Special Tribunal for Lebanon

STL-17-07

Presiding Judge Ivana Hrdlickova, Judge Ralph Riachi,

Judge David Baragwanath, Judge Afif Chamseddine, and

Judge Daniel Nsereko - [Appeals Chamber]

Wednesday, 11 October 2017 - [Rule 176 bis Hearing]

[Open Session]

--- Upon commencing at 9.30 a.m.

PRESIDENT HRDLICKOVA: Good morning to all.

Madam Registrar, please call the case.

THE REGISTRAR: The Special Tribunal for Lebanon is sitting in an open session in a Rule 176 bis hearing in the case STL-17-07.

PRESIDENT HRDLICKOVA: Thank you.

Now, the parties, please state your appearance for the record, starting with the Prosecution.

MR. FARRELL: Thank you, Madam President. Good morning, Your Honours. My name is Norman Farrell. With me is Mr. Doreid Becheraoui, Mr. David Kinnecome and Ms. Maja Dimitrova.

PRESIDENT HRDLICKOVA: Thank you. And now the Defence, please.

MR. ROUX: [Interpretation] Good morning, Your Honour, honourable members of the Bench. The Defence Office this morning is represented by Mr. Johann Soufi, chief legal advisory section; Ms. Caroline Buteau, legal officer; Ms. Lueka Graga Bada, case manager; Marie-Pier Barbeau, legal officer; and Sharaf Hussein, a Lebanese intern presently working with the Defence Office; and myself, Francois Roux, Head of the Defence

Office. So almost all of the team of the Defence Office is here before you.

PRESIDENT HRDLICKOVA: Thank you. For those present in court, I note that the live transcript is available simultaneously in English and French.

Pursuant to Rule 176(B) of the Rules of Procedure and Evidence, the Appeals Chamber, composed of Judge Riachi, Judge Baragwanath, Judge Chamseddine, Judge Nsereko, and myself, has scheduled today's hearing to hear the Prosecutor and the Head of Defence Office on the preliminary questions addressed to the Appeals Chamber by the Pre-Trial Judge.

Today's hearing, therefore, concerns one of the unique features provided for in the Tribunal's Rules of Procedure and Evidence, the procedure under Rule 68(G).

Rule 68(G) provides that the Pre-Trial Judge may submit to the Appeals Chamber any preliminary question on the interpretation of the agreement, Statute, and Rules regarding the applicable law that he deems necessary in order to examine and to rule on the indictment.

The preliminary questions arise from a confidential indictment submitted by the Prosecution on 21st July 2017 for confirmation by the Pre-Trial Judge. Having read the counts in the indictment before him, the Pre-Trial Judge considered that several questions arose regarding the interpretation of the applicable law. The Pre-Trial Judge addressed those preliminary questions to the Appeals Chamber by way of an order issued on 11 August 2017.

Further to a Scheduling Order that we issued on 21st of August, 2017, the Appeals Chamber has received written submissions from the Prosecutor and the Head of Defence Office in relation to the preliminary questions. All the Judges have considered and are familiar with the content of those written submissions, which do not need to be repeated today.

In relation to the written submissions, I note that in his submissions in the response filed on 14 September 2017, the Prosecutor requested that the Appeals Chamber issue an order clarifying the scope and purpose of today's hearing; in particular, the issue of whether the oral arguments are to be limited to the preliminary questions raised by the Pre-Trial Judge.

The Appeals Chamber observes that the Scheduling Order for this public hearing expressly stated that in accordance with Rule 176 bis (B) of the Rules, that the purpose of today's hearing is to provide the parties an opportunity to provide oral submissions on the preliminary questions and to clarify and further elaborate any written submissions on the issues raised by these questions.

Accordingly, we did not find it necessary to issue the order sought by the Prosecution. As is clear from Rule 176 bis (B) and the Scheduling Order, the Prosecution and Defence Office are invited today to address and develop arguments on the preliminary questions posed by the Pre-Trial Judge and the issues they raise.

In this respect, I ask both parties to use their time today as efficiently as possible. Our Scheduling Order is clear in this respect,

and the parties should not merely repeat arguments in their written submissions.

In light of the limited scope of today's hearing, I do not plan on extending time made available to the parties or the duration of this hearing.

Today's hearing will also provide the Judges of the Appeals Chamber an opportunity to ask questions and seek clarifications from the parties before we reach our conclusion on the legal issues before us. And I wish to make clear that the Judges of the Appeals Chamber don't have the proposed indictment in the course of these proceedings, nor will we see the supporting material submitted by the Prosecutor to the Pre-Trial Judge for this review. These materials are confidential and are not before us for the purpose of these proceedings.

Our ruling on the preliminary questions submitted by the Pre-Trial Judge will be in abstracto, that is, in the abstract, independent of the factual context that may, in the future, come to surround what for the moment are purely legal issues before us.

I also wish to point out that the Defence Office works as a guarantor of justice and is here in these proceedings to protect the rights of the Defence and the rights of any potential future accused. As there is no confirmed indictment, there are no accused at this stage of the proceedings.

In this regard, I note that in accordance with Rule 176 bis (C) of the Rules, any and all future accused will have the right to request reconsideration of the interlocutory decision that the Appeals Chamber

issues in relation to the preliminary questions raised by the Pre-Trial Judge.

I will now very quickly summarize the 15 preliminary questions that are the subject of today's hearing. They are represented in four series which can be broadly summarized as requesting clarification as to the applicable law on the crime of criminal association and the criteria for reviewing the indictment.

The first series of preliminary questions raised under the heading "Question A," contain seven questions which relate to the definition of the material elements, the actus reus, of the crime of criminal association.

Under the second series of preliminary questions, under the heading "Question B," the Pre-Trial Judge asks two questions related to the intentional element, the mens rea, of the crime of criminal association.

The third series of preliminary questions, under the heading "Question C," relate to the relationship between the crimes of conspiracy and criminal association, including the distinguished features between the two crimes.

The fourth and final series of questions raised by the Pre-Trial Judge under the heading "Question D," relate to the criteria for reviewing the indictment and specifically the extent to which the reviewing exercise involves an assessment of credibility and reliability of supporting materials before the Pre-Trial Judge that was also submitted as evidence in the Ayyash et al. case.

The full list of the 15 preliminary questions in their authoritative form can be found in the Pre-Trial Judge order of 11 August 2017.

Now let's mention the timetable. As set out in the Appeals Chamber's Scheduling Order of 13 September 2017, we will proceed to hear submissions on the preliminary questions posed by the Pre-Trial Judge. First, we will hear the submissions of the Prosecution on the preliminary questions for up to 50 minutes.

After a 20-minute break, 50 minutes will be allocated to the Defence Office for its submission on the preliminary questions before us.

After a second break, we will return for a final session where any additional questions from the Judges will be directed to the Prosecution and the Defence Office.

I point out that within the time allocated to them for their submissions, the Prosecution and the Head of Defence Office are at liberty to present their submissions on the 15 preliminary questions in the order they see fit.

Today's speakers are kindly reminded to speak slowly to facilitate the work of the court reporters and interpreters without the need for interruption.

So now we will commence with submissions from the Prosecutor, who I now invite to take the floor.

Mr. Prosecutor, the floor is yours.

MR. FARRELL: Thank you, Madam President. Thank you, Your Honours. Good morning. Good morning to my colleagues across the

floor as well.

As I've indicated, I'm with Mr. Becheraoui and Mr. Kinnecome. In the course of this hearing, I will attempt to make submissions and answer your questions. But if necessary, Mr. Becheraoui or Mr. Kinnecome may at different points in time address you.

I should state at the beginning that yesterday morning we received some additional cases from the Defence which I will try to incorporate in my response, and then this morning we received five more, either cases or documents, from the Defence Office. I've not had the chance to look at them since I just received them. If there is any questions that arise from them, I will try to assist Your Honours. But if there is specific questions about that material, I may seek leave to respond to them later. But we'll see how the proceedings go.

As the President has noted, this is not an opportunity to resubmit the submissions in writing. I would note that the submissions of the Defence Office in its filing of September 7th do not make any submissions on the substance of the questions, and the only substance of the questions are those that are in their response filing of September 14th.

There is no stated dispute, then, in relation to the other matters, at least in the written submissions, so I will limit my submissions this morning on the 50 minutes to those areas where there appear to be contrary submissions between the Prosecution and the Defence Office. Of course, I'm free to the extent possible to answer any questions you have outside of that scope, but that is the scope of my

submissions in the next 50 minutes.

First of all, in relation to Question A, the material elements of the offence, the offence being criminal association, there appear to be two points of contention. The first is whether the law requires a hierarchical organization; and the second, whether preparatory acts are constituent elements of the offence of criminal association.

I will first address whether a structured hierarchical organization is a constituent element of the offence under Article 335.

The Defence Office in its filing refers to one case, a 2002 case of the Criminal Chamber of the Cassation Court. And then yesterday -- or I think the night before, but I received yesterday two more cases: One from the indictment chamber of November 14th, 2005, and one from the Cassation Court of December 10th, 2015.

It's the Prosecution's submission that even considering these cases, there is no hierarchical requirement. And I note that though it says in the submission a structured hierarchical organization, the articulation in the decisions say "requiring a mastermind, plans, ranks, or roles." So it's much more specific than just saying there must be some association with some hierarchical organization, those cases actually require a very specific organized structure.

As I'm sure the Court is aware, certainly the members of the Bench know the Lebanese law better than I do, first of all, if you look at the provision there is no requirement. If you do a constructive analysis, comparative analysis of the other provisions in the Lebanese Criminal Code, there are references to organization or armed gang or, in

one case, association. But that's not what's included in Article 335.

The purpose of the provision is to criminalize the coming together, the collective nature of purpose -- of people coming together for the purpose of agreeing to commit crimes. It's the agreement to commit the crimes or to establish an association for this purpose that is criminalized.

The word "association" is meant, in my submission, to denote the collection of individuals who come together. It's this connection, this cooperative link between them that crystallizes in the criminal conduct. It's obviously not an association in the legal sense. It doesn't have a statute, office holders or corporate structure. By its very nature, being a criminal association, it's not going to go register at the ministry.

As a starting point, it may be useful to look at what the Lebanese jurisprudence has more generally required for the crime under Article 335.

There are cases from 1994, which you're aware of, I'm certain, the Antonio brothers or the Balamand Monastery cases which clearly indicate there is no requirement of hierarchy. What the Defence points to are cases since then, 2002, 2005, and 2015.

I would note there is -- and the 2005 decision is an indictment chamber. It's not the Court of Cassation. I would note that there are decision which are before you in the material from the Judicial Council in June 26, 2003, the Cassation Court in June 18th, 2008, the Cassation Court again on June 2nd, 2009, that all refer to the fact that the crime

is the convergence of the will or the agreement, explicit or implicitly, to establish the association, or the entering into an agreement that constitutes the crime.

Therefore, the inference being that decisions in 2002 and 2005 that articulate some form of organization, and by this a structured organization, not an association, have not been required in subsequent cases where the articulation has been made of the specific requirement of the crime which is an agreement.

Let's look then at the case of 2015. The case of 2015 is a charge that protagonists entered into a criminal agreement to kidnap an unidentified woman and rape her. The essence of that decision, the rationale of that decision is that it's not a criminal association because they enter into an agreement to commit one crime. The decision does not require, and though this is a common law concept of obiter, the decision does not require any determination after that finding as to whether there are elements including a hierarchical organization, mastermind, or structures.

But even accepting that that represents the Cassation Court, that individual court's determination, what you have is a number of decisions subsequently, including two decisions in 2016, that don't require a hierarchical structure. To be fair, they don't address it. They don't say that it's not a requirement. But if you look at the decisions, starting with the 2002 decision, which relate to juveniles and robberies, there are a number of decisions subsequently that all relate to robbery.

I've mentioned the June 18th, 2008, decision of the criminal

court of -- Criminal Chamber of the Cassation Court, which deals with an association where people came together to steal automobiles and then to sell them. And the court required that there be an agreement between them. There is no requirement of hierarchical structure. If it was an element, they wouldn't have been able to convict without determining that that was found.

If you look at the Criminal Chamber of the Court of Cassation on the 22nd of July, 2014, it relates to three persons who agreed to steal or commit robbery of eight houses, essentially burglaries. And there was no requirement of a hierarchical structure or a deliberately organized structure. Once again, the exact same crime as the 2002 decision which started the articulation of this hierarchical organization.

If you look at the Cassation Court's decision of the 17th of March, 2015, this is where there was an association established with a view to commit armed robberies at night. There was no requirement of hierarchy or organized structure with a mastermind or plan.

If you look at the Cassation Court Criminal Chamber of the 31st of March, 2015, which related to car thefts, purchase of stolen vehicles, and the disposal of the vehicles, there was no legal requirement or legal finding that there needed to be a hierarchy or an intentionally organized structure.

