that some of the Prosecution witnesses needed to be treated like accomplices? What was the purpose of that argument and why should it be different for Prosecution witnesses but not for your client?

MS GIBSON: [14:02:04] Thank you very much, Judge. And I think you, as ever, have hit on the central points that we were hoping to make.

Obviously an accused is different from other witnesses to a certain extent in that an accused enjoys certain safeguards that don't necessarily apply to other witnesses, the right not to incriminate himself, the right to silence. But our point was that his testimony should be considered in the same way as other witnesses in the sense that if it contradicts a Prosecution witness's evidence, it should be taken into account as raising doubt in relation to that Prosecution witness.

Now, Ms Brady yesterday brought up paragraph 262 of the Trial Chamber's judgment, and indeed that's an important paragraph and it sets out how the Trial Chamber said it was going to deal with Mr Ntaganda's evidence. And Ms Brady read you the section where the Trial Chamber said: When Mr Ntaganda has testified and his evidence contradicts a Prosecution witness, we're going to take into account, where it's appropriate, the possibility that he might be trying to exculpate himself.

But then what it goes on to say is very important. The Chamber's findings and the reasoning on such point are laid out at appropriate places in the factual finding section of the judgment. The problem that we identified is that the Chamber doesn't go on to do that. The Chamber says at the beginning of the judgment: Listen, we're going to tell you if we think that we can't believe Mr Ntaganda because we think on this point he's trying to exculpate himself. But then it never does.

And both the Prosecution and the CLR have raised this paragraph in their pleadings but haven't been able to point to any specific times where the Chamber said: Wait, Prosecution witness says X, Mr Ntaganda says Y, we think on this point Ntaganda has a reason to testify in a particular way and so we're not going to take his testimony into account, we're going to find that it's unreliable.

The problem is that we never see that reasoning. And Ms Brady is right that the Trial Chamber did well to set out at the beginning of the judgment all the right principles on the assessment of evidence, but our problem is with how it's been applied in the judgment consistently.

And again, the CLR (Overlapping speakers)

JUDGE EBOE-OSUJI: [14:04:42] But if the -- one second. If the Trial Chamber had already, more or less, given a road map of where it's going and what would inform the Trial Chamber's assessment and thinking, should they not be entitled to the

presumption that they applied or they said what they were going to do, they applied those principles even when they didn't spell it out clearly in the judgment?

MS GIBSON: [14:05:17] Our answer would be no for two reasons.

First of all, the Trial Chamber says don't worry, we're going to tell you later on where we do this. It explicitly says in the factual findings section, we'll do this if we ever are considering this possibility. And the fact that that language isn't used allows Mr Ntaganda to presume that that wasn't the factor, that wasn't the basis on which his testimony was being rejected. And our (Overlapping speakers).

JUDGE EBOE-OSUJI: [14:05:47] And then you say then that takes us to the default position then that they would have discounted credit from him or credibility from him because they considered that he had an interest in the outcome of the case; is that it?

MS GIBSON: [14:06:03] If that was the Trial Chamber's position that he had a motivation to testify in a particular way, namely to try and exculpate himself, to try and show that he wasn't guilty, we say that just setting out -- setting that possibility out at the beginning of the judgment doesn't then give a Trial Chamber sort of carte blanche to any time the witness -- Mr Ntaganda's evidence bumped up against a Prosecution evidence, to just discount it, particularly in the circumstances where they said that it wouldn't.

And it's a very big deal that an accused would choose to testify in a case and it should probably be encouraged, and Mr Ntaganda really exposed himself by sitting in that chair for 33 days (Overlapping speakers)

JUDGE EBOE-OSUJI: [14:06:58] But that was -- that was a decision he made, wasn't it? That was his decision to testify. And when an accused person testifies when they don't have to, the purpose of that testimony is necessarily to raise reasonable

doubt in the case for the Prosecution. And the question becomes this: Can we say that that reasonable doubt has been raised if it hinges on the testimony of a witness who has interest in the outcome of the case?

MS GIBSON: [14:07:38] The point that we raised on appeal was that the Trial Chamber needed to give reasons. It needed to assess and spell out why it was -- why it could still accept the testimony of a witness like a Prosecution accomplice if indeed that person had motivation to testify in a particular way. And then if it was going to discount Mr Ntaganda's testimony, it needed to do more than say Mr Ntaganda's evidence contradicts a Prosecution witness and we think that's a credible witness and so we're going to believe that witness over him.

So our point isn't that the motivation of Mr Ntaganda in testifying could never have been taken into account. The error was that the Trial Chamber said: We might consider that possibility and we'll tell you if we do. And then it never did.

But then in relation to Prosecution witnesses, like P-17, P-768, P-963, who we have said are accomplices, there is no consideration of whether or not those witnesses had a particular motivation to testify in the way that they did.

And Ms Samson raised yesterday the issue that the Defence in this appeal is now saying that these witnesses are accomplices and at trial they hadn't been characterised in that way. And there's a very clear reason for that, your Honour, which is the Defence position at trial was that these witnesses who were talking about criminal activity during the first operation weren't giving testimony that could be relied upon. The Defence position was that (Redacted) didn't shoot the grenade because he was never ordered to do so, that P-963 wasn't indiscriminately targeting civilians in Mongbwalu because he never received an order to do so and by then the population -- the civilian population had fled.

So it wasn't the position of the Defence that these witnesses were accomplices at trial. Once the Trial Chamber went on and accepted their evidence that they themselves were involved in the criminal activity that was the subject of this case, then it was incumbent on the Trial Chamber to think to itself: Right, these witnesses are putting themselves in the heart of these stories, P-768 is saying he's there on the ground when the UPC is using landmines in Mongbwalu, P-963 is saying he's been told to indiscriminately shoot on civilians. Do they have a reason to testify against Mr Ntaganda, who they're saying gave them these orders in a particular way? And that's the error that we've identified because that's completely missing from this judgment. And that can be contrasted with the really -- the careful approach that's been taken by Chambers here at the ICC and at the ICTY and the ICTR to be constantly reflecting, wait, this witness was part of this story, these witnesses were prison guards in the camps, these witnesses were Interahamwe on the roadblocks themselves involved in the killing, do they have a motivation to be saying that the accused told them to do that?

