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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
v. *GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Redacted Version

**Second Corrigendum to the
Defence Closing Brief**

Source: Defence for Mr Germain Katanga

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I- INTRODUCTION

1. The village of Bogoro sits above Lake Albert on the western rim of the Great Rift Valley. It controls one of the few routes connecting East Africa with the Congo. Stanley passed through on his way to explore the Congo basin for King Leopold. It has never been a large place, more village than town. It sits astride the unpaved road that runs from the lake town of Kasenyi to Bunia, the capital and largest town in the District of Ituri, itself part of Orientale Province, one of eleven provinces that make up the immense Democratic Republic of Congo. Bogoro is at the very edge of the Republic, 2250 kilometres by road from Kinshasa – if there was such a road.
2. The Congo wars, that led to the fall of President Mobutu and the extensive strife that followed, caused Kinshasa to lose control of its eastern provinces. In Ituri, Uganda became the dominant military force, utilising various local groups and political factions – most of which were of its own making.
3. Recognising the strategic importance of controlling the route between Uganda and Bunia, the Ugandans established a military camp in Bogoro at the Bogoro Institute, a local school. With Ugandan agreement they were replaced in August 2002 by the UPC,¹ a mainly Hema militia and, at that time, Ugandan ally. Against a background of increasing ethnic tension the UPC were responsible for several attacks on neighbouring Lendu and Ngiti villages. By early 2003 most of the multi-ethnic population of Bogoro had left to seek the relative safety of Bunia, with its schools and hospitals.
4. On 24th February 2003, the UPC camp at Bogoro was itself attacked. Civilians were killed, buildings damaged or destroyed, and property taken.
5. Germain Katanga is charged with committing, jointly with Mathieu Ngudjolo, or through others under their control, the unlawful killing of civilians present at Bogoro on the 24th February and for associated crimes.
6. These submissions are made on behalf of Germain Katanga. It is not the intention of the defence, and no part of its function, to instruct the Chamber as to how it should view the evidence. That is a matter entirely within the provenance of the Chamber. The defence makes submissions that it hopes advances the interests of Mr Katanga. Whether those submissions do in fact advance his case is, of course, solely a matter for you the judges to determine.

¹ Or more specifically its militia wing, the FPLC.

7. Essentially, the defence submits that the prosecutor has failed to produce sufficient evidence to establish its case to the necessary high standard of proof beyond a reasonable doubt. In large part, this is due to the unreliability of the prosecution's key witnesses.

8. Although the case essentially concerns the one attack on Bogoro of February 24th 2003, this is a complex case. That which follows is an overview of the defence brief and the submissions contained in it.

9. In essence the defence submits that the Prosecution case is wrong. The Prosecution founds its case on the notion of common plan. That plan was 'to wipe out Bogoro' - including the civilians living there. Germain Katanga's liability is that he, together with Mathieu Ngudjolo, had control of that plan. The Prosecution's evidentiary basis for that assertion is essentially that Germain Katanga and Mathieu Ngudjolo planned the attack, controlled the militia or combatants that carried it out and, though not a prerequisite of liability, participated as individuals in the attack.

10. In the essentially adversarial structure of the court, it is not the Chamber that has the role of determining what evidence is led before it, though it can and has called evidence. Rather it is the prosecutor that has to make choices as to the witnesses to be called to prove the charges it brings. Some of its witnesses deal with the generalities of the case. Some with proving the individual responsibility of the accused – the 'key witnesses'. Without those 'key' witnesses, there would be no case. The more serious the crime, the greater should be the reliability of any incriminating witness. Untested at the confirmation stage, they are examined at the trial stage.

11. A significant part of the defence submissions will be concerned with the key Prosecution witnesses upon whom the Prosecution chose to build its case. In the defence submission, there can be few cases brought before any court, whether at a domestic, let alone international level, where the Prosecution's principal witnesses are of the evidential quality that has been seen in this case. The defence submits that none of the Prosecution key witnesses attain a sufficient level of credibility to be relied upon as incriminating Katanga in respect of such serious crimes as those charged.

12. Much of that is the result of the inadequacy of the investigations, the failure to investigate exculpatory matters and the use of inappropriate persons to act as intermediaries. The latter introduced prosecution witnesses whose evidence is demonstrably false.

13. It must be emphasised that, although the defence chose to call evidence including Germain Katanga, who gave evidence on his own behalf, the defence bears no evidential

burden at any point in the case. While it is possible for a tribunal of fact to have doubts, even significant doubts, as to aspects of an accused's case and yet acquit, it is not possible to have doubts about significant aspects of a Prosecution case and yet convict. The defence does not have to prove anything. After all, it was the Prosecution that chose to bring Katanga to the ICC and to place him on trial and it is only right and fair that it is now for the Prosecution to prove its case. It has to do so to the very high standard necessary – proof beyond a reasonable doubt. And to do so on its evidence. Where an accused raises a defence or produces an explanation or account, it remains for the Prosecution to disprove it – not for the defence to prove an account.

14. In the present case, the defence submits that that there is no evidence that Germain Katanga was himself present at the attack. There is no sufficiently credible prosecution witness that can be relied upon to sustain that assertion. It has not been proved beyond a reasonable doubt. Nor is there adequate evidence that there was a plan hatched between Germain Katanga and Mathieu Ngudjolo. For the same reason. Nor is there evidence that a plan existed to commit crimes rather than to attack the UPC camp, a legitimate military target. Nor is it proved that Germain Katanga's position in the militia at the time of the attack was such that, at that time, he had control over those who took part in the attack.

15. Rather, and again it is to be stressed that it is not for the defence to prove a case, Bogoro was a legitimate military target, capable of being subject to a lawful attack.

16. The attack was largely planned, advised on and armed by the *Maison Militaire* in Kinshasa and the RCD-K/ML / APC in Beni, as part of the wider strategy to regain Ituri; the plan did not have the object of killing civilians; Germain Katanga, whatever title or position he was deemed to have, did not have effective control over those who participated in the attack, did not plan the attack with Ngudjolo, nor was he present during the attack.

II- REVIEW OF THE CREDIBILITY OF PROSECUTION AND VICTIMS WITNESSES

A- Review of the credibility of Prosecution witnesses

17. To prove the personal liability of German Katanga the prosecution rely almost entirely on the evidence of five key witnesses. Witnesses 280 [REDACTED], 279 [REDACTED], 250 [REDACTED], 28 [REDACTED], and 219 [REDACTED]. They are the Prosecution's 'first

tier' witnesses. The prosecution case, as can be seen from the constant references in its closing brief, is built upon them and the premise they are credible. The Prosecution addresses few of the profound discrepancies and contradictions in their evidence, almost as if the trial did not happen.

18. What follows is a defence review on the reliability and credibility of some witnesses and why they, and their evidence, are unreliable. The burden of proving the case is on the Prosecution, and satisfying the court as to the reliability of its own witnesses is the primary element of that burden. The defence has no such burden. It is not for the defence to prove that a particular Prosecution witness is unreliable, or that a particular defence witness is reliable.

19. Before addressing the evidence the defence refers briefly to several concerns that will be more fully addressed later, in part III. Firstly, the intermediaries. The effect of intermediaries in this case on the reliability of witnesses or the appropriateness of receiving the evidence of certain witnesses is addressed. The issue is of particular concern in respect of witnesses 28, 279, 280, and 250. The relevance of the *Lubanga* judgement is also addressed. Secondly, the issue of protective measures and the effect they may have on the value of a particular witness's evidence is addressed. Thirdly, the effect that deficiencies in the Prosecution investigation may have on the evidence in the case is addressed. Each of those matters may be relevant to a particular witness when assessing his or her evidence.

20. The defence first review what in the defence submission are the 'first tier' or key witnesses, P-280, P-279, P-250, P-28 and P-250 and then review witness P-12 and P-160 and witness P-161. Other witnesses will be referred to at relevant sections. Before coming to the first tier witnesses the defence wish to refer to the abandoned Prosecution witness P-159.

P-159, [REDACTED]

21. The witness was abandoned by the Prosecution following investigations made subsequent to his evidence and the Chamber decided it would not rely on his evidence as incriminating evidence. He is of interest as an example of a witness coming before the court to lie.

A. Thank you, Prosecutor. The attack of February 2003 started at 5.00 in the morning. Nobody explained to me about this attack. These are events which I saw myself given that I was in Bogoro. I saw all these events with my own eyes from the very start to the very end. These weren't things that were told to me.²

22. His subsequent account was detailed, with descriptions, however improbable, of his movements and the deaths of people. He claimed to have recognised Katanga arrive and

² P-159-T-118-p.72 (FRA-pp.69-70).

congratulate the children. He claimed to recognise Katanga from a political meeting in Bunia before the war.³ None of this was true. It was put emphatically that he was not living in Bogoro on the day. He sat in the witness box during eight court hearing days and lied. In cross examination various discrepancies in his account were raised. Various aspects of his evidence had never been mentioned before by him, despite extensive interviews – such as seeing Katanga, or having a view of events from a hideout on Waka Hill. His account stretched belief. Whether the defence raised a sufficient doubt is no longer an issue. What he demonstrates is that witnesses can and do come before the court and give false testimony. Over eight court days he gave detailed evidence of events he had not witnessed and knowingly gave false evidence against each accused, without battering an eyelid. He wove in facts that are commonly known, but added material from his own imagination. A method, the defence submits, some other witnesses, have employed.

23. What motive did have to lie? Was he someone who fancied being a witness? Did he benefit in some way? Did he want a trip to The Hague? He lost close family in the attack – but it would be strange if he was motivated solely by that. In any event evidence such as his can be potent poison in a case and it is not easy for a defence to provide the antidote. The prosecutor rightly bears a heavy burden in having the duty to convince the court of the reliability of witnesses and of proving the case beyond reasonable doubt.

24. This witness, P-159, was introduced by intermediary P-316, [REDACTED].

P-280 and P-279

25. The witnesses [REDACTED] and [REDACTED] – P-279 and P-280 – fall to be considered together.

26. Both come from [REDACTED] where they and their families were next door neighbours, living within sight and earshot of each other. Both are the same age. Both claim they were abducted, at about the same time, and taken to Zumbe. Both claim to have participated in the Bogoro attack and both continued to live on the hill for some time. Both subsequently lived in Aveba. Both appear, companionably together, in a photograph. Yet they claim not to know one another. P-279 denied knowing 280, even when shown his photograph. P-280 made no mention of P-279 when listing people he knew that were also at Zumbe/the Montagnes Bleus. The defence position is that they are untruthful and have chosen to give false testimony for personal advantage. Both were introduced through the same intermediary, number 143. The subject of intermediaries and the effect on this witness is addressed below.

³ P-159-T-119-p.64

Both were relocated and cut themselves off from their family and both benefit from being part of the witness programme.

27. Both gave false dates of birth. In their closing brief the Prosecution now accepts that neither 280 nor 279 was a child soldier. It is a begrudging concession. If the court concludes that the witnesses were not merely mistaken but lied about their age, as the defence submits each has, then that constitutes a plain attempt to mislead the court by providing significant, false evidence. The giving of a false date of birth by the witnesses is of great significance, not merely because of the importance of age in the case, as would qualify the witness to be a child soldier, but because it demonstrates a clear attempt by the witness to manipulate the Chamber. It is a lie. Each has sought to present himself as something he was not, and has done that in order to increase his currency as a potential witness in the eyes of the investigators. And the reason for wishing to increase their value in the eyes of the investigator is in order to obtain some advantage – in this case, the advantage of being accepted into the witness protection programme.

28. In the circumstances of the case such an untruth arguably affects all of a witness's evidence. Once a witness has crossed that line and, on oath, sought to deceive the chamber on a significant issue, it is wrong for the prosecution to continue to rely on the witness as a witness of truth. In any event, it is submitted that no reasonable tribunal could, in such circumstances, go on to rely on other aspects of such a witness's testimony other than in exceptional circumstances. After all, once a person on oath has been demonstrated to have lied on a significant issue, and sought to maintain that lie, how can such a witness be considered reliable? Only by not relying on the witness can the integrity of the process be demonstrably maintained.

29. Neither was demobilised, so neither had proof of having been militia. [REDACTED] gave evidence for the defence and stated that neither he had been in the militia or participated in a battle. Each gives an account conveniently 'insulated' from the other. P-279 claims he was in Zombe. P-280 claims he was in Lagura. Even so, each moved about and it is incredible that, over the many months they claim to have been there, these '[REDACTED] boys' were unaware of one another.

P-280, [REDACTED]

30. Witness 280 was interviewed for 34⁴ hours - longer than a court week, yet basic background inquiries were not done. He is, the defence submits, a fantasiser, as his previous

⁴ P-280-T-161-p.26 (FRA-p.26).

statements demonstrate. He claimed to have been [REDACTED] camp, where he claims he was trained and later participated in FNI attacks – including, he said, those on Bogoro, Mandro, Kasenyi and Bunia. He then went to live in Aveba and left the militia, though there is no record of his demobilisation.

31. They had been close neighbours. P-280 made no mention of knowing P-279;

A. I believe I had only one friend, and that friend is already deceased. It was difficult to see me in that village in the company of other people. I had a solitary lifestyle. [...] His name was [REDACTED]. He was resident in [REDACTED]. He was a very good friend of mine. We lived in the same house.⁵

However, they appear together in the photograph EVD-D02-00127, identified by [REDACTED] who said the two boys were friends.

They were both introduced to the prosecutor by intermediary 143. The witness could not, or would not say, who acted as intermediary.

A. I answered this. I said I have no idea about this.⁶

32. The evidence that P-280 was born in [REDACTED] could not realistically be challenged. The prosecution now suggests P-280 made a mere slip, a misunderstanding, based on lack of information as to his birth. The defence submits it was a deliberate, calculated lie. Nobody his age ‘loses’ a couple of years. None of the defence witnesses had that difficulty. Witnesses 279 and 280, close neighbours from [REDACTED], lost twelve years between them!

33. P-280 gave a false date of birth – [REDACTED] and, in interview, [REDACTED].⁷ Both dates qualify to be a child soldier. The motive for both P-279 and P-280 lying about their age and providing other incriminating ‘evidence’ was to gain entry into the witness protection programme. For those two young men, the ICC programme was a once in a lifetime opportunity to escape the poverty of [REDACTED].

34. The investigators made no effective inquiries. In his second interview, P-280 said: ‘I ought to have come with my baptism certificate [...] after I went back I did not find my certificate. My youngest sister told me that my other sister had taken it and tore it up’.⁸ That story appears to have been accepted by the investigators. A belated attempt to get some proof involved sending intermediary 143 to obtain a copy birth certificate, which was rather like sending the fox to look for the chickens. 143 returned with a certificate - but with a date he

⁵ P-280-T-161-p.69 (FRA-pp.70-71).

⁶ P-280-T-161-p.27 (FRA-p.27).

⁷ P-280-T-160-p.76 (FRA-p.75).

⁸ P-280-T-160-p.78 (FRA-p.77).

had provided.⁹ The defence, working under greater difficulties, obtained genuine documents. As with P-279, he was unable to state his age:

A I have just told you that I was born in [REDACTED], and if you were to calculation, how old do you think I would be? Anyone could guess.¹⁰

35. He was unable or unwilling to indicate the ages of any of his [REDACTED] siblings. His electoral card - EVD-D03-00024 - dated 2005, shows the date of birth as [REDACTED]. The witness did not dispute applying for the card.¹¹ [REDACTED].¹² [REDACTED].¹³

36. The defence submits that the witness not only lied about his age but has gone on to show other indications of profound unreliability. [REDACTED] claim to have been in the militia, 'he has never been a member of any militia', and had never claimed to have fought [REDACTED].¹⁴ [REDACTED], in the defence submission, had no motive to lie. He is neither Lendu nor Ngiti, and said he came to give evidence because [REDACTED] was not involved in such activities.¹⁵

37. [REDACTED] in early August 2002 when Lopondo got chased out of Bunia and was still there when the Ugandans left [REDACTED].¹⁶ [REDACTED] after the Ugandans had gone and when the UPC reasserted itself in Bunia, causing very many people, of all ethnicities, to flee. This makes sense, as the family was neither Lendu nor Ngiti and consequently had no reason to flee earlier, in August 2002. It was when the UPC returned in May 2003 that other ethnic groups fled the area, fearing reprisals from the UPC, a situation that provoked the arrival of the French 'Artemis' force in June. [REDACTED],¹⁷ [REDACTED].¹⁸

38. Turning to his general evidence, witness 280 spoke of time spent at Lagura and Bogoro and other attacks. Firstly, at its highest, his evidence barely refers to Germain Katanga and assists the defence in other respects. He saw Katanga on only one occasion, much later at Aveba, when the witness was 'a bit far off'.¹⁹ Of events in Zumbé/Lagura he said he had not seen any FRPI commanders come to Lagura camp before the Bogoro attack.²⁰ Nor had he seen any particular FRPI commander at Bogoro: "As I said earlier, I did not see a single

⁹ EVD-D02-00241; see also EVD-D02-00242 for P-279.

¹⁰ P-280-T-160-p.74 (FRA-pp.73-74).

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ P-280-T-159-p.65 (FRA-p.65)

²⁰ P-280-T-157-p.23 (FRA-p.23).

commander of the FRPI.”²¹ He had heard of FRPI commanders – but it was difficult for him to say who was the main one as ‘there were so many’. He named Yuda, Cobra and Katanga, but said he had forgotten the names of other FRPI commanders.²²

39. He could not say if any child soldiers from the FRPI participated as everyone was all mixed together.²³ He spoke of the FNI and FRPI coming together jointly for the Bogoro attack but said he did not know how that had come about.²⁴ He said civilians at Bogoro were armed, the majority with rifles.²⁵ He said he did not witness rape at Bogoro.²⁶ He also said that the attack on Mandro did not involve commanders other than those from the FNI.²⁷ He gave some evidence as to the events in Bunia when the UPC attacked the UPDF. He saw Yuda and Cobra- ‘the only ones I saw’.²⁸ He made no mention of seeing Katanga. The only time he said that the FNI and FRPI fought together was at Bogoro and Bunia.²⁹ He made no mention of an FRPI element in the Kasenyi attack in which he claimed to have participated.³⁰

40. The witness’s evidence, generally speaking, contains little either not generally known or that he could not have imagined. He returned to Bogoro later.³¹

41. The witness was unable to provide names and detail in areas that he might be expected to, bearing in mind his true age, particularly as he has had to recall events since his first interviews in 2007. He was unable to say how long he was on the hills, how long he was in the militia, or for how long the training took, was vague as to what the training comprised, was unable to say how long, months or days he spent at Zumbe or Lagura. He was unable to recall the names of other than a couple of commanders, and could not even recall the ‘influential’ person who got him his coveted job as an MP. He said a lot about fetish, much of it conflicting with other evidence. He had no knowledge of the APC presence under Colonel Hillaire. The defence will not dwell overmuch on his evidence, bearing in mind that much of it concerns events at Zumbe.

42. He could not recall the name of his immediate commander on the Bogoro attack. He said that there were two battalions with which he left, but then changed his account to two companies, and then, just a day later, to two sections of 12 men.³²

²¹ P-280- T-158-p.14 (FRA-p.14).

²² P-280-T-156-p.20 (FRA-p.19).

²³ P-280-T-159-p.69 (FRA-p.69).

²⁴ P-280-T-156-p.21 (FRA-p.21).

²⁵ P-280-T-160-p.41 (FRA-p.40).

²⁶ P-280-T-160-p.33 (FRA-p.33).

²⁷ P-280-T-158-pp.23-24 (FRA-pp.23-24).

²⁸ P-280-T-159-p.54 (FRA-p.55).

²⁹ P-280-T-159-pp.44-45 (FRA-p.46).

³⁰ P-280-T-158-p.61 (FRA-pp.61-62).

³¹ P-280-T-156-p.57 (FRA-p.52).

43. His timings and movement are significantly different to other accounts – leaving Lagura to be down the hill by 3 a.m. and starting the attack between 3 – 4 a.m. etc. He spoke, in a matter of fact manner, of entering houses, taking ten houses at a time, killing ‘quietly’, (as if any killing with machetes could be done ‘quietly’) of killing babies by hitting their heads against walls, and knifing the toddlers. Was this something he experienced on the 24th February, or imagination?

44. His sketch EVD-D02-00044, produced during the interviews, shows him to be another of the witnesses to place the Bogoro Institute away and apart from the UPC camp. He also places the Institute ‘above’ the camp. The witness said he made a mistake: “Even if I am the one who drew that sketch, if I make an error about the camp, that is possible.”³³ It happens to be the same mistake as that made by witness 279.

45. His route from Lagura to Mayi ya Franga passes through Katonie –but is there such a route? – And would an armed group, seeking surprise, first pass Bogoro in order to return to attack? After the attack he said he returned up the hill with his SMG, his looted solar panel, seven goats and wounded face.