I've chosen these cases and the two cases listed in relation to 2016 because they relate to the same facts as the 2002 case from which this started, and they do not require - as a legal constituent element - the requirement of organized structure.

I would also say that the interpretation that I'm advocating, that it not be required, is internally consistent with the section itself. The section itself requires a merger of wills or the criminal agreement. It does not require specificity in terms of the crimes. It does not require specificity in terms of the victims or the means. Why does it require specificity of the structure?

It also, with respect, doesn't make logical sense. You can have a group of people coming together that come together and join together without a mastermind calling them to come together and telling them the ranks or the roles. In all the cases of robbery and car theft -- or in most of the cases you have people coming together and agreeing to commit the crime. There isn't a prerequisite requirement that there is a mastermind or that there is some type of role.

There is no doubt that if that factually occurs, it's a relevant evidentiary factor, but you can have a flat structure or a joining of people together to commit crimes without specifying it. If you need it, that means that when people come together to commit a crime and agree to commit a crime, a general crime against persons or property, and indicate that at a subsequent time they will figure out exactly how they're going to do it and what their roles are, then the crime hasn't occurred. And with respect, that's inconsistent with the concept of agreement as the act element.

There is, despite the three cases that will be referred to by my learned colleagues, there is no jurisprudence constant or established jurisprudence on this issue, and I would respectfully submit that this

Court should not accept it.

I'll now move to the second point of contention in relation to the actus reus, and this is the determination of whether or not as a constituent element of the crime the Court has to make a legal determination that the element of preparatory acts has been established. As is evident from our submissions and written submissions, it's the Prosecution's position that it is not a constituent element. It's a matter of proof. It's an issue of evidence.

In the Defence Office's response of September 14th, they take the position that Lebanese law stands for the proposition that "several preparatory acts and material facts are necessary to confirm the existence of the criminal association." They don't indicate what those are. They don't indicate what the differences between preparatory acts and material facts are. The bottom line is, I take from it that they are indicating that preparatory acts are a constituent element.

I also note that they cite the OTP submissions in 2012, and they are correct, a different position was taken by the Prosecutor in 2012. I don't stand by that position. I've gone back and looked at the case law, and I will take you momentarily to those cases. And with respect, they refer to preparatory acts for the purpose of proving the crime, but they do not require it as an element. I reject the supposition by the Defence that the Prosecution is -- takes no hesitation in contradicting itself because it has some unfair advantage and is attempting to tailor its submissions to meet factual matters that only the Prosecution knows about. With respect, that's unwarranted.

First of all, the Prosecution not disclosing the indictment and the underlying facts is required by the law of this Tribunal. The failure to do so does not result in some impropriety by the Office of the Prosecutor. Secondly, this is, as the President has indicated, submissions in the abstract. My submissions are on the basis of the law.

Let me refer then to the two cases. Those two cases that the Defence refer to are the two cases that are cited in the Prosecution's submissions in 2012. The first case is the Criminal Chamber of the Court of Cassation, judgement 88/2009 of the 2nd of June, 2009. This is a case where the appellant entered into an agreement with another person, apparently the leader of a car theft group, to fraudulently purchase eight cars in return for money. That was the agreement.

There is no reference in that decision, with respect, to a legal requirement that prior to a conviction under Article 335 a court must first make the legal determination that there were preparatory acts. In fact, the defence appeal in that case was rejected as the lower court considered that the appellant entered into an agreement with another to purchase eight cars fraudulently in return for a sum of money. That's the finding.

It's also interesting to note that the appellant's arguments on appeal before the court about the facts were considered merely an attempt to challenge the examination of the facts and evidence of the lower court, which the Cassation Court said was not their role. That was a matter -- the distortion of the facts was a matter for the lower court.

There is no indication in that decision of a legal requirement.

They talk about preparatory acts but it's clear.

Secondly, there is reference to an indictment chamber decision on November 14th, 2005. You may recall this is the decision on the Guardians of the Cedars movement, where there were a group of individuals who came together to propose a particular agenda and a new constitution or a reversion to an old constitution, and reference to some statements about taking over property and belongings to Palestinians and to kill them.

That decision at no point states that it requires preparatory acts as a constituent element of the offence. In fact, it finds that there was no agreement. That's the decision, the basis of the decision. There is nothing in the decision whereby the charges are dismissed on the basis of preparatory acts.

The reference by the chamber to an article by Dr. El-Fadel is cited in the decision in French, and that may be where the confusion lies. That quotation, first of all, is not jurisprudence. Secondly, it speaks to the proof of the agreement and the difficulty in establishing the agreement directly, and then turns to the material nature of preparatory acts or material acts.

In my submission, that clearly must go, based on the finding of the decision itself that does not require preparatory acts, that clearly is a reference to how difficult it is to find the agreement. That's undisputed. If you have to turn to preparatory acts to prove the agreement, that's simply a means by which you find the element to the offence. It's not the element of the offence itself.

I'll now turn to the next area that there appears to be contrary positions taken to try and assist Your Honours related to Question C. This regards the questions on the crimes of conspiracy and criminal association.

In this part, the Pre-Trial Judge raises four questions that relates to distinction between these crimes, and based on the distinction found, whether or not they can be charged.

We have set out in our submission the elements and our submission that they're distinct elements, and that on the basis of distinct elements they can be charged, which is in accordance with the Appeals Chamber decision, the interlocutory Appeals decision, the applicable law decision.

Before addressing the two points I wish to address in relation to the Defence submissions, I'd ask that you please allow me to quickly refer back to the interlocutory Appeals Chamber decision wherein this Court took a restrictive view about cumulative charging. And I wish to inform you that I am going to raise some questions about the underlying rationale of that decision, because it relates ultimately to some of the findings that this Court may have to make.

First of all, the reasoning in that decision was premised, to a certain extent initially, on the rationale of an ICTY Trial Chamber decision called the Kupreskic decision. It's quoted in the decision it referred to for the underlying rationale. It notes that this was overturned on appeal but then dismisses in one paragraph that this decision was overturned on appeal -- or the proposition was overturned by

the Delalic case, which is called the Celebici case in the ICTY.

I wish to note that actually the Kupreskic decision was overturned on appeal. The Delalic decision takes the same proposition. And the Stakic Appeals Chamber decision also takes a different position than the rationale listed. Now, this Court is free to choose whatever decision it makes, of course, and this Court is free to decide that it accepts the rationale of an underlying court and doesn't accept the Appeals Chamber rationale. There is no dispute there. But if there is any -- if one looks -- well, let me summarize. The Appeals Chamber refers to the Kupreskic decision as the underlying rationale. That rationale that cumulative charging should be limited and that it requires two things, and this is cited in the Appeals Chamber decision, it requires both a distinct element and that it relates to different values. Those two elements are listed in the Appeals Chamber decision from Kupreskic as conjunctive, not disjunctive.

I simply wish to note that though only reference is made to the Delalic Appeals Chamber, all the Appeals Chamber decisions that dealt with this matter have not concluded any restrictions on cumulative convictions and, in fact, have all decided that cumulative charging in itself is permissible.

In fact, the Stakic Appeals Chamber decision indicates that the law is that you require distinct elements. You don't require that it's -- that you have to determine on some undefined notion of values or underlying protected interests that if they protect the same interests, they can't be convicted or charged. That's the inference. And I will

take you to the -- your decision and respectfully submit that the reliance on the Kupreskic Trial Chamber, in light of the consistent jurisprudence, should not lead you to the conclusion that cumulative charging -- when there requires some type of assessment of the underlying values. That's not the -- you may decide that but that's not the decision. And if there's any -- I want to make it clear that none of those decisions are cited in the previous decision and only the Kupreskic decision, which was a Trial Chamber decision which was overturned.

Secondly, the Appeals Chamber decision refers -- they contrast this extensive jurisprudence from the ICTY with what is the apparent emerging practice at the ICC, and then refers to the Bemba case. I wish to respectfully submit that the Bemba case did not emerge as a practice at the ICC. It has not been followed since that decision. And in fact, the courts have removed themselves from that underlying rationale.

I will quote to you -- sorry, Mr. Court Officer, may I ask you to pull up the Ongwen case. It's listed as in the additional -- in the presentation queue. It should be the last one.

If I could ask that you go to paragraph 29. In this decision, the question is in relation to the confirmation of the charges, and as you can see at the bottom of paragraph 29, the sentence beginning: "The Defence objects to this approach by the Prosecutor" - and then if I could ask that you please go to the next -- top of the next page - "and argues, relying on minority opinions from the ad hoc Tribunals in which dissenting Judges express their disagreement with cumulative convictions," once again we're talking about convictions, "that

'cumulative convictions have the same effect as the retrial of the same conduct and should therefore not be allowed on the basis of the principle of ne bis in idem.' Also, according to the Defence, 'the matter of cumulative charging should be resolved at pre-trial," and by this they mean the Pre-Trial Chamber, 'in the name of judicial expediency and the light of the fact that the Chambers have the power to recharacterize the crimes at trial ...'"

If I can then ask you to go to paragraph 30. The Chamber here rejects the Defence arguments and say that:

"Arguments concerning the permissibility of cumulative convictions are extraneous to the question of whether" the Prosecutor should be allowed to lay charges.

Now, the Court is here adopting the jurisprudence that the issue of distinct elements goes to convictions, not to charging. And it rejects this notion that somehow there is judicial expediency in determining at the charging stage which crimes could not be found at the conviction stage because they're not distinct elements.

I also note that if the argument is that judicial expediency requires the non-charging of different crimes that could be either cumulative with distinct elements or alternative, then that flies in the face of the principle that the Judges can re-characterize the legal characterization.

I would respectfully submit that it's a little bit fairer that at least the accused know what the characterization is that they have to answer to at the indictment stage than wait until the end of the trial

and be told: Well, based on the facts as pled, we are not going to rely on the charges as alleged. We are going to characterize them legally. As you may be aware, in the Ngudjolo case of the ICC that happened, and they had to adjourn the proceedings and allow the accused to bring evidence because he wasn't charged with the legal characterization which under their law they were permitted to do. I would submit it's better that these be laid out at the beginning, not at the end.

If you go on with this decision, it says:

"The Chamber is of the view that questions of concurrence of offences are better left to the determination of the Trial Chamber."

And then refers to Article 61(7) of the Statute, which:

"... mandates the Chamber to decline to confirm charges only when the evidence does not provide substantial grounds to believe that the person committed the charged crime and not when one possible legal characterization of the relevant facts is to be preferred over another, equally viable."

And then if you refer to paragraph 33, please. It states that their conclusion is in line with the established practice of the Pre-Trial Chamber's, and you see that footnote 13 refers to two other decisions that confirm the same practice.

Now, this Court can, of course, decide on what law it wants to follow. It's an independent Chamber and it does so based on our Statute and our law. All I would ask is that when you're considering submissions about whether the Pre-Trial Judge should limit the charges, that you take into consideration that the underlying rationale in the 2011 case -- that

the underlying rationale in the decision in 2011 was based on decisions which have -- or a practice which has not emerged.

With that in mind, I turn to the points raised by the Defence Office in relation to cumulative charging.

First is the question whether the crime of conspiracy is a special provision under Lebanese law. As you're fully aware, a special provision is enacted either to derogate from a general law by establishing an exception to a general principle admitted by this general law or to supplement a general provision by creating specific elements to deal with the particular criminal situation.

Let's look to the Lebanese law. Lebanese law, Article 181, states that:

"If an act has several qualifications, they shall all be mentioned in the judgement."

They are not precluded at the pre-trial stage or the confirmation stage under Lebanese law. It's clear that this determination of whether a special provision applies in light of a more general provision, under Lebanese law, under Article 181, is at the judgement stage.

Secondly, this Court has indicated that a special provision is one that has an additional element or a distinct element. The Appeals Chamber interlocutory decision on the applicable law, at paragraph 285, states, and I quote:

"The more specific crime (the crime with the different or additional element) prevails over the more general crime (the crime that does not have the additional element)."

Therefore, in accordance with our law of this Tribunal, the legal articulation of when a special provision would apply is when there is a distinct element, an additional element not found in the general provision. Understandably, that element being added to deal with the specific situation or to specify the particular criminal situation that it's attempting to address.

We've already taken the submission -- or the position, I'm sorry, in our submission that there are distinct elements between criminal association and conspiracy. And therefore, based on our law, if there are distinct elements, then it's not a special provision.

Secondly, even if there are the same elements plus one in one of the offences, that's a matter for conviction stage, for a judgement stage. First of all, that's in accordance with the Lebanese law. And secondly, it's in accordance with the concept of lesser included offences. It's an expression that I'm aware of. I'm sorry, I don't know of the expression in Lebanese law. But where you have a crime which has, let's say, four elements and a specific crime which has five, the Prosecution, in my submission, should be permitted to charge one in the alternative in the -- of the other, because if you don't prove the additional element, there is still criminal conduct, it's still a crime under Lebanese law, or our law, and you've proved those elements. It shouldn't be that you, at the charging stage, remove what would be a lesser included offence in law.