And the parties to this appeal are really insisting on the fact that, look, the Trial Chamber gave these huge credibility assessments, 70 pages worth of credibility assessments, they looked at so many factors in relation to the witness's credibility. But that doesn't circumvent the failure to turn their minds specifically to this question of the motivation of these witnesses to testify in a particular way. And in the absence of that, we say that there are flaws in the factual findings.

PRESIDING JUDGE MORRISON: [14:11:42] What you're saying is that the Trial Chamber should have given itself what in many jurisdictions is given to a jury, that is the accomplice direction warning?

MS GIBSON: [14:12:00] Thank you, Mr President. And certainly indicate it to

Mr Ntaganda in his judgment that it still found that it could rely on these witnesses despite the fact that they could have been seen to have these particular motivations, to explain their reasoning fully. The Chamber was perfectly at liberty to conclude at the end of the day: All right, we understand that these witnesses were involved in the events and themselves were saying that they were involved in this criminal activity; nonetheless, we think we don't need to apply any particular caution to their testimony.

But in the absence of that, with no reference to this caution in the judgment, we say that this is an error.

PRESIDING JUDGE MORRISON: [14:12:40] Thank you.

I turn to Judge Ibáñez.

(Appeals Chamber confers)

JUDGE EBOE-OSUJI: [14:12:49] I will now ask my questions to Ms Samson, if she's there.

Yes, I see you.

Two for you. One is on the expression *kupiga na kuchaji*. You said it is not legitimate military language. In other words, it means attack a place and loot it, loot civilian property. Was there any expert witness called in the case on linguistics? *Kupiga na kuchaji*, that would be a Swahili expression. You nod your head. Was there any expert witness called to say what that would mean, both, I mean the words jointly and severally?

MS SAMSON: [14:14:03] No, your Honour, there was no expert who came to provide an explanation for that term.

If I could clarify. Yesterday, when I mentioned that there was no legitimate military terminology in the order *kupiga na kuchaji*, I was referring specifically to the Defence's

suggestion that Witness P-55 solely referred to that expression in a legitimate military way. P-55 said that although it is a military expression, in the UPC, that term was used to refer to an attack to loot, and he said, local civilian belongings. So I want to make that clarification.

And the issue that we were (Overlapping speakers).

JUDGE EBOE-OSUJI: [14:15:06] So the point --

MS SAMSON: -- litigating at --

JUDGE EBOE-OSUJI: [14:15:06] Could it mean then the point being that -- is your point that even if it is a legitimate military expression, somehow it might have been corrupted into a code to attack and loot? Is that the point?

MS SAMSON: [14:15:23] Yes, your Honour, absolutely. So the issue during the trial was the way in which that term was used and interpreted within the UPC military structure. And the Chamber held, based on the evidence of up to 10 witnesses that were called by the Prosecution and one by the Defence, that it was understood within the UPC to refer to attacking civilians and looting their property.

JUDGE EBOE-OSUJI: [14:15:55] Thank you.

My next question to you will be on Rule 68 and its application.

PRESIDING JUDGE MORRISON: [14:16:08] Mr Bourgon, I think.

MR BOURGON: [14:16:10] Thank you, Mr President. I would just like to know the procedure because I would like, of course, to respond to this point or to some of the points. So is there a procedure in place that we should ask for the floor or just wait until the end? I just want to know what to -- how to react.

PRESIDING JUDGE MORRISON: [14:16:26] Mr Bourgon, I will invite you, if you have any submissions, to make them. Not at this -- when the, when the questioning is finished.

JUDGE EBOE-OSUJI: [14:16:41] All right. Let me just finish my questions to Ms Samson and then Mr Bourgon can react to both perhaps.

Ms Samson, in the use of the statements of the two witnesses -- deceased witnesses, P-22 and P-27, what are we to make of that if we are looking at the premise of Rule 68 itself that gives a proviso there, proviso being provided that this would not be prejudicial or inconsistent with the rights of the accused?

I ask that because if we go to -- keeping in mind the right of the accused, if one looked at Article 67(1)(e) of the Statute, it says that accused persons have the right to examine witnesses who testify against them. Can we get around that requirement and use the testimony of deceased witnesses in a criminal case?

MS SAMSON: [14:18:28] Yes, your Honour. In our submission you can. The Rule 68, with its -- in its current form permits evidence to be adduced when the witnesses are not available at trial, such as in the case of deceased persons. And we had an admission regime during the trial, which meant that the parties litigated strenuously whether or not items of evidence should be admitted. So when these two statements were admitted, it was because the Chamber had heard and had been persuaded by arguments in relation to its reliability and authenticity, and it would evaluate the weight of the evidence against the overall evidence in the case.

Now, the jurisprudence that I referred to yesterday that relates to whether or not the evidence from a written statement can be used as the sole or decisive basis of a conviction, we say does not -- in fact, supports the use of the statements from P-22 and P-27 in this case because their statements were corroborated or supported by other evidence in relation to the events in Kilo and in Buli respectively to those two witnesses.

So the convictions were not based solely or in a decisive manner on their statements.

I hope that this answers your question, but I'm available of course for any further questions you may have.

JUDGE EBOE-OSUJI: [14:20:04] I'm not -- help me further, please.

Okay, yes, you did make the submission that the point in question upon which the Trial Chamber used the material -- the evidence was not -- the Trial Chamber did not rely solely on these two witnesses.