46. He said he left the militia – but there is no evidence of demobilization. He gave confused accounts as to his failure to participate in a demobilization program; of his not having a weapon, of hiding his weapon, of giving his weapon to another. In fact, he would not have needed to produce one.³⁴

47. The defence submits, [REDACTED], that this witness was not in the militia and never participated in a militia attack. That is the backdrop against which his evidence should be viewed, including his evidence of age. And against that backdrop the defence turns to the witness’s previous and lengthy interviews and the account he provided and maintained between his first interview in 2007 and his second interview in 2008. This witness did not resile from that account until in court. Once he was in court he began to express, from time to time, concern over what he had previously said to the investigators. And well he might be concerned, for his previous accounts are dramatically different to his court account and to other evidence in the case, and so improbable and fantastical that they raises doubts as to his mental well being, let alone his credibility. He was interviewed In 2007:

Q. You were interviewed by the Prosecutor's investigators on the 29th of March, from 11.00 to 1.00; on the 31st of March, from 9.00 to 12.00; on the 1st of April from 9.50 to 12.30, and again from 16.00 to 17.45; and on the 2nd of April, from 14.30 to 17.45, and again that

³² P-280-T-161-p.47 (FRA-pp.48-49).

³³ P-280-T-161-p.41 (FRA-.42).

³⁴ P-280-T-162-p.51 (FRA-pp.51-52).

evening from 19.40 to 20.00 hours. [...] And then you were later interviewed 16 months later, in July of 2008, on the 11th, 13th, 14th, 15th, 16th, and 17th of July. You were interviewed for almost 21 hours in July.³⁵

Q. You say in your statement at para. 47 "The attack began in the middle of the night towards 1.00 in the morning. Is that right?

A. I have no idea

Q You say at paragraph 56: "At 5.00 in the morning, at the end of the battle all the soldiers and commanders they met at the centre." Is that right? Was the battle at its end at 5.00 in the morning?

A. I think I told you I had no idea about this. That's the answer I gave earlier.³⁶

Q. So the sum of that is that you say that the battle started at 1.00 a.m. in the morning and finishes at 5.00 in the morning. [...] What do you say now [...] to those times that you gave in your statement?

A. I said that I may disagree, that I may disagree with what I said earlier. There may have been some mistakes when I met the investigators. So please consider what I'm saying here in the courtroom to be the truth.

Q. [...] At paragraph 57, first sentence you say this: "Towards 5.00 a.m., when there is a little light, we returned to Lagura." [...] You're now -- making your reference night or day, and you're saying that at 5.00 -- towards -- not "at" [...].

A. I may have made a mistake. We fought a battle in Bogoro. When you ask me about this battle, I may be speaking about a battle which took place elsewhere. I can come back later to these events, think about them, and correct my previous account.³⁷

48. But to which battle 'elsewhere' could that have been referring? His explanation was: "A. We're talking at length about what is written in my document, but at the time, I told the investigators that I might go back on what I said previously and that I might correct some facts, because at present I'm thinking about the battles I fought, and I'm trying to relive the events and give an account of them as they occurred."³⁸

49. And his account becomes more and more fanciful:³⁹

Paragraph 52: 'We took the camp in this way: Kute approached the sentries and killed them and took up a position at the entrance of the camp. From there he behaved as a UPC sentry so as not to draw the attention of the Hema militia to the outside of the camp. We arrived in small groups of a few persons, and we asked Kute permission to enter the camp to visit people. Kute imitated a UPC sentry, gave us permission to enter, and repeated this to other groups that came along. Little by little, we militia got into the camp.'⁴⁰

Paragraph 53: "At this moment Kute had called by Motorola our militia in the centre of Bogoro. They were told we were in position and to throw one bomb into the camp. We in the camp did not fear being killed by this bomb, as before starting out we had the fetishers choose who could go to war without being killed."⁴¹

Paragraph 54: "The bomb exploded and alerted the UPC. They got up with sleep in their eyes. Quickly we started to kill them. They had no means to escape. I estimate that we killed almost

³⁵ P-280-T-161-pp.41-42 (FRA-pp.42-43).

³⁶ P-280-T-161-p.50 (FRA-pp.51-52).

³⁷ P-280-T-161-p.52-53 (FRA-pp.53-54).

³⁸ P-280-T-161-p.53 (FRA-p.54).

³⁹ P-280-T-161-pp.50-60 (FRA-pp.51-61).

⁴⁰ P-280-T-161-p.52 (FRA-p.55).

⁴¹ P-280-T-161-p.54 (FRA-p.56).

a hundred per cent of the UPC soldiers. That is to say that as little as 10 per cent could survive.”⁴²

50. Aside from the above being an example of imaginative narrative, in contrast to that account the witness said in evidence:

A. I didn't enter the camp. I stayed outside.⁴³

51. Paragraph 56: "At 5.00 in the morning, the end of the battle, all the commanders and soldiers met in the centre.”⁴⁴

Paragraph 57: "Towards 5.00, when there was little light, we returned to Lagura.”⁴⁵

On this account the entire battle would have been fought in darkness. His explanation:

A. I think you have not understood me. I said I took part in battles. I may have mixed up some things. When we speak, I may think -- be thinking about another battle. And further, I sometimes went back home and was thinking about other things.⁴⁶

Not a convincing explanation, the defence submits, given that he says he was involved in one attack on Bogoro: “I did not take part in several attacks on Bogoro”.⁴⁷ And this story has to be seen in the context of the defence submitting, and his father attesting, that the witness was never there. The witness said also;

"Q... My question is this: Having returned to Lagura, did you then drive down or were you driven down so that you arrived back in Bogoro, and this is the bit I'll quote: "We arrived at Bogoro at 8.00 a.m. I remember it was 8.00 a.m. because I looked at my watch." Did you drive down to Bogoro again getting there at 8.00 or is that again some mix-up?

A. I know that the questions you're asking me. From what I understand what you want to say. I want you to understand me. What I'm telling you here is I'm speaking about the present. Things about the past -- if you speak about the past, when I say that's not the way it was, please stop. What I'm telling you is what you have to take into account. Please don't go back to what is past when I say that I do not remember what it was.⁴⁸

A. I think that at the time I'm speaking to you, I told you before what I'm currently saying now. If I refuse to go back on what I've already said before, that is because there are things that I accept from the past, and there are other things that I refuse. I'm the one here making this corrections. This is nobody else who is making these corrections.⁴⁹

There is no reasonable explanation for such an extraordinary degree of deviation from his long settled account. The Prosecution cannot expect any tribunal of fact to rely on a witness so inconsistent and compromised by lies.

52. Other parts of his interview demonstrate similar flights of fancy:

Paragraph 24: "I'm not certain, but there were about 2.250 fighters on the hill at Lagura divided into battalions, companies, platoons, and sections."

Q. Is that right, 2.250 at Lagura?

⁴² P-280-T-161-p.55 (FRA-p.56).

⁴³ P-280-T-161-p.36 (FRA-p.37).

⁴⁴ P-280-T-161-p.55 (FRA-p.56).

⁴⁵ P-280-T-161-p.56 (FRA-p.57).

⁴⁶ P-280-T-161-p.56 (FRA-p.57).

⁴⁷ P-280-T-161-p.53 (FRA-p.55).

⁴⁸ P-280-T-161-pp.56-59 (FRA-pp.57-60).

⁴⁹ P-280-T-161-pp.59-60 (FRA-pp.60-61).

A. I think -- I think I have confused this, giving the number of persons. I shouldn't give you the number of persons. This was a confusion on my part. When I spoke about the number of soldiers or about people who were meant to be on the hill, this was a confusion on my part.⁵⁰

53. Contrast his account of a militiaman called [REDACTED] with that of witness P-279. [REDACTED] appears in the photograph EVD-D02-00127 with both of them. P-279 claimed, in evidence, they had been abducted together, were part of the same bodyguard and slept in the same little hut before escaping to [REDACTED] together. P-280, on the other hand, said:⁵¹

[REDACTED].⁵² [...].

A. He is older than me. I know that it was of his own volition that he became a member of the militia.

A. That person joined the militia after me, and he was Ngudjolo's body-guard, and up until the time he returned to Bunia, he was still Ngudjolo's body-guard. We lived in the same house, and I went to take care of my own personal affairs, and I left him in that same house that we shared⁵³ [...]

"He joined after me, and at that time I was getting ready to leave my job" [...].

Q. And by that do you mean in the militia?

A. Yes.⁵⁴

54. He said in evidence that he had not had to kill at Lagura/Zumbe:

"I shot at a person one time. Unfortunately he did not die." Do you remember telling us about that? A. Yes. [...] A. I did not kill anyone in Lagura or Zumbe.⁵⁵

But in his July 2008 interviews boasted:

Q. [...] paragraph 35 -- you were talking about the camp and you said: "Once, to defend myself, I fired and killed five soldiers in my camp" [...] Did that ever happen?

Q. Well, so what, you did kill five of your colleagues? Is that right?

A. Yes.⁵⁶

55. Aside from P-279, the only other purely 'Zumbe' witness presented by the Prosecution is witness 250 – [REDACTED]. P-250 spoke of a battalion of APC – 350 soldiers – arriving in Zumbe for almost a month- P-279 makes no mention of them, even though living in Zumbe itself, and P-280 merely said he heard there were some APC on the hill.

56. P-280 makes no mention of visits by Katanga, but P-279 says he saw him on his way to meet Ngudjolo at Zumbe, where a cow was killed and a feast held. P-250 is now adamant that no such visit took place. P-250 claims he accompanied Boba Boba and the delegation to Aveba. Neither P-279 nor P-280 mention such a delegation, and P-279 is on record claiming he was Boba Boba's bodyguard, though changed that account in evidence. P-279 and P-280 both give evidence of the need to take fetish to prevent being killed by a bullet and that

⁵⁰ P-280-T-161-p.61 (FRA-p.62).

⁵¹ P-280-T-158-p.45 (FRA-pp.45-46).

⁵² P-280-T-158-p.46 (FRA-pp.45-46).

⁵³ P-280-T-158-p.46 (FRA-p.47).

⁵⁴ P-280-T-161-p.61 (FRA-p.62).

⁵⁵ P-280-T-160-p.63 (FRA-p.63).

⁵⁶ P-280-T-160-p.64 (FRA-pp.63-64).

everybody took it – but P-250 makes no mention of it and refers only to the motivation of music.

57. It is interesting to note that all three witnesses make the same error on the sketch positioning the UPC camp at the location of the Kavala school.

58. While P-279 makes no mention of Mandro, P-280 gave evidence of the attack and stated that no commanders from elsewhere participated – it was just ‘FNI’ commanders. 250 claims it was essentially led by Katanga and the FRPI.

P-279, [REDACTED]

59. P-279 claimed to have been abducted [REDACTED], taken to Zumbe, trained as a militia, participated in the Bogoro attack, made [REDACTED], fled with [REDACTED], and reached his family in Aveba.

60. He gave a false date of birth. In evidence to the Chamber Witness 279 ([REDACTED]) stated he was born on [REDACTED], ‘a date that has to remain in my heart until death’.⁵⁷ However, when asked ‘how old are you now?’ he was unable to say.⁵⁸ When first interviewed by the prosecution’s investigators in March 2007, he said he was born on [REDACTED]⁵⁹ making him only [REDACTED] years old at the time of the Bogoro attack, an age doubtless calculated to attract the interest of investigators who were looking for child soldier witnesses. Both of those dates are false and his true date of birth is [REDACTED]. The Prosecution now accepts the reliability of the evidence adduced by the defence but submits the witness was merely mistaken. The defence submits a review of the evidence shows it was a deliberate and significant attempt to mislead the court. It is absurd to suggest he was wrong by six or seven years.

61. His electoral card⁶⁰ bears the date [REDACTED]. He denied that was his correct age. He gave no reasonable account for that age being on the card.⁶¹ He was unable or unwilling to give the age of his brothers and sister, a significant exercise as his age could be assessed in relation to the others.

A. He is quite old, but I could not tell you exactly what age he is.

Q. How much older than you is he?

[...]

A. I do not know.

⁵⁷ P-279-T-144-p.14 (FRA-p.14) ; P-279-T-150-p.50 (FRA-p.49).

⁵⁸ P-279-T-150-pp.44-45 (FRA-p.44).

⁵⁹ P-279-T-150-p.50 (FRA-pp.49-50).

⁶⁰ EVD-D02-00036/DRC-D02-0001-0113.

⁶¹ P-279-T-151-p.20-28 (FRA-pp.19-27).

Q. [REDACTED] years old, is he not, having been born in [REDACTED]. Is that something you can confirm or not?

A. I do not know.⁶²

62. Of his sister [REDACTED], the next youngest, he said,

Q. How old is she, your sister? Your kid sister, how old is she?

A. I've forgotten her age.⁶³

63. [REDACTED]⁶⁴ listed [REDACTED] – the defence say because [REDACTED]. He would not even recognise photographs of his sister, though eventually conceded they were of her.⁶⁵ He stated she was his younger by three years.⁶⁶ One of the photos was attached to a student card showing her date of birth as [REDACTED] which, if the witness was born in [REDACTED] as he claimed, makes her older rather than younger. [REDACTED].⁶⁷ The card was obtained by the defence investigator with the sister's instructions and consent. [REDACTED].

64. A certificate of birth,⁶⁸ dated [REDACTED], attested to by the [REDACTED], states that [REDACTED] [P-279] was born in [REDACTED]. It also correctly states that his mother, [REDACTED], and his father [REDACTED] at the time of his birth and domiciled at [REDACTED].⁶⁹ [REDACTED] [D-147] testified: [REDACTED].⁷⁰ [REDACTED]. The authenticated copy was obtained by the defence from [REDACTED].⁷¹

65. That document was supported by EVD-D02-00125 which is the Certificate of Birth, Number 1200, certifying birth on [REDACTED]. It has, among other details, the birth weight [REDACTED] and is a document headed 'Republique du Zaire.'⁷²

66. EVD-D02-00126 is a further contemporaneous document, dated 3rd September 1984, again from [REDACTED], with a facture number 1200, and shows the 'accouchement' fees paid in respect of the birth of 279 [REDACTED]. After the defence had obtained the [REDACTED] documents, the prosecutor went and obtained identical copies from the same source.⁷³

⁶² P-279-T-150-p.48 (FRA-pp.47-48).

⁶³ P-279-T-149-p.69 (FRA-p.68).

⁶⁴ [REDACTED].

⁶⁵ P-279-T-151-p.28 (FRA-p.27).

⁶⁶ P-279-T-150-p.47 (FRA-p.47).

⁶⁷ [REDACTED].

⁶⁸ EVD-D02-00124.

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

67. [REDACTED] testified that witnesses 280 and 279 were about the same age – both of their birth certificates show [REDACTED] as being the year of their respective births.

68. The evidence led by the defence leaves no doubt that [REDACTED] is the true year of birth. The Prosecution conceded the point only in its closing brief, even though it had followed the defence trail and verified the defence sources.⁷⁴ It is plain that no proper investigation was done by the Prosecution into the background of either ‘[REDACTED] witnesses’ thereby exposing the prosecution to the manipulation that has taken place. The inadequate system put in place by the Prosecutor caused the defence an unnecessary amount of investigation and the court much unnecessary time and expense.

69. The defence for Germain Katanga will not dwell on much of the evidence provided by 279, particularly that concerning Zumbe. Much of that evidence, the defence submits, is unsupported, was given in an hesitant and contradictory manner, lacked appropriate detail and gave little cause for confidence as to its reliability. His account was vague and frequently contradicted by his own prior statements.

70. Born in [REDACTED], the witness was almost [REDACTED] in February 2003, so his evidence is not that of a child. As the Chamber will recall, and the transcripts reflect, the witness frequently engaged in protracted silences, was evasive, gave no answer or said ‘I have no answer to your question’.⁷⁵ He demonstrated the behaviour of a witness who had placed himself in grave difficulties in giving evidence and had been caught out.

71. [REDACTED], fearing the UPC would kill them, fled first to Zumbe and then to Aveba. He said that 279 was not in a militia and had never participated in battle. There was no reason for [REDACTED] to lie. [REDACTED].⁷⁶

72. In evidence, when [REDACTED] [D2-147]’s account was put to him, P-279 denied [REDACTED].

[REDACTED].⁷⁷

73. Throughout his evidence of living in Zumbe, he made no reference to his parents or family being there. It was only reluctantly, in cross examination, that he conceded they were there:

Q. Again there's a pause, so let me ask the question again. Were your parents at Zumbe?
A. Yes, they were in Zumbe.

⁷⁴ EVD-D02-00102/-00103/-00104.

⁷⁵ See, for example, P-279-T-150-p.54 (FRA-p.54); P-279-T-149-pp.9-10 (FRA-p.10); P-279-T-152-p.37 (FRA-p.37).

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

Q. Then why haven't you told us about that?

A. I beg your pardon? I did not quite understand you.

Q. Why haven't you told us before just now that your parents were in Zumbe?

A. I forgot.⁷⁸

74. He attempted to explain his different accounts by saying the family had first fled to Zumbe, then returned to [REDACTED], at which point he was abducted. That was not an account that featured in his earlier interviews, and there is neither mention of, nor opportunity for, 'two' visits to Zumbe. [REDACTED], nor is it likely, given the fear of being murdered.⁷⁹

The witness then appeared to 'collapse' insofar as his original account was concerned:

Q. And when you were in Zumbe, they were in Zumbe too; isn't that right?

A. Yes.

Q. And they built a little house there to live in; isn't that right?

A. That is correct.

Q. And you lived with them too, didn't you?

A. I lived with them.

Q. And there came a time when the Ngiti people who'd fled to Zumbe left Zumbe, or most of them; isn't that right?

A. Yes.

Q. And you left with your mother and younger brothers and your sister, leaving your father with the goats at Zumbe; isn't that right?

A. (No verbal response)

Q. Is that right?

A. I do not remember very well.⁸⁰

Q. Mr. Witness. I'll ask you this: When you left Zumbe with your mother and the younger children, you went to Aveba. Am I right in saying you didn't go back to Zumbe after that?

A. Yes.

Q. And my understanding is that your mother and the younger children with you left Zumbe on the 1st of December, 2002. Is that right? It's before Christmas 2002.

A. I no longer remember.

Q. Just think back, that's before Christmas and the new year of 2002. Does that help you remember?

A. I no longer remember.⁸¹

75. Elsewhere in his evidence, when asked how long he stayed at Zumbe, he said -"What I can tell you is that I spent one month and beyond".⁸² Later specified as 'A month and some weeks'.⁸³

Q. How long were you in Zumbe camp?

A. I spent one month and a few weeks there.

Q. How long had you been in Zumbe before the Bogoro attack?

A. Before the Bogoro attack, I had already spent about three weeks and a few days.⁸⁴

76. Yet in his recorded statement he said at paragraph 18. "I stayed a year and some months in the militia:"⁸⁵

⁷⁸ P-279-T-151-p.36 (FRA-p.53).

⁷⁹ P-279-T-152-p.14 (FRA-p.14).

⁸⁰ P-279-T-151-p.55-56 (FRA-pp.54-55).

⁸¹ P-279-T-151-p.58 (FRA-pp.56-57).

⁸² P-279-T-149-p.46 (FRA-p.47).

⁸³ P-279-T-150-p.34 (FRA-p.33).

⁸⁴ P-279-T-149-p.47 (FRA-p.47).

Q Did you tell the investigators that?

A. I do not remember. [...]

Q. "I left the militia on the 3rd of May, 2003. A little after, the Ugandans left Bunia." Is that right?

A. I do not remember. [...]

Q. Well, whether you remember or not, is it true or untrue?

A. I would say that the investigators probably did not understand me well.⁸⁶

77. The witness did not participate in a demobilisation process. There is no proof of demobilisation.

78. The witness provided a detailed account of having been assigned, after the Bogoro attack, to be [REDACTED]. He gave various details of that – but could name only one other member [REDACTED] with him - [REDACTED]. He could not remember the names of the others.⁸⁷ It was clear from his evidence that this [REDACTED] was distinct [REDACTED]. He could name only one member of Boba Boba's own bodyguard – Ndajangu, whom he said was the youngest and aged 14.⁸⁸

79. Contrast that with his account in his interviews:⁸⁹

I stayed a year and some months in the militia. [REDACTED].

Q. [...] what do you say about that because that's quite different to what you've told us? ⁹⁰

A. I have no idea. ...

Q. All right. Now, what is of interest to me also are that the people you name as being [REDACTED]

A. (No verbal response).⁹¹

80. He said in his statement that:

Q [REDACTED]. Is that right or not?