Now, that's where I come to the Appeals Chamber decision. The Appeals Chamber decision, in a passage cited by my learned colleagues,

indicates where there is a special provision in relation to a general provision, you choose the special provision. In my submission, that's correct at the conviction stage. That's what the law stands for, both the Lebanese law and the international law. It does not, with respect, stand for the proposition that you then at the charging stage choose the special provision. That's not what the law says.

And to impose that and transpose that into the judgement on the basis of some notions of expediency or there is an emerging practice of criticism of cumulative charging is, with my respect, unfounded.

Let me now turn to the Defence Office claim that the Appeals Chamber will "appreciate" the crimes of criminal association and conspiracy with a view to committing a terrorist act are aimed at protecting the same interests.

First of all, it's -- I'm not sure how to respond to an argument that the Court will appreciate something, but let me try and address the point, that the Defence Office does not indicate what those interests are, does not indicate how they are shared, and does not indicate how they overlap because they actually don't indicate what the values are that underline either offence. In that regard, there are no submissions to respond to. But please allow me to address one matter that arises from this question.

The assumption of the Defence's argument is that if crimes have the same interest, then they cannot be the subject of cumulative charging. That's their submission. Because those two crimes have the same interest or same values, they cannot be the subject of cumulative

charging. It's clear that that's not the law. I've already mentioned that in relation to the previous issues of general and specific, but let me address the Appeals Chamber decision itself.

JUDGE RIACHI: Excuse me. [Interpretation] I apologize for my intervention. But from what I understood from the Prosecutor is that there is a confusion between the "concours de qualifications" and "concours d'incrimination." So we have to specify. Are we talking about "concours de qualifications"? In the Lebanese law, the "concours de qualifications" means that we need to implement the more severe judgement. But if you're talking about the cumulative charging and indictment, then I ask you please -- I ask the Prosecutor to clarify this matter, particularly since I didn't quite understand in the Ongwen decision that you have mentioned, why did they rule out the principle of non bis in idem. You said that they had ruled out that matter but I did not understand or I did not see any sufficient reasoning for this refutal.

MR. FARRELL: Thank you, Your Honour. The reliance on the Ongwen case was to point out that the emerging practice relied upon by the Appeals Chamber in their interlocutory decision did not emerge.

Let me address your question about the distinctions. And if I don't answer it properly, please let me follow-up if I -- if I'm unable to.

First of all, cumulative charging occurs when there are distinct elements found in relation to each crime. So each crime has a separate distinct element from the other. When there is a distinct element found

in both, that is cumulative charging. You're allowed even by this Tribunal to charge cumulatively where there are distinct elements.

"Concours idéal," dealing with whether or not, based on the same act, you can have two legal characterizations, is determined by whether or not the legal characterizations are distinct and different. So if there is a distinct element in each crime, from the statutory provision, then even if it is from the same act you can charge and convict on two separate legal characterizations and two acts.

If it is a special provision, it doesn't, at least according to the Appeals Chamber decision, it doesn't have -- one of them does not have a distinct element. One of them has the same elements as the other, and the other one has an additional element. That's the ruling here as to what constitutes the legal determination of a specific provision.

In those cases, you cannot convict on the general. You can only convict on the specific. But you can still charge them both, and they could be charged in the alternative.

So you have distinct elements, which is cumulative charging. You have the principle of a special provision, which is that one overrides the other at the stage when you find the elements. And the third would be the principle of consumption, as I understand it, which is if the two crimes have the exact same elements, then they can't be, according to our jurisprudence, charged or convicted. If they have the exact same elements.

The Appeals Chamber goes further than those three propositions and states that in circumstances where they have distinct legal elements

but they relate to the same underlying values, that becomes the question.

JUDGE BARAGWANATH: Could you give us the reference, please, to that?

MR. FARRELL: Yes, may I -- thank you, Your Honour. If I can ask you to go to -- it's the Appeals Chamber decision starting at paragraph 298 and continuing over to 299. If I can have 299. Thanks very much. If you can pull it up -- yes. Thank you very much.

If you go halfway down after footnote 431, you can see the sentence beginning: "The Pre-Trial Judge ..." It states:

"The Pre-Trial Judge may also request that the Prosecutor reconsider the submission of formally distinct offences which nonetheless do not in practical terms further the achievement of truth and justice through the criminal process."

And then this Court goes on to explain what that means.

"That is, additional charges should be discouraged unless the rules contemplating the offences are aimed at protecting substantially" the same "values."

Well, first of all, in my respectful submission, the law is distinct values, not the -- distinct elements. You cannot override where there are distinct elements and offences if some underlying value appears to be the same between the offences. The elements of the crime are determined for charging and conviction, not some vague notion that they might address similar values. Values are not legal elements.

Secondly, the Appeals Chamber here has been quite circumscribed in what they've said. They do not grant the Pre-Trial Judge the

authority to reject charges that have distinct elements, even if the Pre-Trial Judge concludes that they share the same values. That's the Defence submission to you. The Pre-Trial Judge should reject them if they share the same values. This doesn't say that.

It says: "The Pre-Trial Judge may request that the Prosecutor reconsider ..." And there's good reason why the Appeals Chamber chose that wording and not made it mandatory because the Pre-Trial Judge must confirm if there is sufficient evidence on the elements of the counts. The Pre-Trial Judge cannot decide to not confirm when it is mandatory in the Statute that he must if there is sufficiency evidence on the counts. That's why it doesn't make it mandatory here, and clearly the Appeals Chamber recognized that it can't grant a jurisdiction to the Pre-Trial Judge which doesn't exist under the Statute.

I only have a few minutes left, so --

PRESIDENT HRDLICKOVA: Thank you, thank you.

MR. FARRELL: So I will just finish up my submissions then. I am not sure how much time is left? Five minutes? Thank you.

I was going to address you in relation to the criteria for reviewing the indictment. Our submissions are clear. Let me just indicate that, first of all, the proposition by the Defence that the Pre-Trial Judge should take into consideration inconsistency, ambiguities, or contradictions found in the evidence. I note that there is no footnote for that proposition, and that is because that phrase comes from the Appeals Chamber of the ICC in the Mbarushimana case, which relies on Article 61, which is a different provision and a different

procedure. So with respect, there is no support for that proposition.

Secondly, the request that the Trial Chamber engage in reliability and credibility is contrary to all the decisions that we've cited. It is in the domain of the Chamber to address credibility and reliability, and it is not what prime facie means.

Prime facie, even a reliance on the credible case test, is that there is an assessment, when looking at the evidence as accepted, that it is sufficient to support the charges. The prime facie case or credible case is that the case is credible in the sense that the case, for the Prosecution, taken at face value, if accepted, has a foundation for the counts in the indictment. It's not an assessment of the case.

I can answer any questions you have on that. The standard articulated by the Pre-Trial Judge, which relies on a 1995 one Judge confirming decision of the ICTY, is, with respect, not the subsequent determination of what a prime facie case is. In fact, the subsequent decisions hold that -- what credible case means. It doesn't mean credible in the sense of credibility. It means credible in the sense of the overarching nature of the case on the evidence if accepted.

So with respect, the underlying rationale and the decision from the Kordic 1995 one confirming judge decision relied on by the Pre-Trial Judge is not borne out in subsequent case law.

And I also point you to the decisions that I submitted a week ago, including the Stanisic and Simatovic decision, which is in the additional material, the Krstic decision, which indicate that it's not for the confirming chamber or the confirming judge to look at

submissions. They don't look at competing submissions. And there is a rationale as to why that's the case. And I can get into further submissions on why you can't -- a Pre-Trial Judge cannot go outside the record of the supporting material and attempt to identify other material that he would like to have before him on matters going to credibility and reliability.

In light of the time, thank you for your patience and I will conclude at this point. Thank you, Madam President.

PRESIDENT HRDLICKOVA: Thank you, Mr. Prosecutor, for your submission. Now we will adjourn for a 20-minute break, so we will reconvene 10.55. Thank you.

--- Recess taken at 10.32 a.m.

--- On resuming at 10.55 a.m.

PRESIDENT HRDLICKOVA: Good morning again. In the first morning session, we heard the submission from the Prosecution on the preliminary questions submitted to us by the Pre-Trial Judge, and now we will proceed with the Defence Office submission in relation to the same issue.

Maitre Roux, the floor is yours.

MR. ROUX: [Interpretation] Thank you very much, Madam President, honourable members of the Bench. I'd like to make three preliminary remarks before I hand over to Mr. Johann Soufi.

Let me reiterate here that when a lawyer rises in the defence of a client, immediately our thoughts go to the victims, the victims of the crimes at issue. To defend is not to deny the crimes. Quite the opposite. To defend is to contribute to the judicial process, and

therefore to ensure that truth comes to light.

Jean Boudot, a grand lawyer, said that to defend is not to accept -- not to take for granted anything that hadn't gone through the burning fires of criticism. And François Zimeray, another lawyer, who became French ambassador for human rights, added, and let me quote:

"The paradox of human rights is that initially they are rights belonging to the victims but they take on their substantial meaning in fair trial proceedings."

Now, Madam President, as you said so rightly earlier on, the Defence Office is here in this courtroom to safeguard the accused's rights to a fair trial.

I turn to my second preliminary remark. It's a small digression. To say that today is of particular importance and significance because for the first time -- well, for the first time since eight years was -- the first time that we rose here was in the El-Sayyed case eight years ago. [1]For the first time for eight years I stand here when we have at last the French transcript on our screens. This is not just a detail. I regret the fact that eight long years had to go by before at last we see ourselves settled in that right.

I don't know whether we need to do -- whether we also need to rejoice at the fact that now it's put an end a discrimination against French lawyers. But, of course, it's not over because, as you know, in the 2nd October decision, the Trial Chamber Judges challenged the implementation of that French transcript system.

Now you know full well that language carries with it culture.

Here, civil law, which comes from Berytus University, in other words, the University of Beirut, and so Lebanese law in its concept, contrary to the drafters of our Statute, is too often cast aside here in this Tribunal, which belongs to us all.

I'd also like to remind the report of the Secretary-General to the United Nations Security Council on the 15th of November, 2006, and in particular paragraph 8, the Special Tribunal for Lebanon, it says, "differs from other international criminal tribunals established or supported by United Nations and this in two respects: First, the conduct of proceedings is built more on civil law than common law."

[2]This is why my satisfaction will be complete only when at this Court, at this Special Tribunal for Lebanon, we see that Lebanon, a French- and Arabic-speaking country, I'll be delighted when we have a real life transcript in English and French but also in Arabic. My friends from Lebanon, you can count on me to reach that end.

Third point. An old popular saying says that silence is golden. So we have remained silent in our 7th of September filing. On that date, our entire proceedings, that have now become public, were at that particular point confidential. And anything that I said was likely to impinge upon the rights of the accused in the Ayyash case. [3]I didn't have the right to talk to the lawyers that I assigned to the Defence of the Ayyash case accused, and I would say here and now, clamouring from the roofs, if you will, so that the -- the roofs and the walls here, so that the lawyers that I appointed are not defending the accused, but in keeping with Article 22(2)(c) of the Statute, they are defending the

rights and interests of the accused.

So in my filings, I kept mum. And since the proceedings have now become public, we have had an opportunity to talk with said counsel in the Ayyash case, as we do, in keeping with our professional ethics, every time the Defence Office will act in such a way that will impact upon the Defence, as you would see with the actions of a Bâtonnier.

And so here today, after having spoken with those Defence counsel, it is our decision, following the advice of Jean Boudot, we decided to put through the fires of criticism the submissions put by the Prosecutor, without taking a position on the applicable law given that we don't know -- unlike the Prosecutor, we don't know the in concreto features of the underlying case. We are fumbling in the dark, therefore. Whereas the Prosecutor, for his part, has his eyes wide open, looking at the 01 and 17 case proceedings. And, of course, his approach of the law is built on the contents of his case file that he is cognizant of.

Lastly, I find myself competing with the Prosecutor for a wine tasting, but I am tasting the wine blind whereas he can see the labels on said wine. In those conditions, I would like to say that nothing of what we say today should be seen as involved in a fully adversarial set of proceedings. And as you said earlier on, so rightly so, Madam President, the rights of the future accused will be protected by the way of re-examining or reviewing any decision that you hand down.

I would like to hand over now to head of legal aid at the Defence Office, Johann Soufi, who will be talking about the Prosecution submissions going to criminal association. Then I will rise again to

talk about the powers of the Pre-Trial Judge. Then Caroline Buteau, our legal officer at the legal advisory section, will rise to answer any questions from the Chamber going to cumulative charging.

Madam President, honourable members of the Bench, I would like to thank very warmly the entire team of the Defence Office for all its professionalism in their involvement in this debate as well as our Lebanese colleagues here and in Beirut, they know who they are, for the precious aid they've provided by shedding light on Lebanese law, which at last is the heart of our debate. I thank you.