What I'm trying to understand there is, assuming -- we have heard your submission on when the witness who is not in court may have their material used in a case, I've heard that, and we will evaluate that submission, of course. But the point is this: The reason why Prosecution would have introduced that kind of evidence in a case, there's a purpose to it, and that is to add strength to other evidence in the case.

Doesn't that follow that if you didn't have that strength, the other evidence in the case is that much the weaker?

If that is the case, the evidence of witnesses who are not in court then acquire a particular value and the issue is can that value be had in a case where the witnesses have not been cross-examined?

That's one thing I'd like you to help me understand in the case.

MS SAMSON: [14:21:51] Yes, your Honour. So our position is that the Rule 68 statements do have a place and a purpose in a criminal proceeding; hence, they are legally permitted. The Chamber evaluates the weight that it will accord to those statements in relation to the totality of the evidence surrounding them.

So in that sense, all of the evidence, whether they are live witnesses or Rule 68 witnesses, come together at the end of the day for the Chamber and it is permitted for the Chamber to rely on them.

These two statements did not introduce evidence of the acts and conduct of the

accused. They were relating to acts and conduct generally of the UPC. And so the Chamber weighed that into account as well at the time of its admission but also, of course, when evaluating what was said by the witnesses. And what these witnesses have said is not -- is consistent with what many other witnesses, both inside and outside, direct victims, have said about their experiences and the conduct of the UPC and generally towards persons and inhabitants and civilians of these two particular locations --

JUDGE EBOE-OSUJI: [14:23:08] So the important point there is that they did not relate to the acts and conduct of the accused person; that's what you're saying?

MS SAMSON: [14:23:16] They did not.

JUDGE EBOE-OSUJI: [14:23:17] Thank you.

PRESIDING JUDGE MORRISON: [14:23:19] Mr Bourgon, if you can be as concise as possible. Thank you.

MR BOURGON: [14:23:25] Thank you, Mr President.

I wish to address the point of the *kupiga na kuchaji*.

One, it is correct that no experts were called. However, certain witnesses were questioned specifically on the wording of the expression *kupiga na kuchaji*. The expression was split in two and the evidence on the record shows that it shows that the meaning was attack and charge. And then Mr Ntaganda in his testimony explained those terms.

But the issue here is P-55. P-55 is a very important example. Why? Because P-55 was questioned on this term by the Presiding Judge. Not by the parties. He was spontaneously asked by the Presiding Judge: What is that?

And what P-55 said is: The expression used in the army, it means attack the army and after, you should dispossess the enemy of its -- of the property. So it's a military

expression.
This was a spontaneous answer. And then, then, of course, questions went on and he said various types of goods can be taken, it depends on what the enemy has at their place.
So the case of P-55 is very important because he has a lot of experience, (Redacted) (Redacted), he was asked by the Presiding Judge,
his answer was spontaneous and based on experience. That shows (Overlapping speakers) --
JUDGE EBOE-OSUJI: [14:24:55] But Ms Samson --
MR BOURGON: -- what the expression means.
JUDGE EBOE-OSUJI: [14:24:56] Ms Samson is saying that even if that were the case, that it was -- it might have started live as a legitimate military expression, and there's some -- in my research on this case I saw that it -- I put it on Google Translate what does this mean. It says something like beat or strike for the kupiga charge, and charge more like an Anglicization of the word -- English word "charge".
So one could see, okay, it is really not military expression. But Ms Samson is saying that's not really the point. She is saying that even if it acquired live -- it started live as a legitimate military expression, by way of usage among the UPC, it had become corrupted and given -- become a code terminology for looting. What do you say to that?
MR BOURGON: [14:25:53] Well, I say, first of all, Judge, that it's incorrect because 11 witnesses were asked and that's not what they said. And even the two witnesses who allegedly made something -- some comments beyond property, when you look at their testimony, this is not what they said. So that's very important.
But as I've mentioned yesterday, what is important is what was the understanding of

the troops? And the understanding of the troops in this case, we have one witness, P-17, insider, accomplice, you name it, and he said: Well, I can say for what I think, and for me it's property.

There's no evidence as to how it was understood anything else other than property.

Thank you.

PRESIDING JUDGE MORRISON: [14:26:39] Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [14:26:42] Thank you, Mr Presiding Judge.

This question is both for the OTP and the Defence.

Sexual crimes are very difficult to acknowledge and to denounce in any context.

Now, in the context of the Rome Statute, regarding sexual crimes of rape, sexual enslavement, sexual assault, et cetera, as mass atrocities, as crimes against humanity or war crimes, do you think that the only way to prove or to acknowledge their occurrence is through direct evidence or direct testimonies? What about the context in which these crimes occurred?

First the OTP, please.

MS REGUÉ: [14:27:55] Hello, your Honour.

Yes, obviously these sexual violence -- crimes regarding sexual violence, as any other crimes, but particularly these ones can be established through circumstantial evidence, yes.

And the context is very important because as any other crime which entails violence, crimes of sexual violence should not be distinguished * as crimes like torture, inhumane acts. And the context, for example, in the UPC, the context in which the recruits were living, the coercive environment under which they were living, that was conducive to those crimes, made them being tolerated and even encouraged. And that's an important factor that indeed should be considered. And the Chamber

considered it in addition to direct evidence, because there was a wealth of direct evidence, direct victims who were testifying to their own suffering.

But the context indeed is an important one and it was present in this case in addition to direct evidence.

JUDGE IBÁÑEZ CARRANZA: [14:29:35] Defence, please.

MR BOURGON: [14:29:38] Thank you, Judge. Very quickly, yes, context is important. Yes, circumstantial evidence is possible. However, it's for the Prosecution to decide how it will lead its case and what evidence it will lead. Once the Prosecution decides to call witnesses, then we have to assess what happened directly on witness evidence.