A. I do not remember.⁹²

81. This is a clear difference of account. The story [REDACTED] throughout the period perhaps posed him a problem, given the evidence of witness P-250, whom this witness knows, and his account of Boba Boba leading a delegation to Aveba. It would beg the question, why was P-279 not a part of, or knew about, that delegation? Perhaps P-279 changed his story to avoid conflicting with P-250. Also, he made no mention in his statements of [REDACTED]. Witness P-280, gave a very different account [REDACTED].⁹³

⁸⁵ P-279-T-152-p.14 (FRA-p.15).

⁸⁶ P-279-T-152-pp.14-15 (FRA-pp.15-16).

⁸⁷ P-279-T-152-pp.22-23 (FRA-pp.23-24).

⁸⁸ P-279-T-152-p.23-24 (FRA-pp.23-24).

⁸⁹ P-279-T-152-pp.27-29 (FRA-pp.27-28) and Statement, paragraph 18.

⁹⁰ P-279-T-152-p.28 (FRA-pp.27-28).

⁹¹ P-279-T-152-p.29 (FRA-p.29).

⁹² P-279-T-152-p.30 (FRA-p.30).

⁹³ P-280-T-158-p.46 (FRA-p.47).

82. Witness 279 claims in his evidence to have seen Katanga on three occasions. First, he claimed seeing Germain Katanga visit Zumbe to plan the attack three days before the attack.⁹⁴ The witness explained he saw Katanga passing by when he was on sentry duty or, in alternative account, on his way to sentry duty. He said he knew the person was Katanga because others present had told him so. This, the defence submits, would have been a very difficult exercise, given the circumstances described in his earlier statement where he purported also to identify 'Cobra, Ndargue and Oudo 'amongst a group of twenty or so.'⁹⁵ Second, he said he saw Katanga on the day of the attack at the Bogoro school.⁹⁶ Third, he said he saw Katanga on one final occasion at Aveba:

A. Afterwards, a relative of mine showed me Germain Katanga, and I told my relative that I had already seen him. I had already seen Germain Katanga when we were guarding Zumbe. And I told him that some soldiers had pointed him out. So when my relative showed me Germain Katanga, I had already fled.⁹⁷

83. If true, the three sightings provide crucial evidence for the Prosecution. But no other witness gave evidence to the Chamber of a visit by Katanga to Zumbe. Witness P-250 was emphatic in stating that Katanga definitely did not visit Zumbe before Bogoro.⁹⁸ The basis for P-279 knowing it was Katanga - 'I was told' - is strikingly different to his account given to the prosecution investigators, where it is based on recognition:⁹⁹ In his interview he said he had seen Katanga before his abduction;

*[Reference to para. 25 of statement] -- "I participated at the battle of Bogoro against the UPC. Our group won this battle. The other group with us was the FRPI. I do not know what that means. Germain was the first chief of the FRPI, and after him there was Cobra Matata. I saw Germain and Cobra Matata before my abduction. My parents had indicated that it was Germain and Cobra one day on the road."*¹⁰⁰

Q. You go on to then talk about his arrival at Zumbe. So your basis for knowing it was Germain Katanga passing through your line in your statement is because of a previous identification made to you by your parents; quite different to the account you give us today. Why is that?

A. (No verbal response)

Q. Well, that's a minute since I asked the question or finished asking the question. Do you have an answer?

A. I have no answer.

Q. Am I right in saying that there never was a time when your parents pointed out Germain and Cobra to you on the road before your abduction? Am I right in saying that that never happened? A. (No verbal response).

⁹⁴ P-279-T-144-p.48; P-279-T-145-p.20; P-279-T-147-p.43.

⁹⁵ P-279-T-152-p.39 *et seq.* (FRA-p.40).

⁹⁶ P-279-T-145-p.26 (FRA-p.28).

⁹⁷ P-279-T-147-p.43 (FRA-p.43).

⁹⁸ P-250-T-104-p.17: "I am certain Germain Katanga and no FRPI commander came to Zumbe before the Bogoro attack. Germain Katanga didn't know the road to Zumbe" (FRA-p.18).

⁹⁹ P-279-T-152-p.39 (FRA-p.40).

¹⁰⁰ P-279-T-152-p.42 (FRA-p.42)

Why and how would 279's parents have pointed Katanga out? The witness was asked in evidence whether he had seen Katanga before seeing him at Zumbe and made no mention of this earlier incident with his parents.

Q. Had you seen Germain Katanga before then at all?

A. I do not have any answer to that.¹⁰¹ [...]

Q. Had you seen Germain Katanga before then at all?

A. I would say that I no longer remember. I have forgotten.¹⁰²

84. In giving his account in evidence of the battle at Bogoro it may have seemed to many a listener as if P-279 was reciting - see T-144-p.48 where it is set out. His account does not fit with other evidence, though there is a telling echo of the evidence of his fellow [REDACTED] abductee, witness P-280, in the time he provides for entering the camp – something unique to those two witnesses.

A. The Bogoro attack started at 4.00 in the morning [...]. The first gun-shots served as a signal. The attack therefore commenced and they entered into the camp. There was gun-fire and people were killed in the camp. It was at 4.00 or 5.00 in the morning.¹⁰³

85. He provided no detail as to what he did for the several hours of battle. He was asked:

Q. And were you fighting in the camp?

A. Yes.

[...]

Q. Did you go to the school?

A. I didn't go to the school.

Q. Did you go to the market?

A. Yes, next to the market.¹⁰⁴

86. He said the fighting was over by 10 00 - 11 00.¹⁰⁵ He claims to have seen the two accused together:

A [...] Towards the end of the fighting Commander Ngudjolo and Commander Katanga went into the room of the Bogoro school. I do not know what they discussed amongst themselves.¹⁰⁶

Q. The school in which Germain Katanga and Mathieu Ngudjolo met, was that within the UPC camp?

A. The school was not far. It was next to the military camp.¹⁰⁷ [...]

A. I don't know what they were doing in the schoolroom or the classroom when they met.

A. They were outside and they were observing what was being done in terms of the burying of the bodies.

Q. Witness, where were you in relation to these commanders who were together?

A. I was quite far from them.

Q. Were you able to see them?

A. No. [...]

A. I have just told you. I told you that they met together at this school in Bogoro. I have nothing to add to that. I don't know what else they did.

Q. Witness, who exactly was in the classroom?

¹⁰¹ P-279-T-152-p.36 (FRA-p.38).

¹⁰² P-279-T-152-p.38 (FRA-p.38).

¹⁰³ P-279-T-145-p.26 (FRA-pp.27-28).

¹⁰⁴ P-279-T-153-p.4 (FRA-pp.7-8).

¹⁰⁵ P-279-T-152-p.57 (FRA-p.57).

¹⁰⁶ P-279-T-145-p.26 (FRA-p.28).

¹⁰⁷ P-279-T-145-p.33 (FRA-p.35).

A. I've already answered this question. There was Chief Ngudjolo, Chief Germain Katanga, as well as other commanders.

A. They didn't stay in the classroom for a long time.¹⁰⁸

87. P-279 produced a sketch -EVD-D02-00040- in his 2007 interviews and marked the UPC camp and the School.¹⁰⁹ The sketch is a significant document as it clearly places the UPC camp (he marks it 'YA UPECE'), not at the Bogoro Institute, but in the area of the Kavali school, a considerable distance away. Witness 280 did a similar thing. This does not appear to be a slip when making the sketch as he confirmed he meant to mark it there by a subsequent answer he provided as to where he was when he saw Katanga and Ngudjolo enter the school.

Q. [...]: Where were you when they went into the classroom?

A. We were next to the market. [...]

A. From the market you could see how the people entered into the school, but you could not -- or you did not know what they were doing within the school. From the market you couldn't see the door, but the window, all the windows, it was possible to see them, or it was possible to see if the people were inside.¹¹⁰

88. From the judicial site visit the Chamber will accept, the defence submits, that Kavali school is the only building one could see from the market – albeit only the roof. And it is the Kavali school that P-279 has indicated on the sketch. You cannot see Bogoro Institute from the market, and it is, in any event, far away.

89. P-279 said all the bodies had been buried by the time he left Bogoro. He did not see any 'Red Cross'. He said that Katanga and Ngudjolo had left by then.¹¹¹

90. He said he then returned to Zumbe, arriving in daylight, and that the journey took three and a half hours.¹¹² That would mean leaving about 14.30. Yet in his statement he said:

Ngudjolo and Germain entered the school. I do not know what happened once they went inside. I estimate that they were in the school for an hour. It was in the afternoon, as now the sun began to set.¹¹³

When asked about this he said: "A. I do not remember."¹¹⁴

91. Witness P-279 says he remained in Zumbe/Ladile for an unknown time – weeks or months - after the Bogoro attack before escaping with [REDACTED], but makes no reference at all to the Mandro attack.

92. Despite the fact they grew up as next door neighbours [REDACTED] the witness denied knowing witness 280. They were both inhabitants [REDACTED], recruited by the same

¹⁰⁸ P-279-T-145-pp.33-35 (FRA-pp.36-37).

¹⁰⁹ P-279-T-153-p.11 (FRA-p.10).

¹¹⁰ P-279-T-153-p.14 (FRA-p.14).

¹¹¹ P-279-T-153-p.3 (FRA-p.3).

¹¹² P-279-T-152-p.57 (FRA-pp.57-58).

¹¹³ P-279-T-153-p.4 (FRA-p.4).

¹¹⁴ P-279-T-153-p.4 (FRA-p.5).

intermediary-143. He makes no mention of sharing life and experiences at Zumbe and Bogoro and Aveba. Why is 279 deceiving the court as to his knowledge of [REDACTED], or their mutual recruitment by 143?

Q. Do you know someone called [REDACTED]? (Prosecution witness 280)

A. I do not remember that name.

Q. Let me say it again. [REDACTED] [P-280].

A. No.¹¹⁵

He was shown [REDACTED] [P-280]'s photo EVD-D02-00039, and responded 'I do not know this person'.¹¹⁶ When asked if he had seen [REDACTED] [P-280] at Zumbe, he said 'I do not remember'.¹¹⁷ How, if what they say is true, would it have been possible for one to miss the other? The two lived in neighbouring houses [REDACTED]. The chamber has photos of the two sites.¹¹⁸ [REDACTED]¹¹⁹ – [REDACTED].

93. Both 279 and 280 were 'recruited' by intermediary 143 [REDACTED] from [REDACTED]. When asked if the intermediary had spoken to him and another young man at [REDACTED] he replied 'I can't remember'.¹²⁰ [REDACTED] has a clear recollection of both young men being with intermediary 143.

94. The Chamber has photographs provided of the conditions at [REDACTED] and of P-279's home in particular.¹²¹ Even by standards in Ituri the photographs reveal extreme poverty. It is not difficult to imagine the temptation presented to young people by the witness protection programme. It provides the opportunity for a new life, resettlement, education, support and assistance. [REDACTED] said:

It was the taste of money, the love of money, that put him in this difficult situation and these difficult situations continue to exist today, and [REDACTED]. Everything that has been said here stems from lies.¹²²

P-250, [REDACTED]

95. Witness 250 claimed to have been a combatant based at Zumbe [REDACTED]. He said he participated in the subsequent attack on Bogoro and saw both accused there, and was later present at the fighting at Mandro and Bunia. Although his evidence largely concerned events at Zumbe he is a highly significant witness against Katanga. His evidence is crucially deficient in two respects. Firstly, the witness has demonstrated a capacity to mislead the chamber on significant issues. Secondly, his account has been too contradictory to be relied

¹¹⁵ P-279-T-151-p.48 (FRA-p.47).

¹¹⁶ P-279-T-152-p.43 (FRA-p.43).

¹¹⁷ P-279-T-151-p.51 (FRA-p.50).

¹¹⁸ ICC-01/04-01/07-3234-Conf-Anx, PV of the site visit.

¹¹⁹ [REDACTED].

¹²⁰ P-279-T-151-p.48 (FRA-p.49).

¹²¹ EVD-D02-00132.

¹²² [REDACTED].

upon. Further, while the defence does not have a burden to prove that a witness's account is wrong, the defence has produced cogent and credible evidence to raise further, profound doubt as to this witness's reliability.

96. Witness P-250 was introduced by intermediary W-316 [REDACTED] who was also a party to the introduction of P-161, P-159. The particular dangers associated with witness's that have had contact with that intermediary are reviewed below.

97. Witness P-250 admits knowing both [REDACTED]-279 - and [REDACTED]-28. He may know other witnesses yet not admit it. In the defence's submission it is likely that witness P-28 altered his original story so as to include a reference to meeting witness P-250 as part of the delegation from Zumbé, something W-28 had not mentioned in his earlier and extensive account. As well as meeting, on W-28's account, in Bunia, they also had the opportunity of meeting in Kinshasha.

98. In the defence submission, Witness P-250 attempted to mislead the Chamber in respect of such basic details as his age, family and name. He provided a false date of birth, gave a name by which he is not generally known, and claimed that both parents were dead when both are alive. However, a number of relevant defence witnesses were called, including his own father.

99. It may be that prosecution witnesses, unused to the adversarial system, do not fully appreciate when they make statements that the defence are going to investigate their accounts and confront them with material they thought would not emerge. The defence do not have to suggest a motive as to why a witness might provide a false story but it is a question that might naturally arise in respect of all the witnesses against whom that allegation has been raised. In the case of P-250 he is someone who has had no contact with his father since becoming a potential witness and was last in touch with his [REDACTED].¹²³ Why would he do that? Why would he choose to give evidence against Ngudjolo or Katanga at all? Is he thirsting for justice? What is his motive? P-250 was first preventively relocated from [REDACTED] until the VWU implemented the ICCPP on 20 September 2007.

100. He gave his date of birth as [REDACTED]. The defence submits he was born in [REDACTED].

101. He provided the name – '[REDACTED]'-¹²⁴, but later conceded:

Q. I suggest your name is, in fact, [REDACTED]; is that right? A. That is correct.¹²⁵

¹²³ P-250-T-104-p.28 (FRA-p.25).

¹²⁴ P-250-T-91-p.12 (FRA-p.11).

102. Throughout his interviews he claimed his parents were dead, and elaborated on the story, drawing understandable sympathy;

My father was killed in 1999 or 2000. He was killed in the war."; "And my mother was killed before him.¹²⁶ [...] I began in the movement after the death of my father, which was, I think, in December 1999.¹²⁷

The prosecution was plainly surprised to learn in court that his parents were alive.¹²⁸ Taken separately or together those three matters - name, date of birth, family connection – would hamper any investigation into him.

103. [REDACTED];

[REDACTED].¹²⁹

An old friend, [REDACTED] [D-161], who knew him well, thought he was sick. “[He] told me that he had gone to continue with his studies. [...] He told me that he had a white friend who was going to help pay for his studies.”¹³⁰ [...] [REDACTED].

[REDACTED].¹³¹

104. [REDACTED] was not militia nor at Bogoro.¹³² Though contradicting [REDACTED].¹³³ He gave details of the life and history of [REDACTED]. The essence of his evidence is that [REDACTED].

[REDACTED].¹³⁴

As to visiting Zumbe: [REDACTED].¹³⁵

105. The Chamber had the opportunity of seeing [REDACTED] and assessing his credibility as a witness. In particular, the Chamber saw him answer questions as to the problems caused by [REDACTED], and may have been impressed by the frank and forthright manner in which he answered.¹³⁶

Q. [REDACTED].¹³⁷

He may indeed have been placed in a difficult situation, particularly if [REDACTED] was not telling the truth.

[REDACTED].¹³⁸

¹²⁵ P-250-T-102-p.51 (FRA-p.49).

¹²⁶ P-250-T-102-p.45 (FRA-p.44).

¹²⁷ P-250-T-102-p.48 (FRA-p.47).

¹²⁸ P-250-T-92-p.74 (FRA-p.78).

¹²⁹ [REDACTED].

¹³⁰ P-161-T-268-p.47 (FRA-p.51).

¹³¹ P-161-T-268-p.48 (FRA-pp. 42).

¹³² See generally [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

While the Prosecution will doubtless point to social pressure as a possible motive for the [REDACTED] to lie, the court will be left with the advantage of having seen him give his testimony.

106. As to his [REDACTED] said:

[REDACTED]¹³⁹

107. The academic year in Ituri runs from September to July.

[REDACTED].¹⁴⁰

[REDACTED].¹⁴¹

108. The defence case is that at the relevant period, the latter part of 2002 through to 2003, witness 250 was in Gety and attending school. It is worth noting that witnesses occasionally refer to Gety and Kagaba synonymously. Christian Mbodjima Mbaraza (D2-160) stated in clear terms that P-250 was present at Gety in 2002/2003.¹⁴² Again, the defence stresses that it does not have to prove that P-250 was in Gety, it remains for the Prosecution to prove that he was not, but Christian was, in the defence submission, a reliable witness on this issue.

Q. [Joe=[REDACTED]] Do you know him? A. I knew him in Gety in 2003 when I came to repeat my fifth year of secondary school. I came to know him for two reasons. He was a student at the Abaka Institute in Gety while I was at the l'institut de Gety. So there are two schools there where you have commercial studies and the humanities, and then there was the Gety institute where you can carry out studies also in the humanities. I also knew him because after his school he was working with a trader known as Kulukpa.¹⁴³

Q. [...] in early 2003, January/February 2003, do you know where Joe=[REDACTED] was? A. As I said yesterday, I came to Gety to repeat my fifth year. It was around September/October 2002. So it was the school year 2002/2003. I got to know him during that period, that is, as from that time because the two -- during the two years that I spent in Gety he was there. And what I know about him - and there is very little risk that that is incorrect - is that he was studying, he was a student. Not only did I go and buy items in his store, we knew each other very well. I believe that if he meets me also he will know me. This was a village. It was not a large town where people might not know everyone.¹⁴⁴

A. [...] September, October, November, December, even 2003, Joe=[REDACTED]'s in Geti, because what's certain -- well, when you live in the same neighbourhood, two or three days you might not see the person, but you note person's there, because after one or two weeks you will you'll see them again.¹⁴⁵ [...]

The fact is that the distance between the Abaka institute and the Geti institute is 3 kilometres, but if you come to Geti and you look at the map, where Joe=[REDACTED] was living and where I lived means that [...] In order for me to go to school, I had to go in this direction and go to the Geti institute, and Joe=[REDACTED], in order to go to Abaka, would go in the other direction. So we would meet every day except one of us was absent. Secondly, I said that apart

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² D2-160-T-273-p.8 (FRA-p.7).

¹⁴³ D2-160-T-273-p.8 (FRA-p.7).

¹⁴⁴ D2-160-T-273-p.9 (FRA-p.8).

¹⁴⁵ D2-160-T-275-p.12 (FRA-p.10).

from being a student, Joe=[REDACTED] sold in a store, and after classes he would sell in that store. And we were in the habit of buying basic commodities in that store, polish, pens, amongst others.¹⁴⁶

Christian said that 250 worked [REDACTED]. Witness 250 admitted he worked [REDACTED].¹⁴⁷

109. [REDACTED] (D2-161) knew P-250 ('Michel') well, considered themselves good friends, and had contact with him even after he left Bunia and entered the protected witness programme. She was aware of him visiting his friend in Aveba before the time of the attack on Bogoro as well as after. She said he was studying in Gety and also selling items in the Aveba market.

Q. At the time you met Michel=[REDACTED] in Aveba, did he have other activities, other than those you have mentioned already?

A. No. I am not in a position to say what other activities he was engaged in. [...] I never saw him dressed in military uniform. [...] I never saw him carrying a weapon.

Q. In your conversations with him - and you've told us you knew him well - did he ever mention to you that he had ever fought in any battles or participated in combat at any time?

A. No, he never told me about any battle.

Q. Did you ever hear it said that he was a member of any militia?

A. No, I have never heard of that.¹⁴⁸

110. Jonathan Dubatso Baguma (D2-136) gave evidence and said of P-250, whom he knew when he came to Aveba after the relevant events;

Q. Do you know from anything that he told you or that you learnt from others, do you know whether he ever was a combatant in a militia?

A. No, I do not know.

Q. Did he ever speak to you of being in the militia?

A. He never told me that he was a militia man.

Q. Did anybody else ever mention to you that he was a militia man?

A. No. Other people referred to him as -- referred to him as a trader and after having left that job he was referred to as a driver.¹⁴⁹

111. [REDACTED] (D3-55):

[REDACTED].¹⁵⁰

A. I was in the habit of going to visit them at their house, so [REDACTED] told me that that child was not living with them and that he had sent the child to school in Gety.

[...] Q. Did you learn that [REDACTED] was part of a delegation that went to Aveba to negotiate the plan of attack upon Bogoro? Did you learn that?

A. I never heard that story and I have no explanations in this regard.

Q. Now, once again, during this period of time did you learn that [REDACTED] had taken part in the attack upon Bogoro on 24 February 2003?

A. I never heard that story and I know nothing about that.¹⁵¹

¹⁴⁶ D2-160-T-274-p.41(FRA-pp.38-39).