MR. SOUFI: [Interpretation] Madam President, honourable members of the Appeals Chamber, Mr. Prosecutor said this morning that there were three differences between the filings between the Prosecutor and those of the Defence.

[4]I'm a kind of glass-half-full kind of guy, and I think that disagreements run deeper than that, in fact, between our two offices. As Mr. Roux said, it's obvious at the light of the written submissions of the Prosecutor of the 7th September 2017 and his oral submissions here today, it's obvious that the Prosecutor construes Lebanese case law with his desire to tailor Lebanese law to the case file he has submitted.

I'm going to try and demonstrate this with exact, precise examples. You'll see that the Prosecutor commits not only manifest errors of construction of case law, but sometimes his assertions are the exact opposite of the content of the decision he cites. In my view, all these decisions, these errors fundamentally vitiate the OTP's answers to the questions of the Pre-Trial Judge and doesn't assist you in taking an

enlightened view going to those questions.

I will then seek to draw Your Honours' attention to some significant decisions in Lebanese case law, which, in my view, will avail you of answers to the Pre-Trial Judge.

Now, most, if not all, of the decisions stemmed from the Prosecutor's own 2017 filings. These decisions were already there. However, in his submissions that he filed on the 15th of March, 2012, this was F00160, where unsuccessfully he endeavoured to include the crime of criminal association in the Ayyash et al. indictment. Let me say this, and I noted this morning, that the Prosecutor had decided to return to his initial 2012 position for a specific point. In other words, the existence of a tangible act, material act. [5]I think that his 2012 submissions were huge, much closer to Lebanese case law than his submissions today.

Lastly, and very briefly, and you will understand why, I will address the matter of whether it is open to the Prosecutor cumulatively plead both -- well, with regard to conspiracy and criminal association.

Now as you will see, there are many errors in the Prosecution's submissions and he hasn't looked at things objectively. I only have one or two minutes, and so I'm going to confine myself to three examples. But in my view, they are very striking. And they find themselves in the first three pages of the OTP's submissions.

Now, let us be careful here. This doesn't mean that the 16 remaining pages of the Prosecutor's submissions are right. No. They're riddled with error, but I've confined myself to the first three

pages because in my view I think that will be enough.

What I wish to demonstrate before you, Your Honours, is that these major misunderstandings pollute the entire submissions of the Prosecution. The first error. And you know, I'm lucky enough to be a bit young, but I remember when I was a law student and the first week, in fact, of my studies, we learned the difference between a decision based on facts, which was called a judgement in -- de facto and then a judgement in principle, which goes to a principle of law.

And just to pick up, for example, on what the Prosecution said going to the 2009 judgement he quoted. This is just de facto because the Chamber says, and this was affirmed by international tribunals, analysing the facts is something that is incumbent upon the triers of fact. There is no debate to be had on that point. But I would like to show why the Prosecutor commits an error of understanding between these two types of judgements I've just laid before you.

Let me turn to the first example. The first page of the 7th of September, 2017, submissions put by the Prosecution. What does he say? He says that:

"It's not necessary to identify all the members of a crime of criminal association."

He cites a decision by the Criminal Chamber of the Court of Cassation that Judge Riachi knows very well because he was president of said chamber in the day, where a member of a criminal organization, Ansar League Organization was found guilty of criminal association, whereas the - and this was the Prosecutor who is claiming

this - "other members of the association went unnamed and unidentified."

And to do this, he refers to a judgement of the 25th of October, 2007, which you have here on the screen before Your Honours. What's the problem? Well, if you read this decision you'll see that the problem is that nowhere in this judgement does it say that it's not a requirement to identify the members of a criminal association, as the Prosecutor seems to suggest. The judgement is totally silent on that matter.

To be honest, that got me wondering why did the Prosecutor -- or his office, rather, was so categorical and confident in asserting this? This is -- it's a principle decision talking about a principle, whereas the matter wasn't even addressed. This is what I think, and you'll see that I picked it out in yellow: In fact, the Prosecutor believed that the redaction of the accused names in the case book where the decision was published - you can see here the names here have been replaced by three little dots - that meant to the Prosecutor that the judges of the Criminal chamber of the Court of Cassation and the triers of fact had convicted the accused without any information going to the names of the other members of the criminal association.

But the redaction of the names in a decision handed down by the Court of Cassation is, of course, customary practice, particularly when the decision is published in a case book of case law. Now you can imagine possibly an oversight. But the problem is, is if you take the very next paragraph in the Prosecutor's submissions of the 7th of September, 2017, it's paragraph 4, I refer Your Honours to that, once again he refers to another decision, that of the Criminal Chamber of the

6th of March, 2008, presided once again by Judge Riachi. Here again the Prosecutor, in support of his argument, a decision that doesn't go at all to the matter of identification of the members of an association of -- well, a criminal association.

Once again, the only commonality is that in this particular decision the publishing house used these three little dots to redact the identity of the members or the accused. So there you have it. You can see how that an error in understanding the Lebanese legal tradition and an error in terms of these two -- two types of rulings, trips up the Prosecutor into totally contradicting his own position.

But the errors of the Prosecutor aren't only confined to an ignorance of Lebanese legal tradition.

Answering Questions C and D of the Pre-Trial Judge, the Prosecutor quotes principles set out by the "Court of Cassation" but casting out of mind the most fundamental part of the decision, and this will lead me to addressing a matter raised by the Prosecution in the court this morning. He contorts the decision, therefore, such as it was averred by the Criminal Chamber of the Court of Cassation.

I would like to look at paragraph 7 of the Prosecution's observations of the 7th of September, 2017. The Prosecutor says, and let me quote:

"'The simple fact of implicitly or explicitly concluding a criminal agreement constitutes the crime of criminal association.'"

This is what he told Your Honours this morning. He said that there was no need for a material act. Now this quote, according to the

Prosecution, comes from a decision handed down by the Court of Cassation of the 18th of June, 2008. And I would like it brought up on our screens, please, because this way we'll be able to be talking about the same thing.

I have every respect for my colleagues of the Office of the Prosecutor, but it strikes me that this is really leading the Chamber astray because the matter put -- the question put by the Pre-Trial Judge was to establish whether positive acts, material acts were required by Lebanese case law, or whether an agreement per se sufficed. But the Prosecutor replies by omitting the section of the decision, which you can see here highlighted in yellow, which requires that the agreement be consummated by an act. Basically, the Prosecutor is quoting the simple fact of explicitly or implicitly concluding a criminal agreement per se.

This is something that has been established by Lebanese case law, contrary to what the Prosecutor said. We'll return to that. But it's a shame that the Prosecutor forgot that section of the decision, which for me is a crucial component of the decision.

And a last example and then I'll stop. Here the Prosecutor's error shows you how a manifest error of construing a decision prompts him to muddle up the crime of conspiracy with the crime of criminal association. It's a shame. Because today here in our hearing, I heard the Prosecution say that these were entirely distinct crimes. In my view, this confusion, throwing from the Prosecution, infects all his submissions and the answers to the Questions A, B, and C of the PTJ going to the elements of the crime of criminal association and that of whether

that can be pleaded cumulatively with conspiracy.

Staying with paragraph 7, page 3, the Prosecutor asserts the agreement, this is the offence in itself. It means convergence of intent and unity of will among the conspirators with a firm, final, definitive and uncontested aim of achieving a single goal.

This isn't necessarily a permanent or organized element with a permanent organization with a mastermind directing activity. This is what he said this morning. He said that criminal association is an agreement, and you don't need for that association to be housed within an organized structure. But go off and see that decision, Your Honours, which he cites to support his submissions. This is a decision flowing from the Lebanese Judicial Council of the 26th of October, 1994. And I'd like that brought up on our screens, if you don't mind, pages 22 and 23 in English.

Even if you were to read this superficially, this particular decision, Your Honours, you will see immediately that the quotation here used by the Prosecution doesn't go to criminal association at all. And it's so obvious that just by looking at the decision, you can see the first page is entitled, and here I've got it in English, "Conspiracy." Conspiracy. So you can see the problem that we're labouring under here, or the Prosecutor is labouring under, he is confusing the elements of the crime of conspiracy with those of the crime of criminal association. And here he's quoting a decision by asserting that it's the definition of agreement under the aegis of criminal association, whereas the decision goes directly and unambiguously to conspiracy.

Let me stop here, Your Honours. We're right at the beginning of the Prosecutor's submissions. But basically in a nutshell, that's what I wish to lay before Your Honours, that all these errors of interpretation, these errors of understanding, affect the entirety of the written observations of the OTP. And I would therefore ask you to treat them with the utmost caution, and whenever there is an assertion by the OTP, to check whether that really appears, because we have done this work, and as Mr. Roux has -- says, this is our role to do this analytical work. But when you do that spade work, what you do see is that the very foundations, the underpinnings -- the legal underpinnings that the Prosecution is using just crumble away.

Madam President, Honourable Judges of the Appeals Chamber, I now would like to turn to one or two decisions that illustrate the three points of disagreement that we have with the Prosecutor's Office.

Let me say with the utmost modesty that I am pleading before high-level Lebanese magistrates and who have themselves drafted this very case law. However, I state this with some level of assurance because, as Maitre Roux has stated a moment ago, we have legal officers and lawyers from Lebanon who have helped us considerably.

In our response, dated September 14th, 2017, although limited, we stated that according to Lebanese law there were three additional elements over and beyond those identified by the Prosecutor in order to define the crime of criminal association.

The first is that the agreement be demonstrated by material facts. That was the question put forward by the Pre-Trial Judge, in

fact. The second is that the agreement exists within an organization that be structured and have a hierarchy. The third, and I must say that I really didn't understand the Prosecution's submissions on this point, that there is a certain random characteristic and not clearly defined as regards the victims of the crimes. And I will come back over these three points one by one.

The Pre-Trial Judge has put to you a very clear question: The agreement within a criminal association, must it be materialized by a community of thought -- by positive acts or is community of thought sufficient.

And to this question, the Prosecutor responds, and this is to be found in paragraph 9 in their submissions, and I quote:

"In some instances Lebanese Court have relied upon proof of preparatory acts in order to prove that an accused entered into or joined a criminal association; that is, to prove the merger of wills or community of thought."

But preparatory acts are not a material element of the crime under Article 335 of the Lebanese Criminal Code. I am pleased that it would appear that the Prosecutor did admit, in fact, that they said the opposite in 2012. In France, we like to say that it's always a good thing to be able to change your opinion.

Let me recall what was stated in 2012 three times, and I quote:

"An agreement must be materialized or qualified by several material facts."

He stated it very clearly in 2012, quoting a prior ruling, and I

don't think that Lebanese case law has changed, and yet the Prosecutor has changed his opinion. And I think this shows that he is trying to adapt Lebanese law to his case and not the other way around.

But as the Prosecutor stated, the Defence Office, referring to a ruling dated November 14th, 2005, which is included in the OTP submissions dated September 14th, 2017, and this is footnote 14, they state, and we affirm, that there must be material acts in an agreement. And it's important to read it to you. It's actually in French in the text, and I'm -- this is the English version that the Prosecutor has submitted, and that's most unfortunate because, strangely enough, they didn't translate this passage, which I think is the most important in the ruling. And the text that the Prosecutor submitted to you is annotated French text. They did not think it was necessary to translate it. I'm going to show you the Arabic version, which states clearly:

"Evidence of the decision to commit an act is difficult to establish. That is why lawmakers took care to indicate that the criminal conspiracy is that which is embodied or qualified by one or several material facts. These elements are left up to the Trial Judge on the condition that they specifically mention said facts in their conviction. This materialization of the agreement and criminal projects may derive from the discovery of a vehicle containing weapons, surgeons gloves," et cetera, et cetera.

I know that the Prosecutor was aware of this decision because in 2012, not only did they have this ruling, but at the time they had made the effort of translating the passage. It would have been nice had they

done the same today.

Let me quote another ruling, which is more recent, dated June 14th, 2012, of the 6th Criminal Chamber of the Cassation Court. And again, it's a principle here that is stated, "whereas the Lebanese legislator does not punish criminal intent without any actual criminal act."

The second element under Lebanese case law is the requirement that there be a structure, a hierarchy, as well as a distribution of roles. Contrary to what the Prosecutor has stated in paragraph 7 of his observations dated September 7th of this year, and I believe that perhaps this is just a mistake in quoting, and perhaps he meant to refer to criminal association, whereas he was talking about conspiracy. Lebanese case law requires that there be a structure and a hierarchy.