Now, when a witness comes and talks about the sexual crimes or sexual violence without having been involved himself personally or having been a direct witness, we have to be very careful in assessing that evidence.

So a witness, a person who was trained in Mandro, for example, will testify and say: Oh, yes, there was sexual intercourse between the instructors and the recruits. Well, how do you know? I know.

That's not -- that's where we have to be very careful. But in all -- like with any other things, if the evidence is there, the evidence must be assessed and it can include circumstantial evidence.

JUDGE IBÁÑEZ CARRANZA: [14:30:45] About the same issue, now regarding the vulnerability of children and especially of children that purportedly have been abused, sexually abused, I would like to make a question about Witness P-010. Why we don't have to believe the testimony of witness victim because apparently her primary reluctance to acknowledge and even denounce this crime that was committed on her, taking into account that she was at that time a young girl and it's

difficult for women to acknowledge this?

First for the OTP, the same order, and then the Defence. Thank you.

MS SAMSON: [14:31:45] Your Honour, just so that I'm clear on the question, because the sound sometimes comes out remotely, your question is: To what extent did the Chamber take into account P-10's vulnerability when she was testifying as to acts of sexual violence that she experienced? Is that the question?

JUDGE IBÁÑEZ CARRANZA: [14:32:08] Yes, that was basically the concept in which the Trial Chamber relied, and my question is why now the Appeals Chamber should not believe on that? That was the question. Thank you.

MS SAMSON: [14:32:23] Thank you for clarifying, your Honour.

Well, the Prosecution's position is that this Chamber should, should take into account and provide the appropriate amount of deference, reviewing what the Trial Chamber did, but considering also the position that the Trial Chamber was in at the time that it was able to evaluate the evidence from P-10 or from indeed all witnesses.

And that primary and unique position that the Trial Chamber was in is indeed a very important factor for the Appeals Chamber to consider. That doesn't mean that the Appeals Chamber doesn't need to turn its mind and, of course, very carefully assess how the Chamber made decisions and how reasonable those were, but in the case of P-10, I remind your Honours that she testified for nearly 20 hours. That is a long time during which a Chamber can evaluate the consistency of her account, and it did so, the spontaneity of her account, its detail, its internal coherence, its coherence with other evidence that was provided and given in the case. And although it did not rely on her on the parts related to her age or her abduction and training, on the core of her testimony about her experience in the UPC, her membership in that group, the battles she participated in, her position in Mr Ntaganda's escort, and her own sexual

violence, they found her to be credible on all those counts. And the Chamber considered all of the Defence challenges to her credibility quite carefully in its decision and it did not find that she was undermined to that * extent.

It considered expressly in the paragraphs relating to P-10's credibility whether or not she could be believed on her own evidence of sexual violence and it found that she could, taking into account that it was consistent with the evidence of some 17 other witnesses who spoke about sexual violence in the UPC. And these were witnesses who came from within the armed group from those who had also experienced sexual violence, young girls who were in the group; from the United Nations, who were dealing as human rights officers with sexual violence, specifically with child soldiers from the UPC; from local NGOs who were dealing with sexual violence of civilians generally, but also local NGOs dealing with violence of soldiers within the UPC.

So to answer your question and to sum it up, the Chamber -- in our position is that the Chamber did take into account a variety of issues when it evaluated P-10's evidence on her experience and it found her to be credible. And we urge the Chamber not to disturb those findings.

Thank you.

JUDGE IBÁÑEZ CARRANZA: [14:35:24] Thank you.

The Defence, please.

MR BOURGON: [14:35:26] Thank you, Judge.

With respect to any witness appearing on the stand and giving evidence that was not reported before, I come up with a new story like, for example, P-768, who comes up with mines the night before his testimony, any such witness should be treated with caution.

In the case of sexual violence, we agree that there is -- the reason you mention is quite

true. It might be that a victim of rape, because in certain circumstances before, she decided not to report the matter and report the matter later. That can happen. And that must be given some consideration.

But here, this is not what we have. What we have here, Judge, about P-10 is, first, there's many statements before she appeared as a witness. (Redacted) (Redacted). She -- in her statements, it's not that she did not mention sexual violence. She mentioned different sexual violence. She mentioned that she had been raped by somebody else. And then in her third and last statement, a few months before testifying, suddenly (Redacted) appears. That's wholly different.

So it's not a fact that she didn't want to say it because she had reasons to hide it before. She did report sexual violence before. She just changed the identity of the alleged rapist months before testifying. And when you look at the evidence and when you look at the way she was cross-examined, then you know that her alleged rape simply doesn't walk at all.

And, Judge, I invite you to look at the manner in which she was cross-examined, where I went through every single detail of the alleged rape, coming to the conclusion that it was impossible because she said she was raped during the first operation in Mabanga after a victory, and the facts of this case demonstrate that (Redacted) was not there. And the Trial Chamber said it's because of an alleged trauma. It's not trauma when you consider all the other events. And then when you link that to her lies about her age, her lies about the abduction, the fact that she gave an interview to a UN that she denied having given, when you put all of that together, then the finding of the Trial Chamber must be disturbed because here we have a liar, a straightforward liar.

JUDGE IBÁÑEZ CARRANZA: [14:38:22] A follow-up question, please. So for you she's lying. What will be the motivation for a young girl to come here, enduring a lot of things, not only trauma because it's well known that it is very difficult for a woman, but for a young girl and for a vulnerable young girl coming from Africa to testify here, what would be her motivation to apparently lie, in your words?

MR BOURGON: [14:38:54] Thank you, Judge. There can be many motivations for any witnesses to come on the stand and lie. And it's not for -- it's not for the Defence to show why, what that motivation was. But in this case there is motivation.