¹⁴⁷ P-250-T-102-p.63 (FRA-p.61).

¹⁴⁸ D2-161-T-268-p.51 (FRA-pp.44-46).

¹⁴⁹ D2-136-T-240-p.54-55 (FRA-p.51).

¹⁵⁰ D3-55-T-293-p.42 (FRA-p.44).

¹⁵¹ D3-55-T-293-pp.45-46 (FRA- pp.47-48).

112. [REDACTED] (D3-66)¹⁵² who spoke of visiting Walendu Bindi for supplies made no mention of P-250 being part of the delegation with him.¹⁵³ At that time, [REDACTED] [P-250], was a student in Geti and he lived [REDACTED]. He was a student. He didn't live with his parents in Ezekere. He was going to school at that time.

113. There is nobody who corroborates P-250 in any way – with the exception of witness P-28, and no rebuttal evidence has been sought to be produced by the Prosecution to contradict the evidence as to P-250's schooling or whereabouts in the academic year 2002-3.

114. P-250 is familiar with the geography and terrain having been born and brought up in the area. If born as the defence submits in [REDACTED], is now almost [REDACTED]. He knows several of the Prosecution witnesses. His family were in Zumbe [REDACTED]. So, he does not lack the necessary material to make up an account and there is little in his account that he could not have made up if minded to do so. In his evidence P-250 claimed being [REDACTED] to a militia company in Zumbe. He had never made that claim in his long interviews with the Prosecution. It was put by the defence that it was his brother who had been the company's [REDACTED].

Q. You have an older brother called [REDACTED]; that is right?

A [REDACTED]. He is called [REDACTED].

Q. Did he have any position with the combatants?

A. I don't know.¹⁵⁴

He later conceded: 'Yes. At one particular time he worked [REDACTED].'¹⁵⁵

He said he lived in 'the camp' at Zumbe and described it and life there. He made no mention of his family living Zumbe. It was only in cross-examination he conceded they had fled there and that he lived together with them in the house they built. There was no suggestion that his family lived in a military camp.

115. His evidence is a mine of discrepancies. The defence concentrates on the three key features of his evidence – the delegation to Aveba, the preparations for Bogoro at Zumbe and the attack on Bogoro. Within his account of those three principal areas are discrepancies that cannot, in the defence submission, be accounted for by mere lapse of memory or the pressures of giving evidence.

¹⁵² See for example D3-66-T-296-p.23;29;31 (FRA-pp.20-21 ; 26 ; 28).

¹⁵³ D3-66-T-296-p.35 (FRA-pp.31-32).

¹⁵⁴ P-250-T-102-p.59 (FRA-p.57).

¹⁵⁵ P-250-T102-p.61 (FRA-p.60).

The delegation to Aveba

116. The defence disputes that there was a 'pre-Bogoro' delegation - other than the undisputed visit by Chef Manu in December 2002. There is no mention of P-250 being part of that delegation and he does not place himself in a delegation led by Chef Manu. However, some of witness P-250's account has an echo of the Chef Manu expedition. They both involve delegations, both travel to Aveba, both have Martin Banga and [REDACTED] D3-66 participating. Chief Manu spoke of how he saw, on his arrival by plane to Aveba from Beni, that Zombe was being attacked. Witness 250 spoke of Lone Nyunye having to be the first to return to Zombe from Aveba because they could tell from the sound of explosions that Zombe was being attacked. This is all the more interesting as there is no evidence Zombe was attacked after December 2002. Manu spoke of being given a little ammunition to take with him –and 250 also speaks of taking just a little ammunition. The length of time spent away from Zombe by Chef Manu would be about a month. 250 spoke of being away for one month, one week and four days. In any event, there are a number of similarities between 250's account and the Chef Manu visit in December. The defence disputes the notion of a subsequent delegation after Chef Manu. The defence does not suggest that 250 was part of Chef Manu's visit. But has 250 utilised what he came to learn of aspects of Chef Manu's to help structure his own account? No witness other than P-250 and P-28 speak of a delegation in 2003.

117. Witness 250 spoke of learning of their membership of the FNI on arrival at Lakpa and that the group then had a rubber stamp made up for them in Aveba to reflect that fact. That is of interest as the stamp would have been made independently of those remaining in Zombe. It demonstrates the possibility that people who had fled Zombe and settled in Walendu Bindi could well have made up their own FRPI or FNI stamp, independently of Zombe, which may explain the stamp on EVD-OTP-00025.

118. P-250 said the delegation took a route that took them, 'through the middle of Bogoro'¹⁵⁶ - "We passed through the residence of Manzikala and then we entered the city."¹⁵⁷ That would have been an incredibly dangerous thing to have done. He mentioned 'a vehicle which went - children could get on board, depending on the road'¹⁵⁸ – though then said that he had not mentioned a vehicle.¹⁵⁹ His account of the journey was specific as to the time and route it took:

¹⁵⁶ P-250-T-92-p.57 (FRA-p.60).

¹⁵⁷ P-250-T-101-p.76 (FRA-p.76).

¹⁵⁸ P-250-T-92-55 (FRA-p.58).

¹⁵⁹ P-250-T-93-p.27 (FRA-p.28).

119. "When we left the Bedu-Ezekere groupement, to arrive Lakpa it was one and a half days, and from there to Kagaba another day and a half, and from there to Tchekele also one and a half days."¹⁶⁰ (He reduced the time taken to reach Lakpa to five hours. 'We left the locality of Zumbe at 4.00 p.m., and at 9.00 p.m. we arrived at Lakpa.')¹⁶¹ Later, he made no mention of going via Tchekele, which is a considerable distance off route in any event.

From Zumbe to Lakpa we took one day. Lakpa to Kagaba, one day. Kagaba, Mandre, one day. Mandre to Aveba, once again, one day.¹⁶²

120. He said he had not been to Aveba in this period other than on that mission.¹⁶³ Throughout his evidence he stated that he was away for 'One month, one week and four days'.¹⁶⁴ When was this mission? In his evidence he gave differing times for when he returned to Zumbe - somewhere between three days and a week before the attack on Bogoro. Yet he gave clear evidence that he left Zumbe one or two weeks after the Nyankunde attack of 5th September.

121. It was after the APC soldiers had left the locality where they were and gone through Nyankunde to go to North Kivu. It was at that time that I left Zumbe to go to Aveba.¹⁶⁵ [...] I can say that it was a week and a half after they had left Zumbe. One week or two weeks. The operation for Nyankunde lasted for a week.¹⁶⁶

He later specified:

If I remember correctly, because I'm not very good at remembering dates since there are many of them in my head, it was the 24th -- the 25th of August. That was the date on which we left.¹⁶⁷

As to the date, he changed that again after he was shown the 'soap' letter which is dated January 4th 2003. In final cross examination on behalf of Ngudjolo:

Q. On approximately what date did your delegation arrive in Bolo?

A. It was around the 8th.

Q. The 8th of which month and which year?

A. The first month and the name -- the year that started -- [...].¹⁶⁸

He was unable to name the year

122. Bahati is a significant figure in his evidence but he did not name Bahati in his original list of those who had gone on the mission;

Q. Can you tell us the names of the officers who accompanied Boba Boba?

A. There was [REDACTED], Martin Cobra. They were the ones who accompanied Boba

¹⁶⁰ P-250-T-92-p.64 (FRA-p.68).

¹⁶¹ P-250-T-101-p.76 (FRA-p.76).

¹⁶² P-250-T-104-p.68 (FRA-p.64).

¹⁶³ P-250-T-101-pp.21-26 (FRA-pp.21-26).

¹⁶⁴ P-250-T-92-p.64 (FRA-p.68).

¹⁶⁵ P-250-T-101-p.65 (FRA-p.63).

¹⁶⁶ P-250-T-101-p.66 (FRA-p.64).

¹⁶⁷ P-250-T-104-p.64 (FRA-p.60).

¹⁶⁸ P-250-T-104-p.68 (FRA-p.63).

Boba.¹⁶⁹

He mentions Bahati in his evidence the following day;

Q. So Bahati, Bahati de Zumbé, was with you in the delegation that went to Aveba; is that not correct?

A. Yes, that's correct. Bahati was present in this delegation.¹⁷⁰

This is all the more surprising given that he later says Bahati was head of the mission.

Q. On this mission, who was head of the mission?

A. When we left, Bahati of Zumbé was the head of the mission. We also travelled with Boba Boba and other members of the FRPI.¹⁷¹

He later said: 'Our delegation was led by Colonel Boba Boba. He was the one who was the commander.'¹⁷²

123. Bahati is, in fact, at the core of his account. However, in his previous statements to the OTP in December 2006, when events were presumably fresher in his memory, he stated Bahati was part of the FRPI group that the delegation found on their arrival in Aveba, and made no mention of Bahati being at Zumbé or forming part of the delegation, let alone being the leader of it. He even listed the members of the delegation at length and made no mention of Bahati.¹⁷³ And when asked in the interview who was present at Katanga's residence when the delegation arrived, he said that there were 'many soldiers, including Bahati, who is now a soldier, a Colonel of the 6th Brigade'.¹⁷⁴ What reasonable explanation is there to explain this difference of account, when Bahati is now the core of his present story?

124. On their arrival at Aveba he claimed in his evidence that he saw or met Cobra Matata among others.¹⁷⁵ Yet later, he said that they were sent down to Bavi with the purpose of meeting Cobra Matata.¹⁷⁶

125. If this visit took place shortly before the Bogoro attack, as he claims, it is surprising that he was unaware, in the month he was there, of the arms supplies that were taking place. He made no mention of it, explaining only that weapons were collected from battlefields. He said they left Aveba with only some packages of ammunition for a 'falo'.¹⁷⁷

¹⁶⁹ [REDACTED].

¹⁷⁰ P-250-T-93-p.29 (FRA-p.30).

¹⁷¹ P-250-T-101-p.73 (FRA-p.71).

¹⁷² P-250-T-104-p.67 (FRA-pp.62-63).

¹⁷³ P-250-T-93-p.24 (FRA-p.24).

¹⁷⁴ P-250-T-102-p.25 (FRA-p.25).

¹⁷⁵ P-250-T-92-p.69 (FRA-p.73).

¹⁷⁶ P-250-T-93-p.19 (FRA-p.19).

¹⁷⁷ P-250-T-95-p.28 (FRA-p.30).

126. He said the delegation returned to Zombe in three groups and that he left with the third group.¹⁷⁸ He claimed that Lone Nyunye left first, because “Zombe was attacked and this is how Lone Nyunye and some men went back, to increase the forces which had been reduced.”¹⁷⁹ When asked how they came to hear of the attack, what manner of communication existed, he said that they had heard the ‘kabinda’ (the detonation of mortars) from Aveba.¹⁸⁰ The last attack referred to was the December attack Chef Manu saw from the plane, and which he said was the last attack. Yet according to W-250’s account the attack he speaks of must have been very shortly before 24th February.

127. His account of his return to Zombe is as confused as his journey to Aveba. He stated that he was in the third group to return and Bahati returned to Zombe two days later.¹⁸¹ But in his earlier account in interview he said that Bahati and a section of FRPI accompanied P-250’s own group:

Q. When you went back to Zombe having spent a month, a week, and four days, were there FRPI fighters who accompanied you to Zombe?

A. Yes. Some of them came, almost 12 a section. It was just soldiers who were sent to see the position of Zombe.

Q. Was there a commander of this section?

A. The person who had – (was) leading them was a person who lived a long time in Zombe and he came back, Colonel Bahati. He is now the Colonel of the 6th Brigade of the FARDC.¹⁸²

128. Similarly, he said in June 2007, paragraph 65:

Bahati de Zombe also came back to Zombe. He came back with the group with which he had gone with to go Nyankunde. He had a section with him. I know that he had to go to Aveba after the attack on Nyankunde, because the small Kabule had said that Bahati de Zombe would go there to visit his wife.¹⁸³ [...]

129. Those accounts have Bahati and his men going from Nyankunde to Aveba – not, as in his evidence, going back to Zombe sometime after Nyankunde and then going with the delegation to Aveba.

130. More significant, going to the root of his account as to how the plan was hatched, is his evidence that Bahati arrived back in Zombe from Aveba two days after P-250, having remained in Aveba to plan the attack, and that they attacked Bogoro shortly afterwards.

A. Boba went back with the people from his delegation. They all went back with the members of his delegation. However, Bahati stayed, and he had to plan the attack which we had to carry

¹⁷⁸ P-250-T-93-p.30 (FRA-pp.31-32).

¹⁷⁹ P-250-T-95-p.23 (FRA-p.24).

¹⁸⁰ P-250-T-95-p.23 (FRA-p.24).

¹⁸¹ P-250-T-93-p.30 (FRA-pp.31-32).

¹⁸² P-250-T-102-p.28 (FRA-p.27).

¹⁸³ P-250-T-102-pp.29-30 (FRA-pp.29-30).

out. Two or three days afterwards he came back and we did attack Bogoro. So Bahati stayed to plan the attack on Bogoro.¹⁸⁴

Yet in his interview on 5th December 2007 he stated:

A. The plan, Bahati arrived with 12 soldiers, and when he arrived they agreed with Ngudjolo and they prepared a plan, and that is how it came to be that they went back to FRPI, and they gave the plan to the other side. And after, he came back again to where we were, and he waged war starting from Zumbe. [...] When we arrived with them in Zumbe, they made a compromise, and they prepared a war plan, and that is how they went back to the place, to give the plan to those soldiers, and after, once again he came back again, and so that is how it came to be that we attacked at Bogoro.¹⁸⁵

In this account we have Bahati returning ‘with them’ to Zumbe, discussing with Ngudjolo, taking the plan back to the FRPI and then ‘came back again’. It is radically different to his evidence.

The Bogoro attack

Q. Who planned that attack?

A. It was the same person who planned the attack on Bogoro. [...] It was the commander operator in the FNI called Major Bahati.¹⁸⁶

His account of when they attacked Bogoro after his return to Zumbe varied between three days¹⁸⁷ and a week and a half.¹⁸⁸

131. Contrary to the prominence of the subject in other accounts, witness 250 made no mention of fetish in the preparation for the battle. He spoke only of the ‘motivation’ of music:

Q [...] did the witch doctors or feticheur intervene to give strength to the fighters?

A. We sung, and to be able to have a higher degree of morale and courage, we made a noise. We made -- we produced sounds with horns to be able to -- to be able to -- to be able to drive up our morale, and to be able to beat drums as well.¹⁸⁹

132. The witness said: “A. In general, Germain was in command of elements from the FRPI, but in order to reach Bogoro, well, there was someone who escorted the entire group. There was the individual whom one called Yuda. There was Dark, and there was Matata. They escorted the troops to Bogoro. And as far as the FNI is concerned, there was Bahati from Zumbe who took his group to Bogoro.”¹⁹⁰

133. He provided a sketch - EVD-OTP-00022 - representing his account of the various roles commanders and militia played. Katanga’s name does not appear on it.

¹⁸⁴ P-250-T-102-p.35 (FRA-p.34).

¹⁸⁵ P-250-T-102-p.38 (FRA-p.37).

¹⁸⁶ P-250-T-98-p.58 (FRA-p.59).

¹⁸⁷ P-250-T-95-p.34 (FRA-p.36).

¹⁸⁸ P-250-T-102-p.40 (FRA-p.39).

¹⁸⁹ P-250-T-100-p.13 (FRA-p.12).

¹⁹⁰ P-250-T-93-p.43 (FRA-pp.43-44).

134. His sketch of the camp shows a UPC camp extending over a large area. His other markings show some ability with maps. He spoke of UPC positions in several places away from the UPC camp that we have not heard about from other witnesses.¹⁹¹ P-250 placed another, substantial UPC camp on the Kasenyi road, unique to his evidence.

Q. Thank you. Now, if we now go along the road that goes from Kasenyi to the centre of Bogoro, next to the word "FNI," Pascal Kute, you have also made a cross and you have drawn around this cross in red -- shadowing around it. Now, what does this X represent here?

A. At the time, on the left there was a school, and during the war all this area was replaced with a camp on all sides, whether it's left or right. It was a position.

Q. When you say on the left side, on the right side, do you mean the left and the right side of the road; is that correct?¹⁹² A. That is correct.

135. He spoke of a vehicle with flashing lights¹⁹³ and claimed he had not.¹⁹⁴

136. He had the battle starting later than other accounts we have heard:

Major Bahati said that we had to start at 6.30, and it was at that time that we started.¹⁹⁵

137. He was vague as to what he himself did in the course of the battle – there was none of the vividness of account of somebody who has been in a battle. He drew a green line on his sketch that represented where they all ended up at the end of the fighting.

Q. What did you do after you had assembled at that place?

A. That was the end of the fighting. We had to pick up the military equipment, and that is how come we converged at this location.¹⁹⁶

He had said of the green line – [REDACTED].¹⁹⁷

But later:

Q. Did you meet Yuda and Cobra Matata where that green line is?

A. Neither Yuda nor Cobra Matata were there.¹⁹⁸

When asked about the discrepancy he said: "A. I didn't say that at all."¹⁹⁹

138. He was asked about fighting at the Bogoro Institute:

A. What I said was that after having eliminated the other positions, we went to Bogoro camp to take the military equipment that had been left there.

Q. Can you describe the fighting to us, while you were on your way to the camp at the centre of Bogoro, specifically at the Bogoro Institute?

A. We did not see any more enemies. We were all alone.²⁰⁰

¹⁹¹ P-250-T-94-pp.35-39 (FRA-p.35)

¹⁹² P-250-T-94-p.34 (FRA-p.34).

¹⁹³ P-250-T-94-p.18-l.19 (FRA-p.19-l.6-9).

¹⁹⁴ P-250-T-103-p.33 (FRA-p.32).

¹⁹⁵ P-250-T-94-p.7 (FRA-p.7).

¹⁹⁶ P-250-T-94-p.42 (FRA-p.44).

¹⁹⁷ P-250-T-94-p.39 (FRA-p.40).

¹⁹⁸ P-250-T-103-p.53 (FRA-p.51).

¹⁹⁹ P-250-T-103-p.53 (FRA-p.51).

²⁰⁰ P-250-T-94-p.43 (FRA-pp.44-45).

139. He said that Nyunye was one of the main commanders present at the Bogoro attack and was P-250's own commander at Zumbe.

Q. And Lone Nyunye, what was he doing?

A. There was the entry through the main road from Limbo. It was through that road that he entered, but they used the same route with Bahati, because at one point they met up together and entered together into the centre of Bogoro and right up to the Bogoro camp.²⁰¹

140. Yet in his statement 16th of June, 2007 /1013-0002, he said:

Nyunye was not present at that time. He had been prohibited from taking part in that attack. He had been prohibited by the Kodza - witch doctors. He was not the only one who had been prohibited from fighting, but I remember him because he had an important position. To my knowledge, he was the only one occupying an important position to have been so prohibited.²⁰²

141. The witness claimed he saw Katanga and Ngudjolo in Bogoro sitting under the mango trees just minutes after the end of the attack.

A. At the entrance to the Bogoro Institute, there are some mango trees. And they were seated under the mango trees just right of the road, just beside the road, beside the place where there had been Ugandan troops, beside the Bogoro Institute.²⁰³

142. And indeed there are mango trees there, almost nothing but mango trees, and that would be known to P-250 who had lived in Bogoro most of his life. He said he remained in Bogoro for two days – in his interview for five days.²⁰⁴

Events prior to the Bogoro attack

143. An important part of his evidence, and an insight into his reliability, is the witness's account of events before the Bogoro and the Mandro attack, both accounts being significantly different to his interview. In evidence P-250 said there was no visit by FRPI/Walendu Bindi commanders to Zumbe prior to the attack on Bogoro. In particular Germain Katanga did not come and he confirmed that in cross-examination;

A. Before attacking Bogoro, he did not know anything about Zumbe. He did not know the road leading to Zumbe.²⁰⁵

144. But before coming to those events before Bogoro further it is worth recalling what he said about Mandro.²⁰⁶

Q. Who planned that attack?

A. It was the same person who planned the attack on Bogoro. [...] It was the commander operator in the FNI called Major Bahati.²⁰⁷

²⁰¹ P-250-T-103-p.42 (FRA-p.41).

²⁰² P-250-T-103-p.43 (FRA-p.42).

²⁰³ P-250-T-94-p.41 (FRA-p.53).

²⁰⁴ P-250-T-103-p.59 (FRA-p.57).

²⁰⁵ P-250-T-103-p.65 (FRA-p.68).

²⁰⁶ See P-250-T-98-p.54 onwards (FRA-p.54 onward), P-250-T-99-pp.36-39 (FRA-pp.36-40) and P-250-T-103.

²⁰⁷ P-250-T-98-p.58 (FRA-p.59).