The agreement between the members of the criminal association must agree on the distribution of roles. There has to be a mastermind, "Al-akel al-moudabbir" in Arabic, and individuals who carry out the crimes. This is stated clearly in the decision that I have just quoted, decision of the Beirut Indictment Chamber dated November 14th, 2005, which affirms that a criminal association exists when there is a structured organization that includes, in particular, a mastermind, a plan, and a distribution of roles. Again, this is confirmed in the April 17th, 2002, decision of the 3rd Criminal Chamber of the Cassation Court, presided by Presiding Judge Afif Chamseddine, dismissed the appeal.

In its judgement, the Criminal Chamber confirmed the acquittal of the accused of criminal association under Article 335 of Lebanese law,

stating that the distribution of roles had not been clearly proven.

Therefore, this is again -- this was again confirmed by the 6th Criminal Chamber of the Cassation Court in its December 10th, 2015, ruling. Whereas Article 335 of the Lebanese Criminal Code requires that an agreement lead -- involve an organization and a structure inasmuch as there is a distribution of roles amongst the members of said association and that there be a mastermind who plans the joint criminal action.

I'm being told that I need to speed up. Well, maybe not too fast. Just the same.

One last point regarding criminal association in Lebanese law. Under Article 335 in the Lebanese Criminal Code, a criminal association is defined as: "An agreement, the goal of which is to commit a plurality of crimes against persons," in the plural, "and property," in the plural. Why do I insist on this plural? Simply because a criminal association does not have for its goal the committing of clearly targeted crimes, and this is exactly what the Prosecutor has not been very clear upon.

If you look at the ruling of the Mount Lebanon Criminal Court decision dated February 1998, again quoted by the Prosecutor in his observations, in that indication, the accused agreed to rob the property of two specific persons. The criminal court stated, and I quote:

"The accused was tried before the court under Article 335 of the Lebanese Criminal Code. The essential element in a criminal association such as defined by the Article is the commission of crimes against persons and property," in the plural, and plural emphasized.

"... on the condition that the individuals not be specifically

targeted by said crimes. Therefore, the elements of crime indicated in Article 335 are not satisfied and the accused is acquitted on these grounds."

This is confirmed again by the Cassation Court. And again in the Antonio brothers case, dated April 12th, 1994, let me quote again page 68 of that ruling:

"The accused reached an agreement amongst themselves to work together in order to commit a crime against persons and property, in particular the crime of car theft. They did so in general terms and without specifically detailing the crime or identifying the victims. This is the crime under Article 335 of the Lebanese Criminal Code."

So you see, I believe that these main rulings in Lebanese court law show that the crime of criminal association does not apply, for example, in the Ayyash et al. case. And that is in fact what the Prosecutor concluded in 2012 when he submitted his indictment, because at the time he only prosecuted them for conspiracy.

In five minutes, in order to deal with the issue of cumulative charging, if I may, I believe that Lebanese case law excludes the possibility in the case that it would appear that the Prosecutor is considering, although, of course, we don't have the content of the indictment, I'd like to make two points before I conclude.

[6]The Prosecutor, in 2011, took a very clear and precise decision, as did the Chamber, on cumulative charging, as did the Lebanese jurisdictions, as has been the case in the various international criminal courts that the Prosecutor is relying upon.

In fact, what's happening here is that the Prosecutor doesn't like your 2011 judgement and basically is asking you to reconsider it. I believe that that ruling provides all of the necessary instruments for the Pre-Trial Judge to make the decisions necessary as regards the concrete facts included in the indictment.

However, only the Pre-Trial Judge and the Prosecutor are familiar with the contents of that indictment. You and I may only make a ruling in abstracto and without knowing the specificities of the indictment. And let me note that in 2011, the Chamber itself had difficulty responding to Question 15 of the Pre-Trial Judge, saying that the Chamber found itself at the limit of what can be done in abstracto, and in my humble opinion, we're in the same situation today.

I'd like to conclude again on the issue of cumulative charging. The Pre-Trial Judge put forward a very clear question. In this particular case, in this particular case, based on our understanding, there were several attempts or assassinations against Lebanese politicians. Can the Prosecutor plead both conspiracy and criminal association? In reading the Chamber's judgement, the only answer can be no.

The Prosecutor quotes, for example, the Ongwen case. But what exactly is involved in the Ongwen case at the ICC? We are talking about dozens of attacks where there were murders, rapes, looting, and it's fairly easy to understand the difference between these various crimes. But if I were to ask you which crime we're referring to when you talk about an agreement between several individuals in order -- with the

purpose of assassinating several Lebanese politicians, what crime am I talking about? Am I talking about conspiracy? Am I talking about criminal association? I don't know, because there is no basic difference between the two crimes. And it's so obvious that the Prosecutor himself, when he defines criminal association, he quotes himself the elements of the crime of conspiracy.

My colleague, Caroline Buteau, will respond later, if you will, if you have any questions on cumulative charging.

Madam President, I have stated what I had to say about cumulative charging. Thank you very much, Your Honours.

PRESIDENT HRDLICKOVA: Thank you. Thank you very much, Defence Office.

If you don't have another submission, we will adjourn for 20-minute break and then we will continue with the questions from the Judges. Or do you have another submission, Mr. Roux?

MR. ROUX: [Interpretation] I thought we had another eight minutes to finish our submissions on the questions put forward by the Pre-Trial Judge. If you don't mind, we would like to continue now, or we can do it later?

PRESIDENT HRDLICKOVA: No, of course. You have up to five, six minutes to finish, then we will adjourn for a break, and then Judges will have time for questions.

So please.

MR. ROUX: [Interpretation] Thank you very much. I'd like to make a few additional comments regarding the role of the Pre-Trial Judge,

because we do not agree with the OTP as to what the Pre-Trial Judge can and may do as regards the indictment that has been submitted to him.

The Office of the Prosecutor references ICTY case law, and in the first case, as in STL-01, the Pre-Trial Judge also referred to that case law but improved upon it in order to define prime facie evidence. But here this is not the ICTY. And although this may be incontestable, the STL has made it possible for international criminal law to make considerable progress, in particular in the setting up of the Pre-Trial Judge or the setting up of the Defence Office as an independent organ.

So regardless of the wealth of ICTY case law, that cannot call into question and endanger the future in this institution because it is part of the past. In other words, you cannot build up the future while continually looking toward the past in your rear-view mirror.

This Tribunal is a specific tribunal. The Pre-Trial Judge was created. He has specific functions. His function is to analyse the draft indictment in order to determine whether it contains all of the necessary elements to confirm the indictment. And the questions put forward by the Pre-Trial Judge are particularly relevant. He's saying the Prosecutor is presenting evidence in support of this indictment that have already been examined and discussed in this very courtroom by the Ayyash Defence counsel. And therefore, the Pre-Trial Judge is asking whether or not he can examine the debate that was held on those pieces of evidence. After all, it was done in open court.

Imagine that if in the evidence used by the Prosecutor in support

of his indictment, imagine that in this very courtroom we were to discover that a witness had lied, had made false testimony. Now, should the Pre-Trial Judge just be blind and deaf to such a situation? So those are extremely interesting questions that the Pre-Trial Judge has put to the Chamber: How far can we go? In other words, can he check the elements that have been already discussed in the main case, in particular since some of the supporting elements are identical. At least that's what we're told.

In his Explanatory Memorandum on Rules of Procedure and Evidence drafted by the late Judge Cassese and supported by Judge Baragwanath, Judge Cassese recalled that the Pre-Trial Judge was created as a neutral organ. And he added the following:

"An organ that must not be contaminated by contact with evidence. The Pre-Trial Judge in the Special Tribunal for Lebanon must examine in a free way the evidence presented."

In other words, the Pre-Trial Judge is a sort of filter. And if he is to examine the indictment, it is from the point of view of a filter. And that is how he must determine whether or not the evidence is sufficient and credible; that is, the evidence submitted by the Prosecutor.

As we read through the OTP filings, we have the feeling that the Prosecutor considers that the procedure before the Pre-Trial Judge is a mere formality, and that the Pre-Trial Judge is a sort of administrative agent who must simply stamp the indictment without actually evaluating the sufficient and credible characteristic of the evidence provided.

This is not our interpretation. We believe that the Pre-Trial Judge must, and this is in the interests of justice, I insist, in the interests of justice, the Pre-Trial Judge must check the evidence, because otherwise what's the purpose?

The very purpose of the Pre-Trial Judge is to avoid sending a case before the Trial Chamber which would merely end with an acquittal. So, basically, the Pre-Trial Judge is a filter. He is an independent Judge. And he plays this role as a filter, all the more so that the Defence is not involved in this stage of the procedure. It's not the same thing as the ICC where the Defence is present during the preliminary chamber to discuss the evidence during the pre-trial phase.

But here we have a single Judge who doesn't represent the Prosecutor or the Defence. He is an independent Judge who examines the indictment and the evidence with the independence of a Judge.

Your Honours, those were the comments that we wish to make. But let me add just one thing. We've discussed the responsibility of the Pre-Trial Judge, but let me recall the responsibility of the Prosecutor in an international tribunal, and here I would like to refer to the ICTY case law that our learned friends tend to like so much, the Kupreskic case in particular. And it was Judge Cassese himself who presided over the case, and he stated:

"The Prosecutor in the Tribunal is not or at least is not only a member of the adversarial process but a member of the organ itself of the international court. The purpose is not just to obtain the conviction of the accused but to present inculpatory as well as exculpatory evidence in

order to contribute to the work of the Chamber."

Let me add one more thing, if I may. I would like to quote a Canadian case law, it's the Canadian Supreme Court, where they said, and this is a free translation on our part:

"We can't insist too much on the fact that the goal of a criminal court is not to obtain a conviction, but rather to present before a jury credible and relevant evidence which proves the existence of a crime. The lawyers must take care that all of the available legal evidence be presented, and this must be done in a very firm fashion on the basis of their probative value in an equitable fashion. The role of the prosecutor excludes any idea of victory or loss. The function of the prosecutor is a public responsibility and there is no greater individual responsibility. It must be exercised with dignity, gravitas, and a sense for the judicial procedure."

Thank you very much, Your Honours.

PRESIDENT HRDLICKOVA: Thank you, Maître Roux. We will now proceed with a short break, and we will reconvene five minutes past 12.00 with the questions from the Bench. Thank you.

--- Break taken at 11.47 a.m.

--- On resuming at 12.04 p.m.

PRESIDENT HRDLICKOVA: So far we heard submissions from both the Prosecution and Defence Office on the preliminary questions posed by the Pre-Trial Judge to the Appeals Chamber.

Now my esteemed colleagues and I will put further questions to the Prosecution and Defence Office. I will start with Judge Chamseddine.

He has questions.

JUDGE CHAMSEDDINE: Okay. Thank you, Madam President.

[Interpretation] I will be asking my questions in Arabic. First of all, I will start where the Defence Office has finished.

The question is addressed to Mr. Roux or to one of the members of his team. You've said that there must be some material facts in order for the agreement to be complete -- or material acts. But what about what was stipulated in Article 335? The Article stipulates or talks about a written or oral agreement with a view to commit felonies against persons or property.

If we read the last paragraph, it reads the following:

"However, any person who reveals the existence of such an association or agreement and divulges such information as he possesses regarding the other offenders shall be exempt from punishment."

Does this paragraph or this stipulation mean that the agreement exists, in fact, and that the material acts have not been materialized yet, that the situation is limited to an agreement?

And the second paragraph of Article 335 exempts from punishment any person who reveals the existence of such an association. So any such person that divulges the existence of an association means that the association has not been known yet. It's still unknown, and we don't know the material acts committed by its members. Do you still insist on saying that the material acts are essential and are considered as an element of this crime and of the agreement? In my opinion, these material acts could be a means of proof, not more than that.

But before I hear your answer, I would like to point out that the decision rendered in 2003 regarding the hierarchy -- regarding the hierarchy within this association. I would like to point out that the facts, perhaps, in this case requires us to point out the existence of an agreement, but we rendered another decision in 2008 that is completely different from the previous decision.

And now I would like to hear the answer to my question.

MR. SOUFI: [Interpretation] Thank you very much, Your Honour, for your question.

First, obviously this is my construal of Lebanese law, but it's also that of the Prosecutor, in 2012, which proves, I would say, that this isn't just an argument that is a flight of fancy on my part.

Second, in my view there is a distinction to be drawn between the requirement of preparatory act or a positive act, and this is a question put by the Pre-Trial Judge: Should there be a positive act? And for the crime to be consummated -- I'm not saying that the crime, well, the crime is planned. Let's say there's a theft. I'm not saying that the theft has to be consummated for the criminal association to be proven. And this is what stems from Lebanese case law. At the very minimum, there needs to be a positive act which is evidence of the agreement. Why? Because what the Lebanese legislator says, similar to the French legislator, because we have a similar statute in France, what they tried to avoid is that a simple joke, let's say, or -- I don't know, an act of choler or anger should be construed as guilt for people who gather together.

So by requiring a positive act, what the Lebanese legislator is requiring is that there is something demonstrable, that there is a demonstration of intent when the gathering of individuals is consummated. And to pick up more tangibly upon your question, the last paragraph on 335 doesn't have any incidence on what I said.