If you look at another -- the testimony of another witness and that other witness is -- I believe the number is D-211, D-211, and if you look at her testimony, she was a close friend. Now, why would a witness say "I was abducted" when she actually was in the military? Why would a witness -- so all of these questions, when you read the totality of her evidence, she wanted to incriminate.

Was she a messenger for other people? I invite you again, Judge, to look at the last message she delivered just before leaving the stand, where after I had done my big crunch in my cross-examination, showing that (Redacted) could not be where she said she was raped, and then she delivered a message, a message for all victims of sexual violence, and that message was -- it was a good message, it was an important message, yes, but that doesn't remove the fact that she lied.

Her motivation, whatever it was, to deliver a message, to protect other victims, whatever that motivation was, it's the evidence we have to look at and the evidence clearly shows that she lied about so many things.

This lady, when you look at her testimony about the Mongbwalu operation, you see that she was not there and that's what's important.

So we want to give deference. We want -- it is -- sexual violence is important, Judge.

I don't want to walk away from that. I don't want to walk away from being very careful with the victims of sexual violence. That's not my role as a Defence. My role is to ensure that if (Redacted) for a true event.

And in this case, it's not a true event. (Redacted). And the consequences for the, for the judgment are huge.

Thank you.

JUDGE IBÁÑEZ CARRANZA: [14:41:09] Okay. I was not saying that (Redacted) raped Witness P-010. I was not saying that.

But just to finalise my intervention, now that you have mentioned (Redacted) (Redacted), I would like to come the issue of indirect co-perpetration. This is one of the features of perpetration, one of the modes of liability coming from Article 25(3)(a). In fact, this is a composed form of perpetration. It includes to commit the crime jointly with another and through another person. So this other person can be -- could be a member of one organisation, a member of one power apparatus. And in this case you have acknowledged also that the UPC/FPLC was an organisation with hierarchies, (Redacted), with a lot of members.

So in this case of committing a crime through an apparatus, through members of an apparatus, is it necessary the presence of the member -- (Redacted) (Redacted), is it necessary his presence in the place where the crimes were committed?

And this is also a question for the OTP. OTP can react after.

Okay. It's for you. Thank you.

MR BOURGON: [14:42:50] Thank you, Judge. Indirect co-perpetration is a part of the Statute. Even though it's not specifically in writing, it's recognised. And indirect co-perpetration has objective elements and subjective elements, and that's

how you determine whether (Redacted) should be guilty or not.

Now, in this case one of the things the Trial Chamber did well in this case was to identify objective elements, subjective elements, but then it failed to do the proper, in our view respectfully, it failed to do the proper analysis.

And this morning I said presence on the ground is not required for liability. So whether he was there or not, he can still be found guilty. But the presence is really a very important criteria because it gives the trier of fact the information, both about the mens rea and both about how the accused was involved, both for the objective elements and both for the subjective elements. It is one very important criteria, but it's not the only one. But once you look at it, it might inform all of the other criteria. That's what we are saying.

JUDGE IBÁÑEZ CARRANZA: [14:44:10] I don't know if the OTP would like to react.

Thank you. Thank you, Counsel.

PRESIDING JUDGE MORRISON: [14:44:16] I think Ms Samson had raised her hand in any event.

MS REGUÉ: [14:44:21] Sorry, your Honours. I think that Ms Samson wanted to react to the previous remark on P-10, but I would like to address your Honour with respect to indirect co-perpetration. Should I do that first and then we can --

PRESIDING JUDGE MORRISON: [14:44:35] Yes, please.

MS REGUÉ: [14:44:36] Sure. So the rationale of co-perpetration is that there is a distribution of tasks, of roles among the different co-perpetrators in the different moments of the criminal plan. Therefore, there will be one co-perpetrator which will contribute in the planning stage and another co-perpetrator in the execution stage.

If we are asking now that all co-perpetrators are present in the physical scene of the crime and contribute to the execution of the crime, all rationale of co-perpetration is lost because we shouldn't forget that Article 25(3)(a) requires an essential contribution -- an essential contribution, the threshold is quite high. Therefore, if the co-perpetrator is not contributing to the execution of the crime, he or she has to make up in her or his particular role that he's playing.

Therefore, absolutely, we don't need the co-perpetrator to be present at the scene of the crime and he or she can still contribute essentially, and that's the whole rationale of co-perpetration. Otherwise, all those person who are involved in the planning of the commissions of the crime, who sometimes are the most responsible, will never be responsible for the crimes, and this is simply not possible.

JUDGE EBOE-OSUJI: [14:46:04] Ms Regué, is there a difference between co-perpetrator principle of liability and the second category of joint criminal enterprise developed by the ad hoc tribunals, the joint criminal enterprise variance 2 -- sorry, the variance category, which is the concentration camp sort of scenario where this organisation that has a policy of, or plan, or understood to be more or less barred from criminal conduct and then you have people within that, should I say, aggregate system of complicity being found to be part of it. Is there a difference between that and co-perpetrator?

MS REGUÉ: [14:47:03] I understand that the difference is also in the type of contribution. I understand that we require under Article 25(3)(a) that the contribution is essential. Therefore, the person, the co-perpetrator has the power to frustrate the commission of the crime or the crime will not have been committed in the same manner, while according to joint criminal enterprise, I understand that the contribution is significant. So it's slightly different.