145. His evidence is that Katanga came and stayed at Zumbe for several days before the Mandro attack and participated in that attack – in fact led the attack. No other witness speaks of German Katanga stayed with Ngudjolo at his home in Kambutso or at all.

Q. So Germain Katanga went and slept in the house of Mathieu Ngudjolo; is that correct?

A. Yes, it was there that he was received. There was no question of him spending the night in the forest.²⁰⁸

146. Mandro was attacked, according to P-250: “The second or third day after the fall of Bogoro, we attacked Mandro.”²⁰⁹ In fact it was eight days later. Only Germain, among FRPI commanders, participated at Mandro, according to this witness:

Q. Was Cobra Matata part of the attack on Mandro?

A. Cobra Matata did not go to Mandro.

Q. Did Yuda go to Mandro?

A. Yuda neither. He could not abandon an entire collectivite because of Mandro. If you want to know whether Oudo was in Mandro, I will answer in advance that even Oudo was not there either.

Q. What about Dark? Was he there?

A. I do not know. The president of the FRPI was himself present. His presence was enough. I did not take into account the presence of others. He was there with his guards amongst the people who went to Mandro.²¹⁰

147. The conflicting accounts as to what happened before Bogoro and Mandro are extensively reviewed in the transcripts of his evidence and further demonstrate the unreliability of this witness.²¹¹ In summary, he said in his interview in December 2006 that prior to the Bogoro attack Germain Katanga and Yuda came to Zumbe. They met with Ngudjolo for the first time and attended parades. That is obviously highly incriminating evidence as to common plan and Katanga.

148. In his next interview, six months later, he changed that account explaining that he had confused the events before the Bogoro attack with the events preceding the Mandro attack.²¹² This explanation of it being all a confusion does not fit, and for the following reasons.

149. Firstly, his first account is so intertwined with his account of the Bogoro attack that it cannot be divorced from it. Secondly, he was clear in his revised account that Yuda and others were not present in the events prior to Mandro. If they were not in Zumbe prior to the Mandro attack, and not there prior to the Bogoro attack either, how can he mention them at all in the context of Bogoro? There is only one reasonable conclusion in the submission of the defence. He must have made it up. Thirdly, he also makes specific reference to Katanga and the others

²⁰⁸ P-250-T-98-p.56 (FRA-p.57).

²⁰⁹ P-250-T-99-p.38 (FRA-p.38).

²¹⁰ P-250-T-103-p.65 (FRA-pp.62-63).

²¹¹ See P-250-T-103 at page 65 onward (FRA-p.62 onward), and particularly P-250-T-104-pp.11-18 (FRA-pp.10-16).

²¹² P-250-T-104-pp.20-21 (FRA-pp.18-19).

being present at Ladile and then at Lagura when the troops met for a pep talk and instructions prior to descending to Kavelega. Yet he told us that there were no meetings or parades prior to the attack on Mandro, and no such parades at either Ladile or Lagura. Indeed, there would have been no need to go to either place as Mandro is in the opposite direction. There was only a meeting at Ladile and then at Lagura, on his evidence, prior to the descent to Bogoro.

150. These then are not mistakes born of confusion but, in the defence submission, plain untruths. The specific references, as taken from the transcript of the statement read in court, are:

Before the attack on Bogoro, correct me if I'm mistaken, apparently there was a parade. What can you tell us about that?:

"During the parade an official brought together all the soldiers and lined them up in rows, and after they were chatting, the officers were chatting amongst themselves, and then they came to give us the briefing about entering Bogoro. [...]"

Q. So Mr. Bahati in the briefing -- so Mr. Bahati gave the briefing, the instructions in the presence of the commanders, including Mathieu Ngudjolo." "Mathieu was there, Germain Katanga was there. Yuda was there. Cobra Matata was there too." 757: "So we were talking about before the attack on Bogoro."

Response: "Mmm."

[...] Q. "Where did the parade occur and this briefing?"

A. "Well, the parade had begun in Ladile where Boba Boba was." And the last parade, where we were shown the techniques how to go in, that was in Lagura because Lagura was on a hill and you could go down from that hill directly into Bogoro."

Q. Yes, tell me the name of the commanders who were present from the FNI and the FRPI.

A. "The names were .. "Bahati. Yuda." "Garimbaya." "Dark." "Lone Nyunye." 875: "Kpadhole." 866: "Oudo." 888: "They were the commanders who were present at that time."

Q. "And a few moments ago you mentioned that there was Germain Katanga and Cobra Matata as well, and Mathieu Ngudjolo was also present?"

Your answer: "Those were the officers, the high-ranking people. The commanders that I just mentioned, those were the commanders who went into the field.

"Q. But a few moments ago you mentioned Mathieu Ngudjolo, Cobra Matata, and Germain Katanga were there, and instructions were given by Bahati."

"Yes, they were there but they were seated because... the soldiers were taken to as far as Lagura, where they had to get ready to move to the positions. "So they had already met because they had gone just to the level of the residence of Ngudjolo." : "And from there they left to go to Ladile, where they had a meeting to give the power or to entrust power or authority to Bahati, to entrust authority to Bahati."

[...]"So Germain Katanga went to Kambutso? 985:

"Yes, he arrived in Kambutso.

"And after he went to Ladile?

"Yes.

"Q. And from Ladile after that -- after that they all moved to Lagura.

A. Lagura, yes.

"Q. That was how much time before the attack on Bogoro?

"A. In two days.

"Q. ...so it was two days before the attack Germain Katanga went the residence of Mathieu Ngudjolo.

"A. Yes.

[...] and at page 1025 you say: "We went out. We left to go to the residence of Boba Boba in Ladile, and there they chatted. They decided to work -- they consulted each other and they granted authority to Bahati to direct the operations. On the same day we left for Lagura and Bahati had given this briefing and the officers were there. And we left at night and we left to take up our position -- the positions.

"Q. And it was the next day, the next day, once you had reached your positions, that was when you attacked the village of Bogoro."

A. "Yes, it was in the morning."²¹³

P-28, [REDACTED]

151. The Prosecution describes him in his closing brief (762) as a witness central to its case. His evidence in court may be summarised as follows. He was brought up in [REDACTED], but problems with the Bira people caused him to leave in 2001, together with his [REDACTED] family, and settle in Bunia. Following the fall of Lopondo he fled to Oicha. He left Oicha for [REDACTED] and, on a visit to Aveba, was abducted by [REDACTED] and taken to the [REDACTED] camp at Bulandjabo from where he ran away to Aveba. At Aveba he said he was appointed [REDACTED] and came to learn some of the history, structure and activities of the FRPI, and visited other FRPI camps. He claimed to witness the visit of a delegation from Zumbé to discuss Bogoro and a preparatory meeting of FRPI commanders. He said he was part of the FRPI militia that attacked Bogoro and subsequently fought at Mandro. He remained a member of the militia until he was demobilised in 2005. Much of that account is strongly disputed by the defence.

152. The generalities of much of his evidence are uncontested. The defence accepts that the witness lived for two years in Aveba and consequently would have learned something about events. His 'knowledge' of camps and commanders has to be viewed in that context, particularly as the structure developed largely through 2003 to 2005. It is not disputed that there were radios to link Aveba with Beni and, later, with Zumbé. Nor is the presence of the APC, or the supply of arms and weapons by air, disputed - (interestingly the witness makes no mention of weapons being supplied, only ammunition.). Nor is it disputed that there was a two-pronged attack against Bogoro, launched from Medhu on the one hand and Kagaba on the other, with 'Zumbé' forces arriving later to support the attack. But all this would have been known to people living in Walendu Bindi, and particularly in Aveba, and discussed. It was local history becoming myth. He could use this information to structure his story.

153. However, this witness does not present himself, nor is he presented by the prosecution, as somebody merely recounting things he heard about. He claims to have participated directly

²¹³ P-250-T-104-pp.11-16 (FRA-pp.10-14).

in the attack. Without that element of ‘participation’ his evidence is not merely diminished but, more to the point, untrue.

154. The defence challenges the principle ingredients of his evidence— his abduction by [REDACTED]; his being part of [REDACTED]; the visit of a delegation from Zumbe; his account of the preparations for the attack on Bogoro and his participating in the attack; and his account of the attack on Mandro. These are the elements he made up.

155. Katanga said, of this witness that he did not know when he first arrived in Aveba and he never formed part of [REDACTED].²¹⁴

156. [REDACTED] (P-143), [REDACTED] (P-183), and [REDACTED] (P-316) were his intermediaries. The witness claims [REDACTED] [P-183] told him to lie to the investigators about his age and history, a matter which will be discussed further below. The relevance of particular intermediaries is discussed below. The association by this witness with those particular intermediaries, is a significant factor leading, in the defence submission, to no reliance being placed on him as an incriminating witness.

157. It is not for the defence to demonstrate that this witness’s evidence is untrue, it is for the prosecution to satisfy the chamber, beyond a reasonable doubt, that his account is both true and reliable. Nor is it necessary for the defence to establish a motive for his lying. He was at pains to say he held no grudge, no sense of revenge against Katanga:

‘it’s not to take my revenge’.²¹⁵ A. Up to now I could say Germain is a good person. He has never done me any wrong. He’s someone upstanding, in my opinion.²¹⁶ [...] I must say that Germain is a brother of mine. He is a person I love a great deal. And furthermore, I feel sorrow. It is difficult for me to answer these questions you are going to ask me. Tears are coming to my eyes.²¹⁷

158. The defence express some doubt as to the sincerity of those sentiments. An interesting preliminary question to ask oneself, regardless of whether his evidence be true or untrue, is ‘why is he giving evidence against Germain Katanga at all?’ On the one hand he said:

Mr. Presiding Judge. I wanted to ask you the following question: What is the ICC’s work? What is the aim of this court? What motivates the court? Because I do not know what the objective of the ICC is. The only thing that I do know is that the International Criminal Court does exist, but I don’t know what the objective of it is.²¹⁸

On the other hand;

²¹⁴ D2-300-T-318-pp.44-45 (FRA-pp.38-39).

²¹⁵ P-28-T-216-p.69 (FRA-p.60).

²¹⁶ P-28-T-222-p.53 (FRA-p.47).

²¹⁷ P-28-T-219-p.28 (FRA-p.24).

²¹⁸ P-28-T-220-p.26 (FRA-p.21).

You see me here giving testimony. Now, listen to the reasons that have prompted me to give evidence. The first reason is that the International Criminal Court has for mandate judging or trying those responsible for what happened in my country. Well, I have accepted to give evidence because I wish to help the International Criminal Court. May I add that I am not against anybody whosoever. I came here to help the International Criminal Court in its mission.²¹⁹

159. This witness argued strenuously for, and achieved, relocation outside Africa. In order to ‘win’ international relocation he brought significant pressure to bear upon the prosecutor to bring the VWU to agree to the relocation. The history of his demands and discussions with VWU and the OTP is well documented and known to the chamber.²²⁰ The Chamber has seen the record of meetings between the VWU and the OTP²²¹ and the defence expressed its concern at the way matters developed. It would appear that though VWU expressed the initial view that international relocation was unnecessary, that view changed leading to a commitment to a full international relocation even before the witness had given evidence and a post evidence risk assessment could be made. For this witness international relocation was *condicio sine qua non*. The full extent of the benefits provided to the witness is not known to the defence but is understood to be substantial. Objectively, and whatever the merits of his situation, he has achieved a significant life-changing advantage by giving evidence, and has sought to extend that advantage to others in his family. That is, or may be, a sufficient motive for him, and many others from a poverty stricken background, to give false evidence. He disingenuously claimed that he did not know the decision had been made to relocate him ‘out of Africa’.²²² The defence submits that was untrue, he had plainly fought for and won that relocation, and he knew it.²²³ It was a big prize to win.²²⁴

160. Part of his argument for international relocation involved various stories, untrue in the defence submission, concerning his situation in DRC. Amongst these was his claim that he had been asked to ‘change sides’ by ‘the defence’. He spoke of having been spoken to by a Sage in his 25th October 2010 statement:²²⁵

Q. Paragraph 66: “People from the village have told me that if it was necessary to buy me, they would buy me, but they’ve never made any concrete proposition.”

²¹⁹ P-28-T-222-p.64 (FRA-p.57).

²²⁰ ICC-01/04-01/07-2305-Conf-tENG, *Decision on the Report of the Victims and Witnesses Unit of 31 May 2010 regarding the situation of Witness 28*.

²²¹ ICC-01/04-01/07-2528-Conf-Anx1, Minutes of the meeting with OTP, VWU, and DRC-OTP-WWWW-0028

²²² P-28-T-222-pp.54-56 (FRA-pp.47-50).

²²³ P-28-T-222-pp.55-56: Ms. Maria-Luisa Martinod-Jacome, told you, so she’s talking to you: That the VWU was giving a guarantee that after his testimony you would be relocated internationally. You said that you were happy to hear this. All right? So why are you sitting there now suggesting that the first time you heard this was from my lips this morning?

A. Did I sign that document? If this is the decision taken by the lawyers, well, I think that I’ve just heard this information for the first time from you. (FRA-p.49).

²²⁴ P-28-T-222-p.53 (FRA-p.49).

²²⁵ DRC-OTP-1058-0110.

Q [...] “This person who said that is an old sage. It is Mbakama. He does not live in the village as such. He used to live in the refugee camp of Kindia in Bunia, but I don’t know where he lives today.” Is that true? Did this man Mbakama call you and make that -- and told you that if it was necessary to buy you, they would buy you? Is that true?

A. I do confirm that that is the truth.²²⁶

[...] Paragraph 68: “I don’t know Mbakama very well. He is Ngiti and comes from the villages of Aveba Bolo. I don’t know his age. He’s about the same age as the interpreter, and the interpreter is about 50 years old. Mbakama must have a family, but I haven’t had any relation with his family.”²²⁷ [...]

A. The person introduced himself. He said his name was Old Man Mbakama, and I asked him -- or Elder Mbakama. And I asked him which Mbakama, and he gave me details. He gave me his address.

A. He said -- he told me, “You are speaking to the old man, Mbakama.”²²⁸

161. The defence submits this account is untrue. There was a Sage called Mbakama. The defence submits he was called Alexis Mbakama and is the same man that the witness claims spoke to him. However, by the time the witness claims their conversation took place, namely in July or August 2010, Alexis Mbakama was in no position to do so having died in 2009. The witness would not have known of that when he made his ‘complaint’ to VWU as he was living in Kinshasa, cut off from the community in Walendu Bindi. He may well have heard of it by the time he gave his evidence. When shown a photo of Alexis Mbakama he said he was not the Mbakama he was talking about, but he was unable to provide any further details as to the ‘Mbakama’ to whom he was referring.²²⁹ The defence submits that this is not a mere coincidence of name, let alone status, but the witness being caught out in a lie.

162. By the time he was introduced by [REDACTED] [P-316] and [REDACTED] [P-183] to the prosecutor the witness had already, to a great extent, burnt his bridges with the Ngiti community as a result [REDACTED] in Aveba. It was a sufficiently serious affair for him to have been handed over [REDACTED] by the locals and taken to Bunia where he was placed in custody for [REDACTED].²³⁰

163. This witness, like others, may have had little concept of the nature of the proceedings, or that a defence team would investigate his account and bring to court documents and witnesses to contradict it. The prosecution investigation, despite the very many hours of interview, did not go behind his account and make basic inquiries about the witness’s history.

164. He admitted he gave false evidence. He said he did so at an intermediary’s request. The defence submits that the extent of his false evidence goes further than he is prepared to admit.

²²⁶ P-28-T-222-pp.68-69 (FRA-p.61).

²²⁷ P-28-T-222-p.70 (FRA-p.62).

²²⁸ P-28-T-223-p.57 (FRA-p.51).

²²⁹ P-28-T-222-pp.69-70.

²³⁰ See Bunia court documents DRC-D02-0001-0017/ EVD-D02-00087/8/9 ; P-28-T-219-pp.2-4; P-28-T-220-p.41.

165. The witness presented himself to the Chamber as a ‘child soldier’, born [REDACTED], and [REDACTED] at the time of Bogoro. The defence submits that was a lie, doubtless said to increase his value in the eyes of the investigators.²³¹

166. His true date of birth, in the defence submission, is [REDACTED], making him [REDACTED] at the time of Bogoro. The Prosecution has adduced no further evidence in support of his having been born in [REDACTED].

167. In court, when asked ‘how old are you?’ he would not answer at first and then hazarded [REDACTED]. Had he been born in [REDACTED] he would have been [REDACTED]. Documents produced from the *Ecole Primaire* at [REDACTED] for 2000 bore a date of birth of [REDACTED], as did the ‘Registre Matricule’ from the Lycee in Buna. His electoral card, obtained by the defence, has the date [REDACTED]. That date, [REDACTED], is a common feature in the various records.

168. On his second day in cross-examination the witness volunteered to the Court that he had reflected over the weekend on the subject and concluded that the dates on his electoral card and on his demobilisation card were correct.

When I left, I remembered the date which was put to me, the date which was on my card, my demobilization card, at well as the date of birth on my electoral card which had been made in Aveba, and I confirm that I do know the dates written on those items.²³² [...] Yes. It was just to offer a confirmation that the dates written on these cards are real, and if he has any other idea about that, I think that that’s his business.²³³

169. The electoral card is dated [REDACTED]. The demobilisation card was never produced. His Mandat d'arrêt Provisoire²³⁴ contains the following information: [REDACTED], born at [REDACTED], with the correct names of both his father and of his mother.²³⁵ When examined by the magistrate in Bunia for [REDACTED], he gave the date on oath - [REDACTED], recorded in the *procès verbal*.²³⁶

170. While never conceding the [REDACTED] date, the witness said;

[...] I reach the conclusion that you do have reliable, true information that you have received from a reliable source.²³⁷ [...] You have an information source, a source of information which is reliable, information about me, I suppose.²³⁸

²³¹ P-28-T-220-p.23 (FRA-pp.19-20).

²³² P-28-T-220-p.15 (FRA-p.13).

²³³ P-28-T-220-p.15 (FRA-p.13).

²³⁴ EVD-D02-00089.

²³⁵ P-28-T-220-p.41 (FRA-p.36).

²³⁶ EVD-D02-00088.

²³⁷ P-28-T-220-p.16 (FRA-p.14).

²³⁸ P-28-T-220-p.31 (FRA-p.27).

171. He had produced for his second interview two school reports from Songolo school as proof of his having been born in [REDACTED] – but these were forged. When that was pointed out to him the witness responded by asking the Presiding Judge the aim of the ICC.²³⁹ He finally conceded that these two documents are false documents, as he never attended the Songolo School.²⁴⁰

172. The witness provided false and misleading names. From his first interview, in 2005, he called himself [REDACTED]. It was only in his fourth meeting with the prosecution, in 2007, that he provided his correct name - [REDACTED]. The defence submits he only provided his correct name then because he had no choice, as the forged school records he produced had been drafted with his correct name.²⁴¹

173. He gave a false name for his father - [REDACTED]. It was only a few weeks before he gave evidence that he provided the correct name – [REDACTED].²⁴²

174. He told investigators that his mother, to whom he gave the name of [REDACTED], had been murdered by the Hema – but then said she was killed by ‘our combatants’.

175. He provided the investigators with the names of an extensive family : ‘I have [REDACTED].’ However, he conceded in evidence: ‘I can confirm that these are not the names of my brothers and sisters.’²⁴³ He had made up all the names.

176. In his original account he makes no mention of living in Bunia in 2001-2, presumably to evade questions that may have provoked the investigators to inquire about the family with whom he was then living – two of whom later came as defence witnesses to rebut the witness’s account. Similarly, he omitted being in Bunia when Lopondo fell, falsely stating that he was in his first year secondary in [REDACTED], having fled there with his mother and father. He admitted all that was untrue.²⁴⁴

177. The defence sought to clarify his movements leading up to February 2003.²⁴⁵ He left [REDACTED] in about November 2001 and lived with that family in Bunia. There, he completed his second year secondary [REDACTED]. He left Bunia with [REDACTED] a few days after the fall of Lopondo, in early August 2002. Together they made their way to Komanda. He then made his way to Oicha. That much is agreed.

178. Thereafter, the defence submits, his account becomes increasingly vague as he tried to make a false history fit the facts. The account provided by [REDACTED] and [REDACTED]

²³⁹ P-28-T-220-p.25 (FRA-p.21).

²⁴⁰ P-28-T-220-p.27 (FRA-p.24).

²⁴¹ P-28-T-219-pp.56-63 (FRA-pp.49-53).

²⁴² P-28-T-219-pp.65-68 (FRA-pp.59-61).

²⁴³ P-28-T-219-p.69 (FRA-p.62).

²⁴⁴ P-28-T-220-pp.78-80 (FRA-pp.68-70).