It would be dangerous in a democracy, I would say, to have a crime which would be easy to prove, because how does the Prosecutor -- how could the Prosecutor establish a criminal association if there is absolutely no positive act which shows that the accused at the time of the agreement had in his mind the criminal intent. And in my view, that's how Lebanese case law are not in principle judgements.

When you think about all that's been put forward by the Prosecutor, the Lebanese triers of fact have indicated unambiguously what is sought to be achieved by members of the association. This could be preparatory acts, they could be purchasing a car, for example. It's not necessarily a criminal act per se. It could be purchasing a car. That's not in and of itself criminal, but it is a positive act which demonstrates the intent, the criminal intent, and this is something that has to be proven by the Prosecutor, and this is a material act.

JUDGE CHAMSEDDINE: [Interpretation] I would like to go back again to paragraph 2.

If the legislator really wanted to say and wanted to talk about a positive act, acts that have been materialized, he would have talked about a person that divulges such an association or its acts and actions. The legislator simply mentioned anyone that divulges or reveals the

existence of such an association. Simply put.

MR. SOUFI: [Interpretation] It strikes me -- and this is why the Prosecutor muddles up conspiracy and criminal association. It strikes me that the fundamental component of this offence is the agreement, which doesn't mean that it's the only element. No. But it is a fundamental component. It strikes me as quite natural that the Lebanese legislator required or provided for in the second part of this article that what needs to be divulged is the agreement, not the positive act.

To reveal the purchase of a car, for example, is of no interest criminally. What he needs to be divulged by that person is the agreement, the agreement between the members of the association with a view to commit a crime. That is what society is being safeguarded for. And this provision that you're going to doesn't contradict the Defence Office's construal of Lebanese case law.

PRESIDENT HRDLICKOVA: Judge Riachi.

JUDGE RIACHI: [Interpretation] I didn't want to interrupt the exchange between His Honour Chamseddine and yourself, but you're talking about positive acts.

Does that mean a preparatory act or the initiating of an act? Because there is a big difference between a positive act which is preparatory and a positive act as the initiation of some criminal conduct.

MR. SOUFI: [Interpretation] A positive act means that you are consummating -- you're materializing, cementing the agreement. Of course, there needs to be an initiation of the crime. But we are talking

about the materialization here. The difference is that for theft, for example -- and let me just take up this example again.

Theft, the initiation of theft, does it initiate at the moment when -- when you burgle a house, when you enter the building or when you enter the car? From what I understand, the purchase of a car could be construed as one positive act. But it strikes me also, and this is what the Prosecutor says in 2012, you need several positive acts.

JUDGE RIACHI: [Interpretation] Yes, but these crimes, criminal association, 710, 720, I think, those provisions go to conspiracy. That doctrine tells us that these are buffer crimes; in other words, crimes that will stop the commission of more important crimes. Do you think these crimes were envisaged by the legislator solely to penalize preparatory acts that are not punishable per se, whereas the initiation is.

And when you're initiating execution, are you in the criminal phase that you wanted to avoid in the first place? Well, let's be clear then and say: Are we, for those two crimes, in a preparatory phase, which is not punishable in theory but it could be; or are we initiating the crime? And that begs the question if the execution is already initiated of the crime that we wanted to safeguard in the first place by punishing the agreement? You see? We need to be clear on this. And I'd like to hear what you say about this.

Because if you say positive act, positive act, but what is a positive act? Okay, a concrete -- or cement [as interpreted], rather, consummates something, but a preparatory act, is that a material act that

also needs to be demonstrated?

MR. SOUFI: [Interpretation] What I would like is to see the Prosecutor giving us the indictment. That way, I could be very hands-on in my answer, by drawing on the indictment to say whether we are talking about the initiation of the criminal conduct or the positive act. And this is why, really, I took the example of theft, because I don't know what the Prosecutor is putting forward.

So I think it really depends on the facts. And I defer to your wisdom.

JUDGE RIACHI: [Interpretation] We don't need a fact here. You're already saying that we need a positive fact, so somewhere or other you are talking about an act. But I'm telling you: Can you define this material act? Is it preparatory, or are they conduct that initiates the crime? If you know the purpose of the crime, crime which is a buffer crime, well, then, we can decide whether it's preparatory or initiation.

If you're saying that there is initiation, well, then, of course, that leads us into another phase which goes beyond 335 and the scope of conspiracy.

Please, you don't need to answer.

PRESIDENT HRDLICKOVA: Thank you.

Judge Chamseddine, do you have another question? Because Judge Nsereko wanted to ask a question. Do you have another question?

JUDGE CHAMSEDDINE: Yes, yes.

[Interpretation] My question is now addressed to Maître Roux, and it pertains to the last question that was asked by the Pre-Trial Judge,

and that is Question D. This question is divided into three parts, and, Mr. Roux, you did not answer sufficiently in your submissions or in your oral submissions about this question. You did not provide enough submissions on that. And my question relates to the following: Can the Pre-Trial Judge [In English] assess the credibility and the reliability of the evidence presented -- presented by the Prosecutor [Interpretation] Can the Pre-Trial Judge or to what extent must the Pre-Trial Judge assesses the credibility and the reliability of the evidence presented by the Prosecutor?

The second question relates to the supporting material in the Ayyash et al. case.

And the third part, which you discussed right now, you asked whether the Pre-Trial Judge can himself [In English] does the fact that the content of those discussions which have not been submitted to him [Interpretation] Or the -- the question relates to the fact that the content of those discussions has not been submitted to him pursuant to Rule 68(B).

So is it possible for him to become aware of these matters publicly, that are publicly available? I would like to know exactly what is your opinion on this matter.

MR. ROUX: [Interpretation] Thank you, Your Honour, for your question. For lack of time earlier on, I couldn't expand on my submissions. I'd like to thank you for your question which enables me to provide greater clarity.

Let me refer you to a decision that was used in the Ayyash case

by the Pre-Trial Judge, decision 28th of June, 2011, paragraph 25 of said decision, where the Pre-Trial Judge, without being challenged by anybody at this Tribunal, defined his role as follows. He says, and I quote:

"It is worth rapidly recalling the underpinnings of the procedure for confirming an indictment. Its purpose is to safeguard, guarantee the fact that a person is not prosecuted nor tried without an impartial Judge, an independent Judge has been able to ensure beforehand that the indictment going to that individual is built on credible and sufficient evidence in order to set in train criminal proceedings against him."

JUDGE CHAMSEDDINE: [Interpretation] What's the source? What -- credible source, but what source?

MR. ROUX: [Interpretation] It was very interesting. Very instructive. The Judge cited the ICTR case law, because that had already established a Pre-Trial Judge. And then the Kordic case, paragraph 4, cited by the Judge, says.

"The Judge replaces" -- this will ring a bell, Your Honour, "fulfils a function similar to that of an investigating magistrate."

So if you will, this is where it's going to be difficult to understand -- have an understanding with our common law friends. They don't have an investigating magistrate, because here we have a Pre-Trial Judge whose functions are similar to an investigating magistrate, but with this particular circumstance that with an investigating magistrate there is a Prosecutor and a Defence.

But here there isn't Defence. There is only the Prosecutor. Consequently, if you are talking about what is the deep-seated role

incumbent upon the Pre-Trial Judge, well, to safeguard the Defence's interest and, as the Judge says, to make sure that we don't get embarking upon proceedings that will prove useless, where evidence will be confronted and tested later on.

So the Pre-Trial Judge has he himself used these words, credible and sufficient evidence. That's the first answer I would like to provide.

Second question, which is what he puts, he tells us: Can I -- according to you, can I go and consult debates on evidence that have taken place in this very room? This is a difficult question. We would all agree on that. This is a difficult question because the Pre-Trial Judge cannot substitute the Trial Chamber with regard to debates over that evidence. But, of course, he cannot cast out of mind the debates that have occurred in this court and sometimes the highly relevant submissions made by the Defence during the in-chief examination of the witness. He cannot close his ears nor his eyes.

So in my view, the Pre-Trial Judge, going to these matters, is urging us to -- to be creative. Only yesterday evening I heard the words of a philosopher who said it's not worth only remembering -- not only remembering, you have to invent. And, Madam President, in this Tribunal we are inventing law because a Pre-Trial Judge, such as here, is totally new. Now, we can refer to the ICTR, but those references are not sufficiently pertinent to characterize the circumstances before us now, a Pre-Trial Judge who is seized of a connected case. We are not talking about entirely distinct set of proceedings. We are talking about a

connected case flowing from the main case that he was also seized of. This main case for the last four years has convened people in this room. You cannot ask the Pre-Trial Judge to imagine that all that doesn't exist.

And for my part, I am in favour of you saying that the Pre-Trial Judge, of course, yes, you can know what has been said about that evidence. Thank you very much.

PRESIDENT HRDLICKOVA: Okay. Thank you, Judge Chamseddine.

JUDGE CHAMSEDDINE: Sorry, one more. One more.

PRESIDENT HRDLICKOVA: Okay. One more question.

JUDGE CHAMSEDDINE: [Interpretation] My question is to the Prosecutor.

If we suppose that one member of the association is the one who committed the crime alone. So the agreement was concluded between all the members; however, the person who executed the crime was one of the members. In your opinion, can you prosecute all the members of the association for the crime that was committed regardless of the agreement of the -- the crime of the independent agreement that had taken place, and on which basis can you prosecute them as perpetrators, co-perpetrators, accomplices, or instigators?

MR. FARRELL: Merci. Thank you for your question. If I understand your question, I'll repeat it to make sure that I get it correctly, if that's okay.

The question is when there is a number of people involved in an agreement and one of them executes the crime itself, whether or not all

members who were engaged in the agreement can also be found guilty of the crime that was executed. Is that my correct understanding? Right. Thank you. Then I'll proceed. Thank you.

Without trying to limit the question, it quite frankly depends on the facts. They all can be convicted of the agreement. That's clear in my submission. And the one individual can be convicted of the execution of the crime. That's clear.

It would depend on what the nature of the agreement is and what the nature of the act was. If they were in any way providing support by the agreement, and the other Tribunals, including the ICTY, has said that the simple act of agreeing to or encouraging someone to carry out the crime could be aiding and abetting or complicity, then, yes. If on the facts of the case those in the agreement are carrying out an act which encourages or supports, there is the possibility for complicity, aiding and abetting. At least in the jurisdiction that I'm aware of.

If by agreement they agree to provide other means of support that are not the execution of the act but contribute to its commission, then that would be a basis. Again, aiding and abetting. If they all -- there is one argument, but it once again, it would depend on the facts. If they all agree on the common purpose -- and I'm not familiar with the Lebanese law on this, so I defer. But if they all agree on a common purpose and they all contribute in a significant manner to that common purpose, through their encouragement, through their words, through their support, and then one person goes out and executes the act, that they could also be liable in some form for the execution of the act.

So legally is it possible? Yes. Factually, it would have to depend on the particular facts of the case and the roles and acts that were undertaken.

PRESIDENT HRDLICKOVA: Thank you.

And thank you, Judge Chamseddine. Are you satisfied with the answer? Thank you.

Now, Judge Nsereko, do you have a question?

JUDGE NSEREKO: Madam President, I yield the floor because my question was covered by my brother Chamseddine. I need not repeat it.

PRESIDENT HRDLICKOVA: Thank you.

Now, Judge Baragwanath, do you have a question?

JUDGE BARAGWANATH: Thank you. Two points.

One, at my request there has been distributed the leading English text on criminal pleading, which at page 5 to 9, top half, discusses a case called Galbraith and decisions following it, which bear the common law on the concept of prime facie. I have no questions relating to it but provide it to counsel in case it's of any interest to them.

My questions are directed to both the Prosecution and to the Defence, and I would invite your response in that order, if that's convenient to you, because it concerns a matter on which you are agreed as to the interpretation of Article 335, and in particular the meaning and significance of the plural expression "felonies." In Article 335 that says:

"If two or more persons establish an association or enter into a written or oral agreement with a view to commit felonies against persons

or property," and then the second new bit, "or to undermine the authority of the State."

And you have agreed, and there is authority supporting you, that felonies denotes plurality, that there must be more than one felony in contemplation.

My question arises from what in its first decision this Appeals Chamber discussed under the concept of how you construe legislation. Now, it's perfectly clear, as the decisions I'd mentioned show, that it is possible to interpret the provision as referring to plurality; in other words, there must be more than one felony in mind.

And my question is to invite consideration of whether there is a second one, and if so, whether the second one could be preferred. And this is whether any of the crimes are to be classified generically as felony.

Now, the former construction, the one on which you are agreed and supported, as I say, by authority, ascribes importance to exceeding the number one - there is more than one - crime. The possible alternative ascribes importance to belonging to Lebanon's list of felonies. I say list, there is no formal list, and I mean simply the totality of all the relevant felonies to be found in Lebanese law. In other words, a reference to the generic rather than to plurality, and contrasting the graver crime with lesser offences; notably, misdemeanours.