JUDGE IBÁÑEZ CARRANZA: [14:47:34] About Witness P-010, please, briefly.
There was another counsel.
Okay. Thank you.
MS SAMSON: [14:47:42] Thank you. Thank you, Judge Ibáñez.
Yes, I simply wanted to make one quick reference to the fact that Witness P-10 provided information about her experience of sexual violence by the particular individual. If 2009, in circumstances that I can't address in public session -- Mr Bourgon from the Defence made reference to it and we have sought a redaction. But in 2009, Witness P-10 indicated that she had been raped while she was in the UPC, and she indicated the person in question, and that was relevant for this case.
Thank you.
JUDGE IBÁÑEZ CARRANZA: [14:48:33] Thank you, Mr President.
PRESIDING JUDGE MORRISON: Mr Bourgon.
MR BOURGON: [14:48:36] Mr President, if my colleague is going to bring things that are not in evidence, I'd like to know where this is found in the evidential record of this case, because it is not. So I'd like the Prosecution, if they're going to make a statement like this, that they are going to say where it is in evidence in this case.
PRESIDING JUDGE MORRISON: [14:48:53] Well, perhaps that can be something that can be done, because of the confidential nature of it, in confidential written form.
JUDGE EBOE-OSUJI: [14:49:02] In the meantime, for Mr Bourgon, while you are on your feet, the last time you spoke, I was expecting you to also address -- on Rule 68 address Ms Samson's point that the evidence of the two witnesses, P-22 and P-27, did not go to the acts and conducts of the accused person. Do you disagree with that submission?

MR BOURGON: [14:49:39] Thank you, Judge, for the question. I had, I had an answer ready for this.

The idea is the Prosecution's arguments were with respect to the admission of the evidence of P-27 and P-22. And what I invite the Appeals Chamber to consider is there is a point of admission of this evidence and there's a point of weighing this evidence. That's two different things. And if a statement was admitted without any cross-examination but other evidence shows that the evidence is challenged, then the trier of fact must be very cautious before accepting that evidence and weighing in against -- as a factor against the accused, because there are other facts.

As my colleague from the Prosecution said, look at the totality of the evidence. In this case we have to look at what P-27 and P-22 said. And I invite you, Judge, to look at our arguments in our Defence closing brief on these two witnesses.

JUDGE EBOE-OSUJI: [14:50:46] So your complaint is not about the admission of the evidence or its consideration at all. Your point was that it should not have been given the value that it had in the case. I mean, they, I mean the two statements.

MR BOURGON: [14:51:03] I also believe that it should not have been admitted, but it was so --

JUDGE EBOE-OSUJI: Why not?

MR BOURGON: [14:51:06] So I'm not complaining about that, I'm complaining about the weight it was given once it was admitted very early in the case, because a lot of facts contradicted this evidence and yet it was used as incriminatory evidence without the Defence having a chance to cross-examine and to challenge this evidence.

PRESIDING JUDGE MORRISON: [14:51:30] Can I turn now, please, to see if there are any questions first of all from Judge Bossa.

JUDGE BOSSA: [14:51:38] Thank you, Mr President. I have one question and it is

directed to the Defence.

Mr Ntaganda submits that the Trial Chamber failed to consider whether conclusions other than a plan for the destruction of the Lendu community were reasonably available, and he cites the evidence that was ignored, namely evidence of pacification, establishment of peace and protection of civilians.

In the judgment of the Trial Chamber it considered, according to the Trial Chamber, the common plan it considered established was based on a number of considerations and they include the gathering on an ethnic basis of future members of the UPC/FPLC in 2000; the setting up of a well-functioning armed force with a disciplinary system; ensuring the execution of orders within its ranks; the commission of crimes in a systematic way against the civilian population, predominantly Lendu; the fact that the killing of a Lendu and the looting of Lendu property were not considered punishable offences by the UPC/FPLC; soldiers and rapes were unpunished; the meeting of June 2002 in Kampala, at which the objective to drive out the Lendu was stated; teaching recruits that the Lendu and the Ngiti were the enemy; the objective of the UPC/FPLC to chase away the RCD-K/ML; and others.

Now, in view of these findings by the Trial Chamber and the views that you propagated, I would like to know what other reasonable inference could the Trial Chamber have drawn from this evidence.

MS GIBSON: [14:54:00] Thank you very much, your Honour.

The error that we've identified in this case is that in these paragraphs that you've just referred to, starting from paragraph 781 through to the eventual finding on the common plan, the Trial Chamber was required to -- was entitled to come to whatever conclusion it desired on this evidence, but it wasn't entitled to not take into account this sort of wealth, this wall of evidence provided by the Defence in relation to what

our position is the actual motives of the UPC as an organisation.

And we see in other parts of the judgment that the Trial Chamber did say, well, maybe the UPC had a parallel, a parallel goal of, on the one hand, wanting peace and ethnic reconciliation, but on the other hand, having a criminal purpose. The Trial Chamber did acknowledge in another part of the judgment that this evidence existed. The error that we've identified on appeal is that if the Trial Chamber wanted to come to this conclusion, if indeed its conclusion was, despite all the evidence Mr Ntaganda's given us on the actual, the actual motivations and the actual founding principles of the UPC, putting all of that to one side, we still find that the only possible conclusion, the only reasonable conclusions on the evidence is that there was a common criminal plan amongst the co-perpetrators, and the error identified is that it didn't in this section of the judgment have regard to that very strict standard for the assessment of evidence that it needed to consider when it was drawing an inference on the basis of circumstantial evidence.

And so the error is that in this section where you've identified that indeed the Trial Chamber has set out findings that it then relied on to say that there was a common plan, that there was a common criminal plan, the error is that the other evidence, the other side of the story, the other potentially reasonable conclusion isn't considered and dismissed, as was required by the legal standard.

JUDGE BOSSA: [14:56:27] Prosecution, would you like to say something about this?

MS REGUÉ: [14:56:30] Yes, your Honour. I would simply like to say that what Ms Gibson said is not an accurate reflection of the trial judgment because, on her own acknowledgment, the Trial Chamber considered the Defence arguments as to the motives and purposes of the UPC.

During the first part of the trial judgment, the Trial Chamber considered those -- that

evidence, it entered factual findings, and then in the conclusion, in the part where the Trial Chamber laid out the requirements and the factors that led it to conclude that there was a criminal common plan, it cross-referenced to those findings which it already made and where the Trial Chamber had already considered Prosecution evidence, Defence evidence, and the only reasonable conclusion which was that there was a common criminal plan to drive out the Lendu.