²⁴⁵ P-28-T-219-pp.34-50 (FRA-pp.30-44).

of these events will be discussed below, but essentially it is that the witness did not leave Oicha until the end of January or beginning of February 2003.

179. The witness said it was ‘impossible’ to say how long he was in Oicha. He claims to have gone to [REDACTED], but the very next day had to flee to [REDACTED] following a UPC attack. It was unclear how long he remained at [REDACTED] – he said ‘approximately two months... at most two months’.²⁴⁶

180. He claims that when visiting Aveba to reclaim a bike he was abducted by [REDACTED] and taken to [REDACTED] camp at Bulandjabo. He was vague as to when that happened, how long the journey took, how long he spent there, and other details.²⁴⁷

I have no specific answer. However, I can tell you that I didn’t stay there for a long time in that camp. I stayed there for between one and three weeks.²⁴⁸ [...] I did not spend long at Bulandjabo, then I fled. [...] I did not spend months there. What I know is that the training took [five to six days].²⁴⁹

This in contrast to his account to the investigators, where he said he was there for ‘some months’.²⁵⁰

181. In his account to the investigators he claimed the training took place, not at Bulandjabo, but at Codeza:

‘The training of new recruits was always in a village called Codeza, which is two hours’ march from Bulandjabo.’²⁵¹

He denied having said this and said training was done in the camp.

Q. So how far was the training from the camp? The place where you trained, from the camp, how far was that?

A. I would say the two places were close to one another. It was inside the camp.²⁵²

182. His original, detailed account of his abduction was different. In the investigator’s first note concerning their meeting on 13th December, 2005 the witness claimed to have been in the first year secondary at Aveba when;

‘[...] he had been conscripted by force. He was on his way from school to home with four other boys when they were kidnapped by FRPI [REDACTED] and his escort waiting for them

²⁴⁶ P-28-T-219-p.50 (FRA-p.44).

²⁴⁷ P-28-T-216-pp.62-68 (FRA-pp.54-59).

²⁴⁸ P-28-T-216-p.64 (FRA-p.56).

²⁴⁹ P-28-T-219-pp.51-52 (FRA-p.46).

²⁵⁰ P-28-T-220-p.71 (FRA-p.62).

²⁵¹ P-28-T-220-p.69 (FRA-p.61).

²⁵² P-28-T-219-p.52 (FRA-p.46).

to leave school. They were 36 persons in total. On their way, they stopped at different schools to kidnap more children.²⁵³

183. Second investigators record- 29th of January, 2006:

‘When he was in secondary school, armed men would come to torture him and his fellow students on the road by detaining and beating them. At night, these armed men would prevent him from sleeping as they came to him and his colleagues to encourage them to join their armed movement.’²⁵⁴

Interview, April 23/24/25/26 2006; as in the transcript:

Because of the war, I had to leave [REDACTED] for Aveba, where I continued my secondary studies at the Institute of Aveba. it came to pass the second year of secondary when I was abducted by FRPI militia.²⁵⁵ [...] One day after school, about 1300 hours, as I was going home with my friends, a group of about 36 FRPI militia, [REDACTED], surrounded us and began to hit us with *fouets*. [...] My three comrades tried to escape but were caught. I didn’t try to escape, as they beat me and I was scared.²⁵⁶

At the time, I was between 10 and 11, and my three friends were about my age.²⁵⁷ [...] I was trained with my three friends for about five days by Kisoro or one of his subalterns, whose name I forget.²⁵⁸

He was asked in evidence,

‘Q. Let me ask this question again: Were you with three comrades?

A. I no longer recall.’²⁵⁹

In his second long interview, in February 2007, he elaborated:

14. I was abducted by the FRPI as I said in my first statement. It was the same time as three friends from school called Douani, Matshi Matatia, and Kadiro Warasi.²⁶⁰

184. These things were not said casually but were the product of fifty hours of interview, with the record read back and confirmed and the witness attesting to the truth of the contents on his ‘honour and conscience’ for use in court proceedings.²⁶¹ In October 2010, shortly before giving evidence, he changed his story and said that his account of being at school in Aveba, and being abducted with three companions, was untrue.²⁶²

²⁵³ P-28-T-220-p.55 (FRA-p.48).

²⁵⁴ P-28-T-220-p.58 (FRA-p.51).

²⁵⁵ For the French version, see the original DRC-OTP-0155-0110/para.14; P-28-T-220-p.62 (FRA-p.54).

²⁵⁶ DRC-OTP-0155-0110; P-28-T-220-pp.63-64 (FRA-pp.55-56).

²⁵⁷ DRC-OTP-0155-0110-para.27 ; P-28-T-220-p.65 (FRA-pp.56-57).

²⁵⁸ DRC-OTP-0155-0110; P-28-T-220-p.68 (FRA-p.60).

²⁵⁹ DRC-OTP-0155-0110; P-28-T-220-p.65 (FRA-p.57).

²⁶⁰ DRC-OTP-0171-1830 ; P-28-T-220-p.80 (FRA-p.70).

²⁶¹ P-28-T-220-p.60 (FRA-p.52).

²⁶² P-28-T-220-pp.58-68 (FRA-p.49-60).

A. I never attended school in that village. I have never set foot in that village. Hence, everything related to my schooling during that period, as you told you, is incorrect. That is false information.²⁶³

As for the three companions he named in his story:

A. I think I have already told you that I was giving information provided by somebody else. It was not my information. I have never seen these individuals. I had never seen these individuals. And I would like to continue by saying that all information related to my schooling, whether we are talking about classmates or schoolmates, well, I would like to tell you that all such information is untrue.²⁶⁴

185. By the time he changed his story in October 2010 he may well have learnt that the defence were making inquiries. He gave evidence in November 2010 and was the 22nd prosecution witness to be called. There was some history of contact with others and the proceedings were accessible to view. The witness said he had been following ICC proceedings on television, though not this case – the Lubanga case.²⁶⁵ Unable to sustain the story of an abduction from school, the ‘bike’ story became the basis of his new account of the abduction.

186. The witness blamed [REDACTED] [Intermediary 183], whom he confirmed was an intermediary between himself and the Prosecution,²⁶⁶ for getting him to lie:

“I am not the one who made it up. I am not the person who invented all of this. It was an account that I was told to relate. [...] I did not make up anything in this whole story. [...] I can on any day say and confirm that I am not the one who made up this story.”²⁶⁷

187. It is understood that [REDACTED] [P-183] denies asking the witness to lie. The Prosecution chose not to call [REDACTED] [P-183] to clarify the position. In July 2009 witness P-28 was seen by the prosecution to discuss possible influence by intermediaries. This was presumably sparked by intermediary problems in the Lubanga case. The witness was emphatic nobody had influenced him or told him to lie.²⁶⁸ However, in evidence he said he was told to tell the false story and:

If you tell them that, that’s fine. They’ll take you, you’ll live well, you’ll go to school, your name won’t be disclosed, and no one will hear that you collaborated.²⁶⁹

²⁶³ P-28-T-220-p.59 (FRA-p.51).

²⁶⁴ P-28-T-220-pp.80-81 (FRA-p.70).

²⁶⁵ P-28-T-219-pp.26-27 (FRA-pp.22-23).

²⁶⁶ P-28-T-221-p.23 (FRA-p.20).

²⁶⁷ P-28-T-221-p.23 (FRA-p.20).

²⁶⁸ P-28-T-221-pp.28-31 (FRA-pp.24-31).

²⁶⁹ DRC-OTP-1058-0110 ; P-28-T-221-p.39 (FRA-p.33).

He said that while he admitted that the school evidence was untrue, he had not made up any other matters. The defence submits that he has made up other matters, as is clear from his evidence.

188. Nyankunde was attacked on September 5th 2002, and that date has been used to help anchor a witness's account. In paragraph 12 of his 2007 statement he stated that he was at Aveba and witnessed those who left to go and participate at Nyakunde:

I learnt the details of the first attack at Nyankunde when I was at Aveba and was waiting to start the academic year. I saw many combatants leave Aveba to repulse the UPC who had made an offensive against Singo. Among them were Commanders Besto, Benjamin, Abala, Move, and Doppel, commander of Germain Katanga's escort. I recognised these Ngiti fighters, because in Aveba village, they were known figures.²⁷⁰

189. His evidence changed as to his witnessing the combatants leave for Nyankunde:

As I said on my first day of testimony here, that at that point in time I was not in Aveba, and I said to you that I had never been to school in Aveba.²⁷¹ [...]
A. I have already said that this is a statement which does not reflect the truth. I say this because at that time I was never attending school in Aveba. May I add that I have never attended school in Aveba.²⁷²

The defence case, supported by evidence, is that this witness was at Oicha in early September at the time of the Nyakunde attack, and the witness knew that to be the case. Yet he is willing to implicate others with the pretended authority of an eye-witness. Later, in response to questions from counsel for Mr Ngudjolo based on the witness's account to investigators in his earlier statements in his evidence he was asked;

Q. Mr. Witness, you participated in the Nyankunde battle; is that correct?
A. What Nyankunde battle are you referring to?
Q. Did you ever participate in any battle in Nyankunde?
A. I know that we went and participated in a battle.
Q. In what year?
A. I no longer recall, but I would tell you that it was one of the last battles, but it was not the very last battle.
Q. Thank you, Mr. Witness. Now, this battle, the very last battle, was it before or after the battle of Singo?
A. I have no clarification to give on that. I cannot situate it before or after.²⁷³

There has been no evidence of a battle at Nyankunde that would explain his reply. The witness stated that he did not participate in any battle after Mandro.²⁷⁴

²⁷⁰ For the French version, see the original DRC-OTP-0171-1830.

²⁷¹ P-28-T-222-p.52 (FRA-p.46).

²⁷² P-28-T-220-p.56 (FRA-pp.48-49).

²⁷³ P-28-T-223-p.45 (FRA-p.40).

²⁷⁴ P-28-T-222-p.50 (FRA-pp.44-45).

190. Taking up his story from when he says he fled [REDACTED] camp, he says he went to Aveba. The witness was unable to specify when, and gave conflicting indications of when it might have been. The defence case is that he arrived in Aveba with [REDACTED] end of January / February 2003. In his 2006 interview, paragraph 34, he said:

I decided to go to the camp at Aveba where the main leader of the FRPI, Germain Katanga, was based. At the time, he was already married to [REDACTED] Denise.²⁷⁵

191. In his evidence that changed to:

Katanga and Denise got married when I was already in Aveba, [REDACTED], but at the time they were fiancées.²⁷⁶

They got married when I was already there, [REDACTED].²⁷⁷

192. The significance, aside from the clear change of account, is that there is evidence that their marriage took place in November 2002. The defence case is that P-28 did not arrive in Aveba until late January or early February.

193. In the same interview he said, at paragraph 39: ‘Germain Katanga lived at the camp with Denise in a straw house.’²⁷⁸ In his evidence that changes to ‘they live in the home of Katanga’s father.’²⁷⁹ The defence case is that this witness [REDACTED]. In his own account he goes directly to Katanga: 2006 Statement - paragraph 36: “When I arrived at Aveba camp, I went directly to the commander Germain Katanga’s home and I stayed with him as a soldier”.²⁸⁰

194. He first made mention of [REDACTED] in his evidence, and only to a limited extent:

A. When I arrived in Aveba, if I recall correctly, [...] my first days were spent in the residence of the person, and his name, I think, is on this list. It was at [REDACTED]. In [REDACTED] place. I spent one or two days at that house, then I went to the camp.²⁸¹ [...] A. I clarified that I spent one or two days there. I spent two days at number 11’s place. That is [REDACTED].²⁸² [...] A. It was [REDACTED] place, and I was used to visiting there.²⁸³

195. The defence submits that the defence witnesses provided a clear and consistent account of the witness living with [REDACTED] for a substantial time.²⁸⁴

²⁷⁵ DRC-OTP-0155-0106 ; P-28-T-220-p.74 (FRA-p.62).

²⁷⁶ P-28-T-220-p.73 (FRA-p.64).

²⁷⁷ P-28-T-220-p.75 (FRA-p.66).

²⁷⁸ DRC-OTP-0155-0106.

²⁷⁹ P-28-T-217-p.32 (FRA-p.28).

²⁸⁰ DRC-OTP-0155-0106 ; P-28-T-221-p.54 (FRA-p.46).

²⁸¹ P-28-T-221-p.50 (FRA-p.43).

²⁸² P-28-T-221-p.51 (FRA-p.44).

²⁸³ P-28-T-221-p.50 (FRA-p.43).

²⁸⁴ D2-134-T-257.

196. The witness said he was [REDACTED] – “I would add that within a given period, [REDACTED].”²⁸⁵ He said [REDACTED]. There are photographs of Katanga with bodyguards, in Bunia and elsewhere, [REDACTED].²⁸⁶ There is no corroboration of that elsewhere in the evidence. Witness 219 makes no mention [REDACTED]:

A. Yes, there were close bodyguards but there were also guards who guarded his house. As regards the bodyguards as such, there was Antelope and Mamale. Those were his two bodyguards. As regards the others who guarded his house, there was the Garimbaya team and other soldiers.²⁸⁷

197. The witness said, rather grandiloquently:

A. First and foremost, I was a soldier, which meant that I was ready to fight at any time. I was permanently at the ready.²⁸⁸ A. [...] as combatants we were ready to go and fight, to fight for our cause, to fight for our country. We were combat ready at any moment in time. At any moment, we were ready. And whenever we received a signal, when we heard that one of our villages came under attack, we would go and fight. We would go and fight with a view to saving our village.....We were ready at any time, whether it be in the morning, at night-time. We were combat ready.²⁸⁹

198. But what battles were these? He said he did not participate in any battle after Mandro. He claimed to have participated in a battle of Singo –but when was that?

Q. And when did you first get an SMG or any other automatic weapon?

A. At the battle of Singo.

Q. And when was the battle of Singo?

A. I am not in a position to tell you when, but it occurred whilst I was in Aveba. We went as reinforcement to the battle of Singo.

Q. And how long had you been in Aveba before you went along to be a reinforcement at Singo?

A. I cannot recall. I no longer remember.²⁹⁰

199. The only reference he made in evidence to Singo was [REDACTED]. By his own account he was not a combatant at the time, made no mention of participating in a battle, but [REDACTED]. What other opportunity was there to participate in a battle at Singo?

200. He spoke of there being battles ‘two or three times a week’.²⁹¹ But he gave no details and there is no evidence to support his account. By the time the defence submits he became associated with the militia through [REDACTED], in late 2003, there was no fighting in

²⁸⁵ P-28-T-216-p.76 (FRA-p.66).

²⁸⁶ EVD-OTP-00096; see also EVD-D02-00228.

²⁸⁷ P-219-T-205-p.37 (FRA-p.36). D2-161-T-268.

²⁸⁸ P-28-T-216-p.76 (FRA-p.66).

²⁸⁹ P-28-T-216-p.76 (FRA-p.66).

²⁹⁰ P-28-T-221-p.59 (FRA-p.51).

²⁹¹ P-28-T-220-p.69 (FRA-p.60).

Walendu Bindi. In any event he himself said he was not involved in any fighting after Mandro.

201. How did he come to be [REDACTED]:

[REDACTED].²⁹²

202. But in his 2006 interview he said; paragraph 36;

“There came a time [...] the assistant of Germain Katanga, called Adolphe [...] [REDACTED].”²⁹³

203. He argued that this was an error - ‘I think there’s a problem with the name. Instead of Garimbaya, the name Adolphe appears.’²⁹⁴ And who was Adolphe? In evidence he said:

A. What I can tell you about Adolphe is that he was a low-ranking soldier.

Q. [...] Indeed, I agree with you, and he arrived towards the end of 2003; is that right?

A. I do not know. I am not in a position to tell you when, but I know that Adolphe left the village to go for training, and then he returned to Aveba. However, I cannot tell you when he returned, that is, which year he returned.²⁹⁵

204. As a ‘low ranking soldier’ Adolphe would not [REDACTED]. Yet in his interview, he gives Adolphe an importance that conflicts with this description:

Paragraph 42: “In peacetime my daily work was to get up early, at 5.00, and make a footing of the village. Afterwards, on returning to camp, Commander Adolphe or his subalternes Move or Akenda gave us different tasks to do for the day.”²⁹⁶

Paragraph 45: “The battalion based at Aveba was commanded by Adolphe.”²⁹⁷

Paragraph 68: “When we were all in the centre of the camp, Germain Katanga said just that ‘one goes to war to die or win the battle.’ At his side, Germain Katanga always had Commander Adolphe.”²⁹⁸

Adolphe, in his interviews, is a senior commander in his account of Bogoro.

205. The witness said that among his own special duties was that of arresting people for witchcraft and the penalty was having their throats cut.

Q. Can you remember the name of anyone that you arrested or helped arrest and was killed?

A. With respect to the name of a particular individual, I cannot provide you with that information.²⁹⁹

²⁹² P-28-T-217-p.21 (FRA-p.19).

²⁹³ DRC-OTP-0155-0106 ; P-28-T-221-p.54 (FRA-pp.46-47).

²⁹⁴ P-28-T-221-p.54 (FRA-p.47).

²⁹⁵ P-28-T-221-pp.54-55 (FRA-p.47).

²⁹⁶ For the French version, see the original DRC-OTP-0155-0106, para. 42.

²⁹⁷ DRC-OTP-0155-0106 ; P-28-T-221-p.56 (FRA-p.48).

²⁹⁸ DRC-OTP-0155-0106 ; P-28-T-221-p.56 (FRA-p.48).

206. His evidence concerning the preparations for the attack on Bogoro presents, in the defence submission, an insurmountable obstacle to this witness being viewed as credible. That evidence is part of his core account and the different versions are irreconcilable.

207. His evidence to the Chamber has the following key elements: a delegation from Zombe; a separate meeting by FRPI commanders in Aveba; Aveba based combatants moving to Kagaba to make preparations for the attack prior to the attack itself.

208. His first interview extended over four days, lasted twenty hours, with a final review and attestation.³⁰⁰ That original, lengthy account had none of those key elements but instead a different, personally observed, history. The relevant part of the transcript is to be found at T-221, pages 64 to 80, and T-222 pages 12 to 48, of which parts are reproduced below:

Paragraph 81: Due to the UPC attacks from Bogoro on the Ngiti villages, the FRPI commanders decided it was best to neutralise the UPC force based at Bogoro, and on the initiative of Commander Matata Cobra, they met at Bavi to plan a final and common attack on Bogoro. All the commanders were at the meeting to plan the attack. They included Germain Katanga that I accompanied to Bavi [REDACTED]. Even though I did not take part in the meeting, I can tell you who did. Matata, Yuda, Baby, Androzo, Anguluma, Oudo, and Mbafefe. [...]

Paragraph 82: During this meeting at Bavi, [REDACTED]. Nevertheless, following the meeting, the order came to group all the FRPI troops at Kagaba, where there was already the largest concentration of FRPI troops. All the commanders returned from Bavi to their camps to assemble their troops for Kagaba for that evening. As for Germain Katanga, he stayed at Bavi with Cobra. He sent his deputy Adolfe [...] with Deputy Move to Aveba to go down with the groups as agreed. Germain Katanga and Cobra Matata went directly from Bavi to Kagaba to join up with the assembled FRPI troops there. [...]

Paragraph 83: As agreed, about 1900, the FRPI troops of Kagaba and those of Geti and Aveba assembled at Kagaba. [...] About 2200, Commander Yuda addressed the assembled troops and recalled how the UPC soldiers had made us suffer for so long, but they were about to be vanquished, that we were going to exterminate them, to pillage their goods and burn their houses, and finally to set ourselves up in their place. And as I tell you later in my interview, that is just what happened at Bogoro. Then Matata Cobra also addressed the troops, raising our morale in the same terms. Nevertheless, Germain Katanga did not address the troops, because he was already drunk and waiting just to leave to the front.

Paragraph 84: [...] 2300, in full darkness we began to walk towards Bogoro.

Paragraph 85: [...] About 0400 the troops that left Kagaba of which I was part arrived near Bogoro village. We took position and waited for day. The attack began at 0500.

209. This account was provided in 2006 when the events would be clearer in his recollection. The witness sought to explain this different account saying;

²⁹⁹ P-28-T-221-p.58 (FRA-p.50).

³⁰⁰ For the French version, see the original DRC-OTP-0155-0120, paras 81, 82, 83, 84, 85.