When you stand back and look at it, self-evidently a single felony may be of immense dimensions. That's something that -- of which judicial notice may be taken. And that raises the question: Is there a

logical reason to adopt a numerical rather than generic criterion.

I invite you now to turn to the 2011 judgement of this Chamber at page 51, paragraph 19, where there was recognized "the spectrum of meanings that words, and especially a collection of words, may have." And it may be, I suggest, that there are two possible ways of viewing the collection of words here.

If one goes on then to page 61 of the judgement, paragraph 36, the judgement says we are to:

"... stand back and identify the principles that express the state of the art in Lebanese jurisprudence."

Then we go back to page 55, paragraph 28, the Vienna Convention, which imposes the responsibility to construe text "in good faith in accordance with ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

And some of you will recall President Cassese speaking about teleological interpretation, purpose of interpretation in this context.

At paragraph 29 it is said, and this is of present relevance:

"Contrary to what has been argued by the Defence Office," in that case, "the presence of teleological interpretation based on the search for the purpose and the object of a rule with bringing to fruition as much as possible the potential of the rule, has overridden the principle in dubio mitius (in case of doubt, the more favourable construction should be chosen)," in favour of the Defence.

And then at paragraph 30, it's said:

"An element of teleological interpretation is the principle of

effectiveness ... (... that a rule be effective rather than ineffectual)."

It should have appropriate effect.

Now, those are the principles that I would invite you to consider answering in my question. In terms of effectiveness, if there is a really grave crime in question, and take the 9/11 attack on the towers in New York, something that is great and criminally grand, is there any good reason to exclude that from the ambit of Article 335? Why should a mere number matter? That's my question.

Mr. Prosecutor.

MR. FARRELL: Thank you for question, Your Honour.

The provision as read or as cited, as you've noted, Your Honour, indicates the word "felonies." And if I understand the initial comments, that the proposition could read that the felonies are a generic reference to all the crimes that are listed. Not that it requires a plurality of crimes to be agreed to. And that interpretation would be on a teleological or on a purpose of approach be one which would meet the underlying object and purpose of the crime, which is to ensure that people entering into agreements for such serious crimes -- and these crimes in this case are crimes under state security, authority of the state, prestige, and could in -- sorry, they include the authority of the state and the prestige of the state, and have been included in the case law to incorporate state security concerns, concerns that go to the fundamental nature of the fundamental interests of the state, particularly internally.

I guess, taking a bit of a guarded approach, but I don't think the provision itself precludes the generic interpretation. I don't think the wording of it as such precludes the generic interpretation in light of what comes after the word "felonies," the categories of crimes. Those being the plural, not the individual felonies. To that extent, I would agree.

If the purpose is, as it appears to be, to capture crimes that would include crimes that go to the very authority of the state, then that would also be an interpretive tool to understand what the objective and purpose is. So in that respect, I would think that that would also support the interpretation of the generic over the plural.

So to that extent, I would submit that that is a plausible potential reading of the article. I must admit I hadn't thought of it, but it is one.

The only thing, to be fair, I should note is that my understanding of the jurisprudence, and having reviewed it, is that they have -- the jurisprudence has required a numeric, a number, and has identified that as being in the plural and specifically addressed it. So the interpretation given by some of the cases cited goes to felonies in the numerical sense, not in the generic sense of those listed afterwards.

Does the provision itself preclude it? I don't think so.

JUDGE BARAGWANATH: I stand to be corrected by my learned brethren who are masters of Lebanese law, but on my reading of the cases, some of which indeed support the numerical approach, I have not seen a discussion of the generic concept or the principle. And so from that

point of view, in the common law at least, there would be no impediment to adopting the generic approach, because the matter simply was not debated.

MR. FARRELL: I could not find any case law that addressed that either specifically in terms of the different interpretations of the word in a definitional sense.

I have one comment on the Galbraith. If you wish me to raise it now or to do it later.

JUDGE BARAGWANATH: It's entirely in your hands --

MR. FARRELL: Just --

JUDGE BARAGWANATH: -- whether you do or don't.

MR. FARRELL: All I wanted to say is that if the Court is to consider Galbraith, and I accept it for what it says, obviously, under UK law, and looks to analyse whether or not and to what extent issues of credibility and reliability fall within the jurisdiction of the Pre-Trial Judge. In addition to the submissions, I'd also ask you simply to look at the Appeals Chamber in Karadzic. It addresses a similar aspect that Galbraith does and it interprets the word "no evidence," which is what Galbraith interprets, whether there is no evidence upon which -- and it interprets that as the evidence must be, at the prime facie case, incapable of belief.

So there is a similar jurisprudence though it is at the no case to answer, the motion for acquittal stage. But I can appreciate how that can be relevant and I simply draw that your attention.

JUDGE BARAGWANATH: Karadzic has the advantage of being an

international case, and Galbraith lacks it at their advantage. Thank you.

MR. FARRELL: Thank you very much, Your Honour.

JUDGE BARAGWANATH: Maître Roux.

I'm sorry, Mr. Soufi.

MR. SOUFI: [Interpretation] Thank you, Your Honour, for your question.

We mentioned earlier that we needed to be creative. As regards the role of the Pre-Trial Judge, there is no creativity to be had in terms of the criminal law, which is interpreted in strict fashion. Lebanese law is clear. It refers to felonies, in the plural, "commit felonies." So in a civil law system, if you use the plural it's quite clear. If there are crimes, misdemeanours, et cetera, we are talking here about the most serious crimes, the plural is not the same as the singular. Therefore, I believe that the interpretation here is obvious.

Let me, however, respond to the question that you put forward, the 9/11 attack, an agreement to commit a very serious crime. Your Honours, with all due respect for common law, this crime has already been provided for under Lebanese law. It's called a conspiracy. That was the very subject of what I stated earlier this morning, that is, what the Prosecutor seems to be trying to establish is a conspiracy.

So I don't think we need to discuss any further what's included in the plural of the word "felonies." It's obvious -- as you stated, it's already covered under Lebanese law.

Let me also emphasize that the 1958 law that the Prosecutor has

quoted in the Hariri case, it's exactly the same situation that is provided for in Lebanese law. There is no lacuna in Lebanese law as regards that issue. Therefore, I believe we need to keep to the precise terms that the Lebanese lawmakers decided upon.

Thank you.

JUDGE BARAGWANATH: Merci, Maître Soufi.

PRESIDENT HRDLICKOVA: Mr. Roux, would you like to add something.

MR. ROUX: [Interpretation] Well, let me just respond to Judge Baragwanath regarding the Pre-Trial Judge and the case law that you provided to us. Thank you very much.

As you recalled yourself, this is a ruling in a common law system, and we have had the opportunity, last year in fact, to attend a hearing in London presided by the excellent Judge Topolski, and it was interesting to see what a English judge does when he speaks to the jury. He explains the arguments developed by the defence, the arguments developed by the prosecution, and he makes a remarkable legal synthesis of the situation in an adversarial fashion. And in fact, the judge does not take any position.

In common law, the judge is a mere arbiter. That is not the situation of the Pre-Trial Judge in this Tribunal. And if I may, Judge Baragwanath, in the explanatory notes of -- you yourself commented on the role of the Pre-Trial Judge in paragraph 14, and you in fact modified paragraph 14 the way it had -- as it had been initially drafted by Judge Cassese, and let me read out your very own words, which is very precise and interesting. You state:

"All of these provisions enable the Pre-Trial Judge to take on the role of an independent and neutral actor operating in the exclusive interest of justice. This contrasts with the adversarial model which is substantially based," et cetera. This refers to the ruling you provided to us "substantially based on the notion that a trial unfolds as a contest between two opposing parties. By the same token," as you say, "the public interest in fair and expeditious justice is notably bolstered."

I approve fully your drafting of paragraph 14, Judge Baragwanath. Thank you so much.

PRESIDENT HRDLICKOVA: Thank you. And thank you, Judge Baragwanath, for his question.

Now I would like to invite Judge Riachi.

JUDGE RIACHI: [Interpretation] I will talk first to the Prosecutor, then get back to the Defence Office.

Regarding the Prosecutor, I have a remark and I have a clarification to ask. Regarding my remark, it happens that I agree with what has been said by the Prosecutor regarding what was submitted in the list you provided us with, and what leads me to tackling this issue is that in your list you quote the Chamber I was heading in your submission and you say things I haven't said at all. So you make me say things I didn't say.

In page 18 of your filing, you rely upon Decision 252 of 2005, dated 4th of October, 2005, that was published by Cassandre, issued by the 6th Criminal Chamber of the Cassation Court that I had the honour of

presiding during that period. You say that this decision proves that in order to implement Article 335 the Cassation Court says that there should be many felonies, and in that you are confusing the facts that come in the case, "cas d'espèce," and the legal conditions.

In that case and in the topic that was submitted to the court, there were many crimes, many felonies, and there was a case based on Article 335. The Cassation Court did not say in this decision that there should be many felonies, but it has enumerated the crimes subject of the indictment. And it has said that the case that was submitted will not be related to the number of felonies, but this case applies to Article 335.

So you have to take into account that this decision does not stipulate as a condition for the implementation of Article 335 that there should be many felonies, because this decision has not mentioned anything in this regard as we have seen in your filings.

Another remark in the same context. In page 10 of your submission, namely in line 1, you say that the criminal association or the crime of criminal association is established whether there is an agreement on the means to be used or not. I will not delve into analysing this, but you say that while relying upon the encyclopedia of late Mr. El-Zogbhi in page 33 as we read in your submission.

I went to this page and I have not found anything related to the issue of criminal association. But what we read in this page is related to conspiracy and not to criminal association.

Now I would like to ask you for a clarification regarding what you have mentioned in page 5, what we find in footnote number 18 of this

page. You say there that Article 335 of the Lebanese Criminal Code takes into account for its implementation felonies against persons and property. Then you continue to say and regarding crimes of undermining the authority of the state, its prestige, and institutions, this may include misdemeanors as well as felonies.

Can you explain how did you come to this conclusion from two similar places in order to reach this conclusion, this result, since you consider that felonies against persons and the property, here Article 335 of the Lebanese Criminal Code applies. But here we are talking about the same article and then you mention misdemeanors in this regard.

So can you explain to us this position? Thank you.

MR. FARRELL: It's my understanding -- thank you for your clarifications, Your Honour, and for addressing those.

In terms of your question arising from this part, it's my understanding that you're referring to the footnote in the Prosecution's filing footnote 18, that's the part referred to? Thank you. Where it says:

"Since the Lebanese Criminal Code only refers to felonies in the part against persons and property."

I should indicate that, partly in light of your question but also partly in light of a review of the article, that I would submit that it's felonies only.

JUDGE RIACHI: [Interpretation] In that you are withdrawing what you have mentioned in the footnote 18, if I understood you well? Thank you.

MR. FARRELL: Yes. If you could just grant me one moment so I can just check with my colleague on that matter. But, yes.

[Prosecution counsel confer]

MR. FARRELL: We maintain the position I've just articulated and thank you for allowing us the clarification.

JUDGE RIACHI: [Interpretation] I would like to confirm again: Do you still maintain your position regarding footnote 18 of your submissions?

MR. FARRELL: If you can allow me one minute, Your Honour.

The Prosecution maintains the position. The point that my colleague was simply drawing to my attention was that footnote 18 was a reflection on the fact that Article 335 mentions both undermining the authority of the state and the prestige of the state.

Prestige of the state, as you know, is under state security, Article 295 to 298. Articles 296 to 298 are misdemeanours. And therefore there could be an open interpretation that since the prestige of the state crimes, as articulated in the Lebanese Criminal Code, are misdemeanours and prestige of the state is listed in Article 335, it could remain open that it include misdemeanours in particular in relation to the provisions of prestige of the state which are listed particularly in the code as misdemeanours from 296 to 298.

We maintain the position, though, that in light of the case law it refers to felonies.

JUDGE RIACHI: [Interpretation] What you are saying with regards to Article 335, and it is entitled -- or which talks about the prestige

of the public authority, and that doesn't necessarily mean the government. It is exercised by the state but it is not the state itself. The prestige of the state itself is different.

This paragraph talks about misdemeanours, if my memory is still -- still serves me well. And there is one aggravating factor that talks about felonies. If you are referring to this paragraph in particular, that means that this pertains only to misdemeanours, because the article that you are referring to does not mention felonies, Article 335.

There is an aggravation of misdemeanours but they do not talk about felonies. So if you want to really interpret that article, you need to interpret it within the context of Article 335 and the following articles of the Lebanese Criminal Code. This is how I understand it.

Or you retract what you have said? But this is something that is up to you.