So the Trial Chamber had conducted an accurate fact-finding, considering the reliability, credibility of the evidence. It entered factual findings considering also the Defence evidence, which did not place a reasonable doubt. And then, finally, it applied those factual findings to the elements of the crimes and the modes of liability, and the only reasonable conclusion was that there was a criminal common plan.

PRESIDING JUDGE MORRISON: [14:58:02] Judge Bossa, I've been told that Ms Gibson has raised her hand again.

Ms Gibson, is there something new that you wish to raise?

MS GIBSON: [14:58:13] Yes, your Honour. Very briefly just to respond to the comments from my colleague in the Prosecution.

I think it's very important to keep in mind that in establishing a common criminal plan under the form of liability of indirect co-perpetrator, there are only two paths that are available for the Trial Chamber. The first is to rely on direct evidence, the second is to infer a plan based on the subsequent concerted actions of the co-perpetrators.

Now, Ms Regué argued yesterday that there was direct evidence of the common plan that the Trial Chamber relied upon and she referred in her submissions to a document which she said set out rape -- that rape of enemy women would be used as a means of waging war. That was the evidence that she gave, an example that she gave of direct

evidence.

The Defence position is that it knows of no such document in the record of the case and we'd ask the Prosecution to provide a reference.

But we draw the attention of the Appeals Chamber to paragraph 293 of the trial judgment and the evidence of P-14, who did talk about this topic in the context of a side discussion in a corridor during the Kampala meetings in June 2002, and no such document is referenced in the trial judgment.

But just to conclude very briefly, in our position there was no direct evidence of a common plan and so what could the Trial Chamber look to? It could look to concerted actions of the co-perpetrators themselves that were subsequent, that happened after the plan materialised. And on that basis, it's important to recognise in this case that the Prosecution's case, how it charged the case and again what it said in its closing brief at paragraph 831, was that the common plan materialised on or around 6 August 2002 and then the Trial Chamber found that it materialised in August 2002, that's para 793 of the trial judgment.

So if the Trial Chamber is constrained to look at subsequent concerted actions of the co-perpetrators, meetings in 2000 or whether or not this group of people came together any earlier doesn't assist.

And that was what I wanted to add and thank you, Mr President.

PRESIDING JUDGE MORRISON: [15:00:38] Thank you.

Judge Bossa, any further questions?

JUDGE BOSSA: [15:00:43] No, thank you, Mr President.

PRESIDING JUDGE MORRISON: [15:00:45] Thank you.

Judge Hofmański?

JUDGE HOFMAŃSKI: [15:00:50] Thank you, Mr President. I have no question.

PRESIDING JUDGE MORRISON: [15:00:52] Thank you very much, indeed.
The only question I was going to ask has already been asked and answered.
So that brings us to the conclusion of this hearing, save and except for the opportunity for Mr Ntaganda to address the Court should he so wish.
MR BOURGON: [15:01:18] Mr President, I just wanted to make a quick remark on a question that was asked this morning, and I thought I would have an opportunity to respond and --
PRESIDING JUDGE MORRISON: [15:01:27] Please do. Yes, please do.
MR BOURGON: [15:01:28] The question was put this morning regarding the ways to prove the organisation policy -- organisational policy and that it could be proved otherwise. And, Judge, you mentioned the word "logistics" this morning and all the measures that were other, other ways to prove.
Well, I would like to invite the Appeals Chamber to look at the Defence closing brief, where we highlighted all such measures that were taken within the UPC. And this is at paragraph 154 to 185 of the Defence closing brief, where we explain the measures that were taken, the origins of the FPLC, why did UPC decide to create an armed force? What was the ideology of the armed force given by Mr Ntaganda and Mr Kisembo? They went and they decided to get uniforms. That's very, very important because uniforms allowed them to distinguish themselves from the civilian population. Not a word was said by the Trial Chamber about this. They actually organised training of gunners, the heavy weapons operator. They sent a group to another country to be trained as heavy weapons operator. Now, why would you do that? Well, you do that, Judge, because you want to be sure that the heavy weapons operator will operate their weapons in accordance with the law.
There's a very, very important topic that was also ignored and that is the exchange of

troops. At one point in time the evidence reveals that the UPC/FPLC, they teamed up with groups -- with troops that came from Aru. Now the troops in Aru were experienced and they came from the former APC.

Now, the UPC, they wanted to ensure that these troops would operate in accordance with the law. Now, that's all in evidence. What they did is they made an exchange of troops. They sent the recruits from Mandro up in Aru to fight so that the mix in Aru would not be a pure -- would not be purely on an ethnic basis, and they brought back experienced officers from Aru to Mandro again to ensure that the troops would fight in accordance with the law. That's all in evidence. So those are measures of organisation.

And then the disciplinary system, at trial I made a big issue of what I called defining moments, including what I referred to quickly yesterday, execution by firing squad. Twice this happened. Twice this happened. Not as a measure of violence, it happened as the ultimate punishment imposed with the approval of the president down to Kisembo, down to Ntaganda to show a message to the troops to abide with the law of armed conflict by killing two people execution by firing squad.

I'm a previous soldier, and in Canada, the execution by firing squad was still part of our military code of discipline right up until I was a military lawyer back in 1987.

Now, that's an important issue. That's the kind of thing that we have to look at in order to derive the organisational policy.

JUDGE EBOE-OSUJI: [15:04:50] Mr Bourgon, those two executions, what were the crimes for?

MR BOURGON: [15:04:56] The crimes, the first -- the execution, first of all, there was one in a camp called Ndromo. Sorry for my pronunciation. That person was executed because there was looting in the house of a -- if I -- of someone from an

ethnic group other than Hema and other than -- I don't -- I'm missing the exact fact, but it was a civilian and soldiers looted in the house of a civilian. And to show the message, then he was executed in public in the camp with all soldiers present and with the victims present. Now, if that's not a powerful message.