A. No problem. I think that it was noted down that I had stated this, and that is true, but when it comes to the Bavi meeting, this was quite a different meeting. It was not the final planning meeting before the attack. It is true [REDACTED] to Bavi.³⁰¹
 [...] As I have already said, there was indeed a meeting in Bavi, but it wasn't the very last meeting prior to the battle. These were preparatory discussions.³⁰²

210. But there is a problem. Firstly, he says the meeting took place at Bavi. The meeting was in order 'to plan a final and common attack on Bogoro.' There is no such meeting at Bavi in his evidence and he makes no mention of any meeting elsewhere. Bavi is a significant distance from Aveba. Secondly, it is plain that this is the prelude to the Bogoro attack. He says the commanders left Bavi to get their respective troops assembled at Kagaba 'that night'. The meeting is inextricably linked to the Bogoro attack. Thirdly, he makes it clear that Katanga did not leave Bavi but remained together with Cobra and they went directly from Bavi to Kagaba. In place of Katanga going to Aveba, Adolphe goes in order to take the troops from there to Kagaba. Fourthly, the witness accompanies Katanga to Bavi, [REDACTED], and names the commanders that attended the Bavi meeting.

211. This account is not a momentary confusion of memory but a completely different account. There is no mention of the key features of his present evidence – no mention of any similar meeting in Aveba; no delegation from Zumbe, no marching down, over two days, to Kagaba. Bavi is several hours march from Aveba. Going there is not something you are likely to be confused about.

212. When he changes his story ten months later, during the second interview with the Prosecution in February 2007, he says:

Paragraph 36: I have some details to add to my declaration signed 27th of April, 2006, on the subject of the Bogoro attack. I'm wrong when I indicate that before the attack the meeting of FRPI commanders took place at Bavi. The meeting took place at Aveba, in the home of Germain Katanga's father.³⁰³

He is not saying here that he is mixing it up with some other meeting– if that were possible – he is substituting the place. It does not work because the original account is directly related to Kagaba, for example, by reference to Katanga having to go directly to Kagaba from Bavi etc.

Q. [...] Even if you'd confused it with a meeting at Aveba, how do you get Germain Katanga doing this cross-country journey from Bavi to Kagaba? Why is that part of the story?

A. Let me tell you the following: I do not have a given source, a particular source that provided me with that information. I explained events that I experienced. You cannot then ask me where I got this information from.³⁰⁴

³⁰¹ P-28-T-221-p.66 (FRA-p.57).

³⁰² P-28-T-221-p.69 (FRA-p.60).

³⁰³ For the French version, see the original DRC-OTP-0171-183, para. 36.

³⁰⁴ P-28-T-221-p.77 (FRA-p.67).

213. In evidence the witness now claims that there was another meeting and that he confused the two. If there was a different and distinct meeting at Bavi when would that have been and how does it fit into his account?

Q. How long before the Bogoro attack do you say there was a meeting at Bavi? If there was a meeting at Bavi.

A. Counsel, I have no further clarifications to give.

Q. Was it before or after the delegation came from Zumbe?

A. I have no clarifications to give. These are events that took place at that certain point in time, and I do not have the chronology of those events in mind. [...]

Q. So you can't help us when the Bavi meeting took place, but was it days before the attack on Bogoro or weeks before? Just help us, please.

A. I regret to tell you that I am not in a position to recall that.³⁰⁵

214. And could he possibly have confused such a thing, given the story he presented and his direct involvement in it, over several days of interview? The context of what he said in his account stands in the way of that kind of explanation. And his explanation involves not only having a distinct 'Bavi meeting' but also creating an 'Aveba' meeting. He had not mentioned that previously and where could it be fitted in to his account?

Q. You spoke on Wednesday of last week of this separate meeting of the FRPI commanders held in Aveba as a preliminary to the Bogoro attack. I just want to ask you today, if having perhaps reflected on it, can you tell us when that meeting took place in relation to the attack on Bogoro?

A. Counsel, I have already answered that. You have asked me many questions. You have asked me when, and I told you that it occurred during a certain period. Please do not insist that I should tell you when, because I risk giving you an answer which is not accurate.³⁰⁶

The Zumbe Delegation

215. He makes no mention of a delegation from Zumbe, until his February 2007 interview. It is notably absent from his earlier, lengthy account. In his earlier account he spoke of a spontaneous contribution by Zumbe:

Paragraph 87: "Lendu and FNI combatants positioned at Zumbe, who had also been victims of attacks by the UPC from Bogoro, came under the command of Commander Kute to reinforce us about 9.00 in the morning. They had heard the firing in Bogoro, which was not far from Zumbe."

Paragraph 88: "This third attack on Bogoro was the first time that the FRPI and the FNI fought together against the common enemy, the UPC. I do not know why the FRPI had asked them to help. I only know that they did."³⁰⁷

It is strange to have omitted all reference to the delegation if it was, as he later claims, within his knowledge.

³⁰⁵ P-28-T-221-pp.75-76 (FRA-pp.65-66).

³⁰⁶ P-28-T-222-p.45 (FRA-p.39).

³⁰⁷ DRC-OTP-0171-1828 ; P-28-T-221-p.79 (FRA-p.69).

216. In his evidence he said:

Q. [...] did you know, in respect of this attack, how the Zombe combatants or the FNI were going to take part in this attack? Did you have any details at that moment in time as to their participation?

A. Yes, I did have that piece of information. The meeting had occurred previously in Aveba. During the meeting, it was said that when Bogoro came under attack, we would attack together with the Zombe combatants or with the FNI combatants.³⁰⁸

Q. Now, there's no mention of the -- any delegation or group of soldiers coming from Zombe to Aveba in this first statement, but it appears -- first appears in your second statement, almost a year later when you make your statement. ...Now, I'll ask you again. In relation to the Bogoro attack, when did that delegation arrive? How long before Bogoro? Was it days, a matter of weeks, or was it a month or so before Bogoro?

A. I do not have an answer to give you. Yes, they arrived, but I am not able to give you an estimate, a time estimate. I can only confirm that they did arrive.³⁰⁹

217. Witness P-250 claimed his delegation was there for a month, a week and four days. That is disputed by the defence but, if that had been the case, why is witness 28 unable to provide more detail? In his testimony the following day, he said;

A. I think that I have already answered this question. I did so yesterday. I said that I had no further details on that. I cannot say whether it was a few days prior, but I know that it was a few days before the attack.³¹⁰ [...]

Q. [...] But let me ask you this: How long did this group of people remain in Aveba? A. I don't know, but I know that they didn't stay a long time.³¹¹

218. In witness P-28's evidence to the Chamber he said:

"The delegation was led by a commander from Zombe. His name was Boba Boba."³¹²

Yet when he first mentioned the delegation he said:

"I am asked if I have heard of Commander Boba Boba. I have never heard anyone of that name."³¹³

219. He places Kute in that delegation,³¹⁴ whereas witness 250 told us he was not part of it and had remained in Zombe.

220. The interview account conflicts with his evidence in other, significant ways. In his evidence the witness says that Cobra was not present at Kagaba as he had to lead his troops into battle from Medhu as part of the two pronged attack. In the interview he states that he was at Kagaba:

³⁰⁸ P-28-T-218-p.18 (FRA-pp.15-16).

³⁰⁹ P-28-T-221-p.80 (FRA-pp.69-70).

³¹⁰ P-28-T-222-p.14 (FRA-p.12).

³¹¹ P-28-T-222-p.15 (FRA-p.13).

³¹² P-28-T-217-p.44-l.14 (FRA-p.38).

³¹³ P-28-T-222-p.15 (FRA-p.13).

³¹⁴ P-28-T-223-p.67 (FRA-p.60).

[...] Matata Cobra also addressed the troops, raising our morale in the same terms.³¹⁵

Asked about this discrepancy he said;

A Yes. I have confirmed that Cobra Matata was not in Kagaba at the time of preparation for the battle.³¹⁶

221. Adolphe's role in the interview account (returning to Aveba to take charge of the troops) is not that of the low ranking soldier described by the witness in his evidence referred to above. When asked about this he took Adolphe out of the scene all together:

A. I told you that Adolphe came later. To answer your question, at that particular point in time, I was not aware that Adolphe was a commander. Adolphe was not a commander at that particular point in time.³¹⁷

222. The witness has significantly different times as to when they arrived in Kagaba:

A. [...] We didn't leave the day before the fighting from Aveba to Kagaba, but, rather, we left - we left two days before. I'll give you an example. The fighting that was to be held on the Thursday, we left on Tuesday afternoon, because we had spent one night along the way during the trip. The next day, in the morning, we entered Kagaba, and we rested. And in Kagaba, that is where we did all our preparations.³¹⁸

223. In his earlier account the troops congregate at Kagaba the same day immediately after the meeting in Bavi. He arrives in the evening, not 'in the morning';

First interview, paragraph 41: "The day before the attack on Bogoro, I went to Kagaba. We arrived at about 1700 at the camp."³¹⁹ [...]

First interview, paragraph 83: "As agreed, about 1900, the FRPI troops of Kagaba and those of Geti and Aveba assembled at Kagaba."³²⁰

224. Witness 28 knows and refers to Witness 250, who becomes a source of information for witness 28 when he allegedly came to Aveba with the delegation. They knew one another from before the troubles and witness 28 spoke of meeting witness 250 subsequently several times - "I saw him frequently in the street [REDACTED],³²¹ [REDACTED]. He was, however, evasive on the issue, not recognizing his name³²², or his photograph³²³, and stating that when he saw him [REDACTED]:

³¹⁵ P-28-T221-p.65 (FRA-p.56)

³¹⁶ P-28-T-221-p.79 (FRA-p.69).

³¹⁷ P-28-T-221-p.78 (FRA-p.68).

³¹⁸ P-28-T-217-p.50 (FRA-p.44).

³¹⁹ DRC-OTP-0155-0106 ; P-28-T-222-p.47 (FRA-p.42).

³²⁰ DRC-OTP-0155-0106 ; P-28-T-222-p.47: Q. [...] In your first interview at paragraph 83, you refer to, as agreed, about 1900, everyone assembled in Kagaba. As I say, that's in the context of that account, and I don't need to remind us of that (FRA-p.41).

³²¹ P-28-T-222-p.36 (FRA-p.32).

³²² P-28-T-222-p.18: His first name doesn't ring a bell with me. The second name, [REDACTED], doesn't ring a bell, and the third name doesn't ring a bell either. (FRA-p.15).

³²³ P-28-T-222-p.19: Q. And may I say I understand this was a photograph taken of this person about 2005, early

A. I did not meet with him, but I remember that I did see him at some point in time, but I avoided him. The first time that I met with him and we greeted one another, I met with people from the protection unit and I said that I had seen someone [REDACTED], and I said that I did not want to meet with that person. So I notified the people from the protection unit.³²⁴

225. Witness 250 said that he had met the witness 28 [REDACTED]:

A. I know him.

Q. When did you last see him?

A. I even saw him [REDACTED].

A. [REDACTED].

Q. Have you ever discussed your evidence with him?

A. Regarding my testimony, I would say that this is someone [REDACTED].³²⁵

226. The Defence submits that, given their circumstances, it is likely that there was more contact than they care to admit. They had both been in contact with intermediaries [REDACTED].

227. [REDACTED] (D-161) said she knew the witness and had not heard from him since he left, telling her he was ‘going to Kinshasa were [REDACTED] had gone’ but over Christmas and New Year [2010] [REDACTED] had returned to Bunia and gave [REDACTED] some ‘information’ about the witness, which suggests [REDACTED] was probably in contact with him.

228. In the subject of the attack on Mandro he stated that:

A. On the occasion of the attack on Mandro, the FRPI commanders present were Germain, Muhito, Dark, and others whose names I would not be able to provide you with. They were numerous, very numerous.

Q. Are you able to provide us with the names of the FRPI commanders who took part in the attack on Mandro?

A. As I have just stated, there was Germain. There was Sipa. There was Muhito. There was Dark, and others.³²⁶

229. However, in the first interview, in April, 2006, Mandro is discussed at length in paragraphs 91, 92, 93, 94, 95, 96, and he made no mention of Katanga at all.

Q. [...] and you say how it was a mixed group of FRPI and FNI under command of Dark and Kute, respectively. Nowhere in this account do you mention Germain Katanga [...]. Indeed, you have earlier said how he’s gone back to Aveba after Bogoro. And if we look at paragraph 96, you say: “After the conquest of Mandro, I returned to Aveba via Zumbé and Bogoro. Once I got back to Aveba camp, I restarted my work [REDACTED] up until the day he left for Kinshasa.” So my question really is: Do you accept that in that account you didn’t mention Germain Katanga at all in relation to the attack on Mandro?

2005, maybe end 2004. Do you recognise that person? Do you recognise the person in that photograph? A. No (FRA-p.20).

³²⁴ P-28-T-222-p.37 (FRA-p.33).

³²⁵ P250-T-104-p.25 (FRA-p.22).

³²⁶ P-28-T-218-p.27 (FRA-p.24).

A. If you read on these pages and you do see -- and you see that I have not mentioned Germain Katanga, then that is because I did not mention him.³²⁷

230. It seems inconceivable that, if Katanga had played the prominent role the witness alleges in his present account of the Mandro attack, that the witness should have omitted him entirely from that earlier, detailed account. It is, of course, the defence case that Katanga was not present at Mandro, and given the witness's significant omission or difference of account, it is submitted he cannot be relied upon to support Katanga's presence.

231. Given the depth of inconsistency in this witness's testimony it would be a leap of faith to put trust in what he says about Germain Katanga. The Chamber is entitled to look for consistency in the evidence. These are not minor discrepancies, and have to be seen against the assertion by the defence that witness 28 is not providing a true account.

T-240, Jonathan Dubatso Baguma aka Adoula (D-136)

232. Jonathan said he met the witness when he came back to Aveba and later [REDACTED] before witness 28 left for Kinshasa, [REDACTED].

Judge COTTE: Do you know whether number 1 was a member of a militia, and we await your answer.

A. No. Number 1 never spoke to me about being a member of a militia group.

Q. Did number 1 ever speak of fighting or being a combatant?

A. No.

Q. Did number 1 ever speak of being at the battle of Bogoro, for example?

A. No, he never spoke to me about that.

Q. Did anybody else ever mention to you that he'd fought at Bogoro or been a combatant?

A. No, neither.

Q. Did you ever see him carrying a weapon or wearing a uniform?

A. No. He was demobilised as an adult.

Q. when you say he was demobilised as an adult, does that mean that he was a soldier? What does his demobilisation in other words mean to you?

A. At that time the real militias gave weapons to young people who were not militia men in Aveba. So at the time he had been given a weapon for him to join, and it was at that time that he was demobilised, the weapon for him to give to CONADER.

Q. do you know who gave him the weapon to give to CONADER?

A. Yes, I do know. The name was Garimbaya.³²⁸

T-257, Alain Mula Metu aka Pasteur, Ali (D-134)

233. Alain Mula Metu has known the witness -- [REDACTED]. He gave details [REDACTED]. He described their movements in 2002-2003. He confirms the defence case that P-28 left Bunia for Oicha and, essentially, remained there until he left [REDACTED] for Aveba in January 2003. Alain saw him [REDACTED]. [REDACTED]. When Alain moved to

³²⁷ P-28-T-222-p.13 (FRA-p.11).

³²⁸ D2-136-T-240-pp.47-48 (FRA-pp.44-45).

his brother's house at the end of 2003 [REDACTED]. He said that at no time was P-28 in the militia, and never claimed that he was, though he had a close association [REDACTED], even living at his camp, and through [REDACTED]. He also said that the problem over the bike was rooted in an incident where P-28 was suspected of having taken [REDACTED]. Alain was interviewed at length by the Prosecution in 2010.

T-260, Victor Rumbale Mbagyele aka 'Pastor Vicky' (D-501)

234. Pastor Vicky is [REDACTED]. He said that the witness came [REDACTED] in 2003 having come from Oicha and stayed for about a year.

Q. During the time [REDACTED], was he ever in the militia?

A. I object because he was a student.

[...] Q. Yes. So Jack was a student. To your knowledge - I pose the question again - was he ever in the militia?

A. For the time [REDACTED], he was never a member of any militia.³²⁹

T-268, [REDACTED] (D-161)

235. [REDACTED] [D-161] is not related to the witness [REDACTED] but knows him well and also knows witness 250, [REDACTED]. She said she thought he was older than she. She said that Garimbaya was [REDACTED]. He was living [REDACTED]. [REDACTED], he was a student at [REDACTED] school, though she could not provide a clear date when he was there.

Q. Did he do anything else other than be a student?

A. No, I'm not aware of any other thing that he was doing apart from going to school.³³⁰

Cross examined;

Q. But Louis himself, to your knowledge, was he a militiaman? Was he a combatant?

A. Louis was not a combatant.³³¹

236. As for being demobilised [REDACTED] Garimbaya she said:

WITNESS: [...] One of his friends who joined at the same time with him -- well, it's Garimbaya who brought that person to the site because Garimbaya brought several people to the site.

Q who told you that? How did you come to know that?

A. They came to the site or they entered the site with Fabrice.³³²

A. [...] When they went to the site, they went together with Fabrice, [REDACTED]. And it is Garimbaya who took Fabrice to the site because Fabrice was a civilian. [...] I talked about Fabrice Banga.

³²⁹ P-501-T-260-pp.17-18 (FRA-p.20).

³³⁰ P-161-T-268-p.54 (FRA-p.48).

³³¹ P-161-T-268-p.67 (FRA-p.60).

³³² P-161-T-269-p.55 (FRA-p.47).

[...] A. Fabrice told me whilst we were in Bunia, and he was with him in Bunia when they received the last sum of money. [Correction: Or they were with him in Bunia when they received the last sum of money.]³³³

T-271, Jeannot Malivo Kagaba (D-129)

237. Jeannot knew the witness [REDACTED]. Jeannot arrived in Aveba in January 2003 and P-28 was not yet there but arrived a month later. Jeannot lived with many others, [REDACTED], at Pastor Vicky's.

A. Up until that I left as far as I know none of the people I mentioned was a member of the militia.

Q. Do you include Claude [REDACTED] in that or not?

A. When I say none of them, that includes him [REDACTED].³³⁴

238. In cross-examination he was asked how old P-28 was at that time and said:

Q. And I will repeat to make sure we are clear. In Aveba, 2003, while you were there, it seemed to you that Claude [REDACTED] was between 12 and 14 years old; correct?

A. Yes.

239. The defence do not accept that P-28 was '12-14', and the evidence does not support that opinion which appears in Jeannot's written statement, drafted by the defence and provided to the prosecution. There was no 'manipulation' or suppression of his opinion. P-28 was [REDACTED] at the time, as P-28 himself previously stated on oath before the Bunia magistrate in his PV EVD-D02-00088.

T-277, David Adirodu Achele (D-001)

240. David Adirodu stated that P-28 had not been in the militia.

Q. Do you know whether he was a militia at any time or not?

A. No. He was never a militiaman.³³⁵

T-285, Bonheur Mugangu Awenya (D-259)

241. He stated that P-28 [REDACTED] was someone he knew well, and first came to know him in early 2003 in Aveba. He went to the same school, was a little older, played football and lived [REDACTED]. He was certain that he had not seen him in Aveba before 2003.

A. With regard to the first meeting, I can say with certainty that it was in 2003 because we were students in the same school, and it was in 2003 that I saw him in that school.³³⁶

³³³ P-161-T-269-pp.55-56 (FRA-pp.47-48).

³³⁴ P-129-T-271-p.75 (FRA-p.67).

³³⁵ P-1-T-277-p.17 (FRA-p.15).

³³⁶ P-259-T-285-p.61 (FRA-p.53).

242. There was some discussion about the value of a defence summary of Bonheur's expected evidence which referred to P-28 arriving at the end of 2002. Bonheur did not accept that that reflected the facts. He had been clear in his written statement that it was 2003.

P-219, [REDACTED]

243. It is not disputed that P-219 lived in Aveba for a considerable time and knows a lot about the background events, the structures etc. What is disputed is his claim to have been living in Aveba before May, 2003. His evidence on events prior to then, the defence submits, is a mixture of things he gleaned from others and things he made up, particularly his claim to having been an eye witness at Bogoro.

244. One may ask, regardless of whether he is truthful or not, why did he choose to become a witness? What motivated him can only be guessed at, not least because the defence is handicapped in investigating his motives by the constraints of witness protection, though it has been revealed that he has been relocated. At some point this witness decided to be a prosecution witness. Was that in pursuit of truth and justice – or self-interest? If one concedes the latter possible then there are no limits someone may go to achieve such ends, including, if necessary, false testimony.

245. It is for the prosecution to prove that he is a credible and reliable witness. The defence submits that in order to do so the prosecution must address, in a satisfactory manner, some disturbing parts of his testimony – in particular his account of visiting Bogoro in a day, and his history of the preparatory meetings in Aveba. The defence identifies those two areas, but also other aspects of his evidence, as demonstrating his unreliability and untruthfulness. If he cannot be relied upon as to those key elements of his story, then he should not be relied upon at all as an incriminating witness.

246. The defence case is that this witness arrived in Aveba in May 2003 and not, as he said, in August 2002. With the fall of Lopondo in 2002 many Ngiti fled Bunia fearing UPC ethnic attacks but [REDACTED] this witness had no objective reason to flee. He said he left his 'wife and children'³³⁷ in Bunia.