MR. FARRELL: I maintain the position I have taken since I've stood up, which is that we retract what we've said in the footnote. I was simply trying to explain why there was some confusion in the filing of the Prosecution. But thank you for the opportunity to clarify that and for the --

JUDGE RIACHI: [Interpretation] Is this your final position? Your final position is that you are retracting what you have mentioned in footnote 18?

MR. FARRELL: Yes.

JUDGE RIACHI: [Interpretation] Thank you. Thank you,

Mr. Prosecutor. Thank you very much.

I would like now to address a question to the Defence. I was surprised to see your interpretation of Article 335, and you come from the school of civil law. You explained it by saying that it stipulates committing several felonies and not just one simple felony.

I would like to clarify the following: If you consider that you should interpret literally the text of Article 335, this means that when implementing that article, we should not talk about the existence of two felonies. That's not enough. There must be three or more. Because the word "felonies" in Arabic is a plural, and the plural is more than two.

If the Lebanese legislator wanted to limit this to two, they would have said in Arabic or used the plural "for two." But when they mentioned the plural in Arabic, they mean multiple felonies, and that means more than three.

So if we adopt this interpretation, that means if there are two felonies only, then Article 335 does not apply. Do you agree with this?

MR. SOUFI: [Interpretation] I'm going to answer straight away. But I would like to provide a correction to the transcript. I heard you criticize Prosecution submissions by saying that you were in agreement with the Defence. I heard this in Arabic. But in French and English, it says that you agree with --

JUDGE RIACHI: [Interpretation] I said that I agreed what was featured in the documents, and the differences that are not constant with truth. But I'm not saying that I -- I didn't say that I agreed with him, no. I said that I felt more in keeping -- my position was more in

keeping with that of the Defence.

MR. SOUFI: [Interpretation] Yes, I do understand. But on page 73, line 17 in French, and 69, page 69 in the English version, there is, and I quote:

"It so happens that I agree with the submissions made by the Prosecutor with regard to what featured in the list that was handed up to us."

But I'm just pointing out that actually it was about Defence.

Going to the question that you put to the Prosecutor, I'm delighted to note that after having maintained and withdrawn and then maintained and then withdrawn, he's actually withdrawing his submissions.

In the light of your second comment, which we also identified, that the Prosecutor seems to confuse criminal association and conspiracy, and so I'm just wondering whether you were asking the Prosecution to withdraw his definition of the agreement in criminal association, because --

JUDGE RIACHI: [Interpretation] Don't put words in my mouth. I said what I said what I said.

MR. SOUFI: [Interpretation] Very well. Then I won't do what the Prosecutor is doing.

So now to answer your question, Your Honour. It strikes me, but of course you will correct me if I'm wrong, because this is what was told to me during a recent trip that I made to Beirut, that 335, that Article was initially brought in from the French Criminal Code to the Lebanese Criminal Code and it was redacted in French. So it strikes me,

therefore, that the crimes mean more than two.

Now if you're telling me that the Lebanese legislator required that that means more than three, then there it is --

JUDGE RIACHI: [Interpretation] I'm asking whether it's your construal. If you're saying that the word "crime" in the plural means that you need more than one crime to apply 335, if we use the Arabic construal, then two crimes are not enough for the rule to obtain, because "jinayat" means more than two crimes. Otherwise, it would have been said "two crimes or more." He didn't say that, the legislator. He talked about plurality of crimes, three or more. So it's not enough for this rule to obtain. That's all I'm saying.

MR. SOUFI: [Interpretation] In that case I agree with you. But I would say that goes without saying, and I can say this because this is French, which is my mother tongue, crimes doesn't mean one crime --

JUDGE RIACHI: [Interpretation] Yes, that's right. In French --

PRESIDENT HRDLICKOVA: I would just like to remind the speakers to make pause between the questions and answers for the interpreters. Thank you.

JUDGE RIACHI: [Interpretation] In French and in Arabic we have "Al-mouthanna" which means two, which you don't have in French. So I'm interpreting a text which was written in Arabic. "Jinayat" means more than two crimes. Are you for applying 335 -- well, if you are, then more than two crimes need to be committed. Three crimes or more.

So two crimes, you cannot invoke 335 based on what you say, Mr. Soufi.

MR. SOUFI: [Interpretation] Well, I defer to your greater knowledge on that matter. You are an Arabic speaker. In all modesty, I defer to your wisdom therefore. But I would add that as you yourself said and as His Honour Judge Baragwanath mentioned earlier on, it's not only us who are talking about these crimes. It's the Prosecutor himself who has that interpretation in his submissions in the first page: How to define the material element of crime of association. And at 335, the constituent elements of a criminal association is to commit crimes, in the plural.

So the Prosecutor, maybe he wants to adjust his position now, I don't know, but we've all had a consensus here that at least two crimes had to be present. If you're saying now you need three --

JUDGE RIACHI: [Interpretation] No, I'm not saying that. You seem to, all of you, wish to put words in my mouth. If you are saying that "jinayat" is in the plural, following your reasoning you need more than two. I didn't say that you need more than two. It could be that just one crime suffice and not three. It could be that I don't use the prime facie interpretation of 335.

Article 335, historically at least, was drafted to stigmatize a buffer crime to prevent greater crimes. Would you agree with me to say that one single crime -- as Judge Baragwanath has said, one single crime could also be so important that it requires invoking 335 to avoid it being committed in the first place? Or there could be a series of crimes.

In any case, this is what my question hinges upon, but don't put

words in my mouth.

MR. SOUFI: [Interpretation] Just to return to French law, in French law there needs to be a plurality of crimes and I'll leave it there. If the Lebanese legislator requires the same thing, the plural, fine. But I don't want to get into a debate about two or more. In French at least it's the plural. More could be 50.

JUDGE RIACHI: [Interpretation] Well, if you don't want to get involved in Lebanese interpretation, then perhaps I could do that for French law.

French law doesn't talk about anything more than two laws [as interpreted]. One single law on the French Statute is enough. Look at the doctrine. Look at criminal association. There you'll find that one single crime is enough in France, and that it's not -- nothing is said about the plurality of crimes.

Now in 1890s, this was very criticized and things had to be changed in light of Article 265, which is actually the underpinnings of Article 335. I would add that there is a reference, I don't know who mentioned it, but according to which Mohammed El-Fadel in his book "Crimes against state security," he mentions the fact that there needs to be several crimes. He states that. I don't know which page that is. But he talks about the Syrian Criminal Code, and he only says what featured in that criminal code, the Syrian Criminal Code.

But Farid El-Zogbhi's encyclopaedia on Lebanese law, at tome 10, page 185 says unambiguously that on only one crime suffices or several crimes. So it's not important per se the number, but the seriousness of

the crime is important, which also I think is encompassed by 335.

Another question for Defence. I'm a bit perplexed, really. We're talking about the establishment of the Pre-Trial Judge with limited powers. Now, it's a very complicated issue here at this Tribunal. We've established something, but it's something, well, that's lacking something. If we found ourselves in a civil law system, then we'd have an investigating magistrate, charges would be placed before him, and conspiracy, criminal association may be placed before him.

If here we have a notional plurality of crimes, in other words, a legal characterization of the crime, then you can say to the Chamber: Well, here we've got these two crimes and I request that the plurality of crime notion should be applied, which involves applying the most serious crimes. Of course, it's not easy to do with the Pre-Trial Judge system because this latter, when two charges are placed before him, he's either going to refute one or accept both.

So if he refutes one and we find ourselves in a notional plurality paradigm, we're forbidding the Prosecutor to bring evidence to support two crimes. You're only confining him to one crime. Whereas, according to the Judge, there was the opportunity of initially proving the existence of two crimes.

Maybe the ideal situation would be to refer both crimes before the Trial Chamber to say: Well, maybe we do see here notional plurality of crimes because this latter only has an impact upon the penalty but it doesn't have any -- it doesn't impinge upon anything else. You can't find guilty an individual of both but only -- you only sentence somebody

with a -- which carries the most severe sentence.

So I would agree with you, Mr. Roux. This is a very tricky issue, a very sensitive issue. To broach it without knowing the facts and with having the limited scope of powers of the Pre-Trial Judge makes it even more difficult. Thanks very much.

PRESIDENT HRDLICKOVA: Are you going to reply, Maître Roux?

MR. ROUX: [Interpretation] No, I don't think there is any necessity for me to respond. Thank you.

PRESIDENT HRDLICKOVA: I would like to thank Judge Riachi.

It's, indeed, a very, very interesting discussion. My only question is regarding the criteria for reviewing the indictment, which I would like to address to the Prosecution.

Is your view or what is your view: Does the fact that the Pre-Trial Judge refers to the supporting material before him for review that is the same as evidence submitted within the Ayyash et al. case limit the Appeals Chamber's ability to pronounce Question D in the abstract or does not? Or what is the limitation, if you see any?

MR. FARRELL: Thank you for your question. We didn't address this in our filing, so please allow me the opportunity to address it now.

The questions previous to this about what are the legal standards obviously may be matters that this Court pronounces on to give guidance. There is something about questions falling under section D that relate to the particular aspects of an individual case in relation to supporting material.

The only way that it -- the Court may consider it being within

your jurisdiction if the question was framed as to what is the scope -- the legal scope of the material that the Pre-Trial Judge can look at in a confirm -- in the confirmation stage, and the answer in our respectful submission is: You know it's quite clear, it's the supporting material submitted to him as required by the Statute and the Rules.

The broader question here about somehow it's relevant because it happens to be in another proceeding, I would submit is not a legal question and is not before you. We approached it on the basis of a legal question that what legally is confined within supporting material. The characterization of it being specific and whether that's somehow relevant is not a matter that is a legal question, in my respectful submission.

PRESIDENT HRDLICKOVA: So, sorry, you don't see any limitation to the Appeals Chamber to answer the question in abstract before -- because our thinking and decision is only in abstracto?

MR. FARRELL: I think there could be a characterization of the question as a legal one, saying what falls within the scope, what is he legally permitted to consider on the confirmation process. I think that would probably fall within the scope.

Whether the evidence arising from another proceeding is a relevant consideration for you? No, it's not. Thank you.

PRESIDENT HRDLICKOVA: Thank you.

So now I would like to ask my colleagues, do you have another question?

JUDGE RIACHI: No.

PRESIDENT HRDLICKOVA: Thank you. So at this juncture, if there

are no other questions from my colleagues, I would like to thank both the Prosecution and Defence Office for their submissions. And the Appeals Chamber will be working to render its decision on the preliminary questions as quickly as possible, so that the Pre-Trial Judge may be in a position to rule on the proposed indictment before him.

And finally and before we close today's hearing, I would like to express my gratitude to the Registrar, the Registry team, the Appeals Chamber team, and all the many persons in court and behind the scenes, especially the interpreters, the court recorders and technicians and all other staff involved in today's hearing and its preparation. Your work is absolutely essential to the smooth and efficient operation of this Tribunal, and I think I can safely speak on behalf of all my colleagues in expressing my sincere thanks for your dedicated work.

On that note, the proceeding now will be adjourned. Thank you.

--- Whereupon the hearing adjourned at 1.17 p.m.

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1 ERRATA:

Following the Verification of Interpretation of the Transcript between the interpreted English against the original speech, the Language Services Section of the Tribunal has made the following corrections in the transcript:

- Correction on Page 30 lines 16 to 22:

"For the first time in eight years I stand here when we have at last the French transcript on our screens. This is not just a detail. I don’t know whether we should deplore the fact that eight long years had to go by before we finally see ourselves settled in that right or whether we should rejoice at the fact that

what must be described as discrimination against French-speaking lawyers has finally come to an end."

2 - Correction on Page 31 lines 11 to 15:

"This is why my satisfaction will be complete only when at this Court, at this Special Tribunal for Lebanon – Lebanon being an Arabic and French-speaking country – I'll be delighted when we have a real-time transcript, not only in English and French, but also in Arabic. Dear friends and colleagues from Lebanon, you can count on my support for any request you make to that end."

3 - Correction on Page 31 line 20 to Page 32 line 1:

"I didn’t have the right to talk to the lawyers that I’d assigned to the Defence of the rights and interests of the Ayyash case accused. And I would say here and now, loud and clear in this courtroom, so that the very walls can hear and echo it back to whoever should take heed, that the lawyers I appointed are not defending the accused but, in keeping with Article 22(2)(c) of the Statute, the rights and interests of the accused."

4 - Correction on Page 33 lines 14 to 15:

"I'm a kind of glass-half-full kind of guy, but I think that disagreements run deeper than that, in fact, between our two offices."

5 - Correction on Page 34 lines 12 to 14:

"I think that his 2012 submissions hewed much closer to Lebanese case law than his submissions today."

6 - Correction on Page 45 lines 22 to 25:

"I recall that in 2011 the Chamber – as did the Prosecutor – made a very clear and precise decision on cumulative charging under Lebanese law, taking into

consideration the international criminal tribunal case law that the Prosecutor is relying upon today."