The second crime was the murder of a Lendu civilian in Mandro. And, Judge, when you look at the evidence, you will see that in the logbook this measure was first requested by P-768, who then during his testimony denied having been involved. But P-768 was involved in that measure himself and he denied it. And they killed. The Trial Chamber said, well, he was killed but maybe because the -- because the member of the army, it has to do with alcohol and lack of discipline. But a member related to the family of the person who was executed testified and said: The UPC came to my house and they told me that my brother had been killed but that he would be -- that he would be -- measures would be taken. And measures were taken.

And there's another clear example on the record, Judge, and that Mr Ntaganda himself during an operation, and that was in Komanda. At one point in time they captured the town of Komanda. This town was captured back and forth. Now, after capturing this town, he was -- got information that soldiers had done some looting. What did Mr Ntaganda do? Which he explained and which is in evidence. He took all the soldiers together, he brought the looted goods in one area, they burned the looted goods and they whipped the UPC members who had done that. If that's not a strong message. And that's in evidence. That was explained.

This is part of knowing whether there was an organisational policy, whether there was an intent behind all of this to commit crimes. There wasn't. The intent was not to attack direct -- to commit a direct attack against a civilian population.

Thank you.

PRESIDING JUDGE MORRISON: [15:07:44] Everything you just said was in evidence, Mr Bourgon?

MR BOURGON: [15:07:49] It was, Mr President.

PRESIDING JUDGE MORRISON: [15:07:51] Thank you.

Well, Mr Ntaganda, you now have the opportunity to address the Court. I see you rising with papers, so I assume that you are going to avail yourself of this opportunity.

You have 10 minutes.

MR NTAGANDA: [15:08:06](Interpretation) Mr President, your Honours, Judges of the Appeals Chamber, I am very happy to be afforded the floor to speak before you today.

I have waited for this moment for a long time, almost four years, that is, since the commencement of my trial.

The Judges of the Trial Chamber decided to convict me on all the charges against me. For the time that I was standing up to listen to the Judges convict me, this was one of the most painful moments of my life. That is, when I heard the Presiding Judge of the Trial Chamber speak, I thought he was even handing down a double conviction. These convictions concerned all the charges brought against me, even though my Defence team made their submissions and arguments throughout the trial, but those arguments were not taken into consideration.

At that point, I was tempted to give up, but I decided against it. My Defence team and myself, we decided to continue working relentlessly and the outcome is that all the documents and materials that we have filed or tendered in this case have been corroborated during these hearings.

So I would like to thank you very much for the time that you have allocated to me. Particularly during this time of crisis that is affecting the entire world, I would like to express my gratitude to the Presiding Judge as well as all the authorities of the ICC for making it possible for my spouse and my son Moïse for participating -- to participate in these hearings. I would also like to thank all my family and my children for continuing to support me and to believe in me, even when I am not there at home with them.

Mr President, your Honours, at the commencement of this trial I said loud and clear that I am a revolutionary, someone who pursues change. Your Honours, I am not a criminal. I am not a criminal. I have always believed that I am a revolutionary in my heart and in my mind. I have never been a criminal.

In the course of my career as a soldier, when I was still a new recruit and when I was a platoon commander during the Rwanda genocide, and even while I was a trainer in the various groups, as well as a leader within the UPC/FPLC right up to the time that I was a general in the national army of the Democratic Republic of Congo, all that time as a soldier I believed that my job was to ensure the security of the entire population without any discrimination whatsoever.

I would like to add that at no time have I not been thinking about this trial. I have been asking myself every day how it was possible that the Trial Chamber Judges were able to arrive at the decision that they arrived at.

My Defence team is an excellent team and in the course of the trial they provided all the explanations necessary. They conducted themselves properly before the Trial Chamber. And so I'm wondering how it is possible that the trial Judges ended up convicting me.

There were witnesses who came and told lies before the Judges. I do not understand

how they used my logbook when I arrived here. My own leader told me that the Defence team wanted to use my logbook and I thought that that would lead to my release. There were events that took place in 2002 and 2003 which are recorded in those logbooks and they constituted crucial elements in the trials involving the UPC/FPLC, and my conduct during those conflicts are in that document. So I do not understand why the trial Judges did not take into consideration all those materials and all that information.

In spite of all this, I continue to believe in the principle of fairness that is the hallmark of the International Criminal Court.

Mr President, your Honours, Judges of the Appeals Chamber, I fully believe that you will take into consideration all the submissions made by my Defence team by closely assessing the decisions taken by the Trial Chamber, particularly in relation to the witnesses who did not tell the truth. And based on that, you are going to review my conviction. And even if this leads to a new trial, which will require a lot of time, I am fully prepared for that.

And to conclude, your Honours, I would like to say a word to all the populations of Congo and all the Lendu and I will tell them that the video excerpts that they saw during the trial were not a movie. This means that I am calm and serene and I am anxiously waiting for your decision in this case.

I thank you very much, Mr President, your Honours, Judges of the Appeals Chamber.

PRESIDING JUDGE MORRISON: [15:18:34] Thank you, Mr Ntaganda. Of course the Appeals Chamber will take into account everything that it's heard from all parties when it assesses the appeal in this case, or appeals should I say.

We've now reached the end of the three-day hearing. I'd like to thank everybody involved, the court officers, the interpreters, who have done an excellent job, the

reporters, as well as the technicians for their assistance in making this hearing possible, particularly in a time of COVID when we are constantly facing new challenges.

Thank you very much and this hearing is now closed.

THE COURT USHER: [15:19:19] All rise.

(The hearing ends in open session at 3.19 p.m.)