247. David Adirodu Achele – D-001 - said: A. "After the fall of Lopondo and when Nyankunde fell, I went to Zumbe, and I saw him in Zumbe. Later on, I saw him again in Aveba."³³⁸

³³⁷ P-219-T-207-p.44 (FRA-p.46).

³³⁸ P-1-T-277-p.19 (FRA-p.17).

248. On May 12th 2003, after Bogoro, the UPC reinvested Bunia causing not only the Ngiti and Lendu to flee but other ethnic groups as well, including some Hema. There was, as the Chamber has heard, a flood of refugees that streamed south to be welcomed and assisted in Walendu Bindi by the Ngiti. The defence submits that it was at this time that witness 219 first fled to Aveba.

249. The only Prosecution witness to refer to him was witness 28, who remembered him being there but was unable to say whether he arrived before or after Bogoro.³³⁹

250. A number of defence witnesses spoke of witness 219 arriving in May.

- Pierre Célestin Pichou Iribi Mbodina (D2-P-228):

I found him there. He had been there for quite a while since the leaders had left Bunia after the 12th of May attack.³⁴⁰

- Alain Mula Metu (D2-P-134):

Q. Did you ever see him in Aveba? A. Yes, I saw him in Aveba. Q. Where was he living?

A. Well, these were displaced people with whom we had fled from Bunia in 2003, and he lived [REDACTED].³⁴¹

Q. Do you know why he'd come to Aveba?

A. He was a displaced person who had gone to Aveba as I had.

Q. Do you know what had caused him to be displaced?

A. Thank you. Well, in fleeing Bunia, virtually everybody, all of the non-Hema felt that the place that we could hope to be safe in was Aveba. So like so many other displaced people, he took the route to Aveba.³⁴²

Q. When you said virtually everyone fled, when was that?

A. That was in May 2003.³⁴³

- [REDACTED] (D2-P-161) said that she saw him [REDACTED] after Bogoro and not before, and he came with others and stayed [REDACTED]. Witness 219 does not claim to have stayed elsewhere at Aveba.

I had known Frank ever [REDACTED] [...] I saw Frank in Aveba. This was after the battle of Bogoro. It was when everybody fled Bunia.³⁴⁴

Q. [...] how many months was it after the battle of Bogoro that everybody fled Bunia and when you saw Frank ? A. It was around three months.³⁴⁵

JUDGE COTTE: [...] you said that Frank=[REDACTED] had been seen, you had seen him [...] in Aveba around three months after the attack on Bogoro. Do you know where Frank=[REDACTED] was living before the attack on Bogoro?

³³⁹ P-219-T-250-p.28 (FRA-p.26).

³⁴⁰ D2-228-T.250-p.28 (FRA-p.26).

³⁴¹ D2-134-T-257-p.56 (FRA-pp.50-51).

³⁴² D2-134-T-257-p.57 (FRA-p.51).

³⁴³ D2-134-T-257-p.57 (FRA-pp.51-52).

³⁴⁴ D2-161-T-268-p.32 (FRA-p.29).

³⁴⁵ D2-161-T-268-pp.34-35 (FRA-pp.30-31).

A. Yes. Before the attack on Bogoro I know that Frank=[REDACTED] was living in Bunia. [...] When Frank=[REDACTED] arrived in Aveba, I was also living in Aveba. [...] [REDACTED].³⁴⁶

- Germain Katanga Simba (D2-P-300):

Q. do you know when he came to Aveba? A. He fled Bunia. He fled from Bunia like all those who fled that area on the 12th of May, 2003.³⁴⁷

251. What is there in the evidence of witness P-219 that could not have been gleaned or imagined by someone arriving in Aveba only in May 2003? The defence submits that there is nothing he could not have learnt after arriving in May, or have made up. For example, the defence largely accepts his listing of camps and commanders in Walendu Bindi, but the camps and the commanders he described were there up until at least 2005. Some of his details— such as his naming the force at Aveba the ‘Leopard Battalion’, or stating that there was a camp at Medhu, are examples of his conflating facts. The defence do not accept his evidence is a ‘snapshot’ of how things were on February 24th but rather how things came to develop in the following months. The witness provided detailed, though not necessarily accurate, accounts of several events he did not witness, such as the murder of Kandro, the subsequent selection of Katanga as leader, the taking of fetish before battle, etc. There was a large amount of background detail that would have been known, discussed or the subject of rumour.

252. Naturally, living in Aveba, he would have picked up a good general knowledge of the place - of the BCA, of its communication and radios, camp structures and organisation, the FRPI and FNI etc. Similarly his placing of Katanga as a paramount leader may reflect Katanga’s position later but not at the time of Bogoro. Some of those matters will be visited in the review of the charges.

253. The defence accepts that 219 was never a combatant, though later ‘demobilised’ for its advantages. No prosecution or defence witness has described him as other than a non-combatant, and that is the prosecution position also.

254. When he met the investigators he nevertheless inflated his position stating that, after members of his wife’s family had been killed, he became an active combatant, though ‘only fought against combatants and never took part [...] in crimes’.³⁴⁸ In evidence he claimed that was a misunderstanding. The defence suggests that the investigators recorded him accurately

³⁴⁶ D2-161-T-268-pp.36-38 (FRA-pp.-30-33).

³⁴⁷ D2-300-T-318-p.45 (FRA-p.39).

³⁴⁸ P-219-T-207-p.33 (FRA-p.32).

and that he was telling them what he thought would appeal to them. Similarly, his claim to them that he was an insider - 'became adviser for the FRPI.'³⁴⁹ He wanted to be a witness.

255. The defence does not accept that he had the level of access to the BCA camp he claimed, at any time, and of course not in the disputed period. Why should he? He was neither Ngiti nor a combatant and at the time was merely working as an [REDACTED]. Access appears to have been very limited for civilians; - 'No civilian could enter into the camp. At the camp the person who gave permission was Germain' - paragraph 167 of his statement.³⁵⁰

256. Over the contested period of August to March he says he went to Beni four times. Given the distance, and his need to stay there for a while, that would add up to a couple of months of absence, on his own account. He appeared to be claiming that he was visiting all the other camps in the same period. Which would not, on his own account, leave him much time in Aveba.

257. Yet he claimed that his 'usual day' was to get up and go to the BCA camp:

A. In the morning I would go to the Aveba military camp because there was communications at 11 o'clock, and then after that we would go to the market or to another place where we could drink alcoholic beverages.³⁵¹

[...] All my days, if I'm at Aveba, I spent in the camp. I left the camp only to sleep.³⁵²

258. He spoke knowledgeably of the communication systems, of radios, phonies, Kenwoods, the 'boulevard', *etc.* – but all that existed in the months and years after Bogoro and, the defence submits, only to a limited extent before Bogoro. He said his visits to the camp were for 'communications'. He said that the black Kenwood phonie was kept at the BCA.

Q. You mentioned Oudo Juliette Oscar. Where was his radio set up, Witness?

A. His radio was set up in the camp, in the house where Germain Katanga lived.

[...] Q. Where were the munitions kept, Witness?

A. There was a house where the radio was kept and in that same house the ammunition was kept.

Q. If I follow your previous answer, the house where the radio was was also where Germain Katanga was living. So am I to believe that this is also where the munitions were kept? A. Yes, that is correct.³⁵³

259. The defence case is that Katanga, prior to Bogoro had just the one house — his father's house, and only moved to the BCA in May. The radio was initially kept in the health centre and only later moved to the BCA. That happened, the defence submits, after Bogoro and when the militia was being better structured. He is speaking of a state of affairs that existed after Bogoro.

³⁴⁹ P-219-T-207-p.50 (FRA-p.52).

³⁵⁰ P-219-T-207-p.57 (FRA-p.60).

³⁵¹ P-219-T-207-p.58 (FRA-p.60).

³⁵² P-219-T-207-p.58 (FRA-p.60).

³⁵³ P-219-T-205-p.26 (FRA-p.25).

260. The key area of his evidence is, of course, Bogoro. And it is there that one finds greatest cause for concern in his evidence. He was seen and interviewed at length in 2005/2007 and 2008, spending fifty hours in interview, and producing 1100 pages of transcripts, reviewed and approved by him, and later condensed into his statement of December 2009. It follows that references to his statement are references to accounts made by him that have been the subject of careful consideration over several years.

Delivery of weapons

261. The witness says he was present when deliveries were made by plane. Though referring to the 'plural' he seemed to say, at one point, that he saw one plane arrive – that is to say one plane making one delivery on one occasion.

Q. Well, I'm not asking you about MONUC planes. I'm asking you about planes that perhaps were delivering munitions and the like that you talked about. And I'll ask you one last time, please, if you can bring yourself to answer this question, how many of those planes did you see land yourself?

A. One, just one.

Q. And what date was that, do you recall?

A. I do not recall the date.

Q. And on that occasion - and I'm assuming it was weapons or ammunition that was delivered - to where was the ammunition taken at Aveba?

A. To Germain's residence.³⁵⁴

262. He later reverted to the plural, but his 'one plane' answer does, for the defence, seem clear, particularly as it is related to 'date' in the singular. In any event, he spoke of witnessing the arrival of a plane/or planes belonging to the 'Across' company. In fact, at the relevant time, the deliveries were made by 'Mangomat' and Across only began making flights later – after Bogoro. It is of course easy to be confused about names but the significance here is that if he was at Aveba after Bogoro he could indeed have seen 'Across' planes landing. The defence submits that as he was not there before Bogoro he did not see 'Mangomat' planes deliver – which he why he does not say they did.

Blaise Koka and colleagues

263. The significance of Blaise Koka and the other APC officers arriving at Aveba in the ranking of notable events does not need emphasising. They clearly were at Aveba, and playing a key role. The prosecution did not dispute that Koka was there, and P-28 make specific reference to that. How then is it that he was unaware of Blaise Koka's existence?

Q. Did you ever meet someone called Blaise Koka?

A. I do not know him.

Q. Or Lieutenant Pip, P-i-p?

A. I did not know Lieutenant Pip.

Q. During your time in Aveba, you never even heard of their names; is that right?

³⁵⁴ P-219-T-208-p.29 (FRA-p.26).

A. No.

Q. And the third of the trio is a name you have mentioned, I think, and that was someone called Mutombo. Did you meet him?

A. No. I have never seen him, but I have heard of him.³⁵⁵

Q. Did you ever meet someone called Kasereka? [...] And I'm asking you in the context of Aveba at a time prior to the attack on Bogoro. He was also known as Mike IV

A. I have never lived with him, and I did not see him

Q. Have you heard of him?

A. Yes, I have heard that name, Kasereka, 'Mike IV.'

Q. And what did he do?

A. I don't know anything about it.³⁵⁶

Q. Well, let me enlighten you. He [Mike 4] arrived and was later joined by Blaise Koka, Mutombo, and Lieutenant Bip. I said 'Pip' before. It's Bip, B-i-p. So there was a group of them. You don't know anything about that; is that right?

A. I knew that group, but I have never lived with it.

Q. Now you say you do know that group. Maybe I misunderstood you a moment ago. You didn't know them when I named them. You do know that group. Just tell us what you know about them, please.³⁵⁷

264. The witness then went on to say that he had mentioned them in his statement:

A. "I think that all of that is well written out in my statement. I said the following, I will say what I know, but I cannot say anything on what I do not know anything about. If I say that I heard talk about them and that I don't have any further clarification, what more do you want me to say?

265. It was then pointed out to him that, in fact, he had not mentioned. He accepted that was the case.

Q. So Blaise Koka, was he in Aveba? You told me a moment ago you didn't know anything about it, but you seem to know something. Was he in Aveba at all?

A. I cannot provide an answer. At the very beginning, I told you that the name Mutombo rings a bell, and now you're moving on to other details which could mislead me.³⁵⁸

266. The defence asserts that the witness was not in Aveba at the time that Blaise Koka and his colleagues were present. Had he been, then given his purported degree of knowledge and contacts, he would obviously have known about them and their significance. His not knowing strongly supports the defence case that he was not there at the time.

Visit by Chef Manu?

267. There is no dispute that Chef Manu made a visit to Bogoro in December 2002. The witness may have come to hear about that. However, he says Chef Manu visited a week or two before Bogoro.

A. It would be difficult for me to say it with any accuracy, but he came shortly before the Bogoro attack; one or two weeks prior to the attack on Bogoro.³⁵⁹

³⁵⁵ P-219-T-208-pp.29-30 (FRA-pp.26-27).

³⁵⁶ P-219-T-208-pp.31-32 (FRA-p.28).

³⁵⁷ P-219-T-208-p.32 (FRA-pp.28-29).

³⁵⁸ P-219-T-208-p.33 (FRA-p.29).

³⁵⁹ P-219-T-209-p.75 (FRA-p.74).

268. There is no evidence to support 219 that Manu visited at that time. Interestingly, whether 219 was in Aveba or not, he makes no mention of the Boba Boba delegation visit as alleged by witnesses P-28 and P-250. He says:

A. The Zumbe delegation that went to Aveba, well, I never spoke about that delegation.³⁶⁰

And

Q. [...] paragraph 251 of the statement: "I do not have knowledge about soldiers or the commanders at Zumbe participating in the meetings and Lendu representatives coming chez Ngiti to prepare the attack on Bogoro. I know because I was there." Is that correct?

A. Yes.³⁶¹

269. It follows that the witness is not confusing visits. Chef Manu's visit was, according to the evidence and as accepted by the Prosecution in November/December 2002. According to P-250 the 'Boba Boba' delegation was there for almost five weeks and of a size and composition that would surely not have gone unnoticed by this witness? In any event, whatever conclusion is reached regarding these respective visits, the defence submits the evidence of the witness supports the defence contention that he was not present at Aveba at that time.

Planning meeting at Aveba before Bogoro?

270. This evidence is, the defence submits, one of the two central aspects of his account, the other being his visit to Bogoro and seeing the 'commanders' there. The witness's account of events immediately prior to the Bogoro attack is set out in transcript 250, at page 41 onward. A crucial part of his account is that he says there was a meeting held on Sunday, 23rd February, at the BCA camp in Aveba, 'to see how the attack would be organised', attended by officers:

All officers based in Aveba attended the meeting: Sipa; Muhito; Bahati; Kachuaki; Safari; John, the little brother of Germain [...] Germain.³⁶²
[...] After the meeting there was a parade.³⁶³

271. As it was a market day, he did not attend the meeting but learnt of it, and what was discussed, from [REDACTED] who told him there was to be an attack on Bogoro the following day. He was told that Katanga had personally taken the radio to tell the people of Bogoro there was to be an attack the following day'.³⁶⁴ He saw the soldiers leave that evening together with all the commanders, including Katanga.³⁶⁵

272. He did not enter the BCA camp that day because;

³⁶⁰ P-219-T-208-p.43 (FRA-p.39).

³⁶¹ P-219-T-208-p.43 (FRA-p.39).

³⁶² P-219-T-205-p.44 (FRA-pp.43-44).

³⁶³ P-219-T-205-p.44 (FRA-p.43).

³⁶⁴ P-219-T-205-p.45 (FRA-p.45).

³⁶⁵ P-219-T-205-p.50 (FRA-p.49).

A. On that day I did not enter the camp and, moreover, it was a market day. It was a **Sunday**. When I left the market I went home, and it was at home that I learnt about the holding of a meeting to discuss about the attack on Bogoro.³⁶⁶ [...]

A. I said that on Sundays I was not in Aveba. I -- consequently, I did not go to the BCA because it was a market day.³⁶⁷

273. In any event, he says he was not in the camp on the Sunday, yet elsewhere has said he was:

Q. Can I just read from your paragraph 252 of your statement and ask you if you agree with it: **"I was at BCA** when the message was passed to the Lendu at Zumbe by the use of the phonie that the attack was to take place on the 24th of February's". Is that right?

A. They were communicating. I am not saying that I was at the BCA on that day.³⁶⁸

274. He was referred to his statement, provided in December 2009 and based upon many hours of previous interviews:

Q. So I just want to read some parts of your statement in just December of last year. Paragraph 244 under the heading 'The Bogoro attack. Planning the attack.'

"I was present during the meeting that took place in Aveba during which the battle plans for attacking Bogoro were discussed. It took place on a Sunday, the day before the attack". What do you say about that?

A. Nothing.

Q. Let me go to paragraph 245,

"I am asked **who I saw and heard** at the meeting [he names the commanders he claims were present]." ³⁶⁹

Paragraph 247:

"Germain said, 'Now is the time to attack Bogoro. We have the strength... we have all that is necessary. We must attack Bogoro.' He explained the strategy, et cetera.

Why were you telling Mr. Dutertre in December you were there at the meeting and recounting those events as things you saw and heard?

A. Let me make a few clarifications on this point. Yes, I attended the meetings, and the planning of the attack on Bogoro was not done during one meeting only. You will notice that there were several meetings held for several attacks, but I did not participate in the meeting on the attack on Bogoro. I think I have already given clarifications on that point.

Q. Well, you've given a different story on that point. DRC-OTP-1030-0585, deposition 19th of November, 2008, where at page 1 the investigators say:

"Now we want to talk about the attack on Bogoro."

And you're asked: line 5: "Were you present in meetings where the plans to attack Bogoro were discussed?" And your answer is: "Oui, j'étais."

And then at page 3, line 75, you're asked this:

".....before this Sunday, had you heard it spoken about, or did you participate in meetings in which they spoke about the attack on Bogoro before this Sunday?" In other words, they're saying, did you hear about the attack on Bogoro, or did you participate in meetings about an attack on Bogoro before this Sunday? And you say, line 81: "Non. Non."³⁷⁰

[...]

A. As concerns the meeting held on the eve of the attack on Bogoro, I was not present. However, I attended other meetings.³⁷¹

³⁶⁶ P-219-T-205-p.44 (FRA-p.44).

³⁶⁷ P-219-T-208-p.66 FRA-p.58).

³⁶⁸ P-219-T-208-p.69 (FRA-p.62).

³⁶⁹ P-219-T-208-pp.62 (FRA-pp.55-56).

³⁷⁰ P-219-T-205-pp.63-64 (FRA-pp.55-56).

³⁷¹ P-219-T-208-p.65 (FRA-p.57).

275. He was asked when those other meetings were held. He did not say and the defence submits, was caught out. When could such meetings have taken place, given that he has said he did not participate in meetings before the Sunday, and none on the Sunday? Asked in what capacity he attended such meetings he said:

I was not invited to these meetings. What I mean is that there might be a discussion on a particular subject, and I would be present by some form of coincidence and then would I hear everything.³⁷²

In his deposition of 24th of February, 2007, DRC-OTP-0175-0553, page 23, line 806, he said:

It was a certain Sunday, in the afternoon. I saw soldiers passing by. **I didn't know what was happening.** I saw so many soldiers passing by. I heard they were speaking in the mother language of the boy 'X' where I was staying, X started chatting with those soldiers who were coming from the camp going out, and then they answered him in the language that they were going to attack Bogoro. And then they went -- and then they went by. I didn't catch what they said, and then I called X. I asked him, "What did they say?" And he told me they were going to attack Bogoro. And then at that time Nyakunde had already fallen. They went in the evening at about 4.00 p.m.³⁷³

This image of him as someone who had no idea of a plan to attack, finding out about it only when the soldiers pass him as they leave Aveba, is a significantly different to his other two versions. It is a third version.

Walking to Bogoro and back.

The roundtrip to Bogoro is about 100 kilometres. It is the equivalent of walking from The Hague to Amsterdam and back. But with hills.

A. We left early in the morning and we took a shortcut. We arrived in Bogoro about 8.30 to 9 o'clock in the morning.³⁷⁴

A. Yes. I went there on foot.

A. I left in the morning.

Q. What time? What is it light, or were you walking in the dark?

A. It was already daylight.

Q. Which is about 6.00 in the morning. And you -- you got there at what time? Remind us what time you got there, please.

A. I was not wearing a watch, but if I try to approximate, it must have been around 9.00 a.m.³⁷⁵

276. The witness had [REDACTED].³⁷⁶

277. The witness provided the investigators with the following estimate of distance; paragraph 277, "From Bogoro to Kagaba is 12 kilometres, and Aveba to Kagaba is 37 kilometers"³⁷⁷ - a total of 49 kilometres. The defence do not dispute that estimate and it is

³⁷² P-219-T-208-p.68 (FRA-p.60).

³⁷³ P-219-T-208-p.70 (FRA-p.61).

³⁷⁴ P-219-T-205-p.55 (FRA-p.54).

³⁷⁵ P-219-T-208-p.76 (FRA-p.67).

³⁷⁶ P-219-T-208-p.77 (FRA-pp.67-68).

³⁷⁷ P-219-T-208-p.72 (FRA-p.63).

amply supported by other evidence.³⁷⁸ The Prosecution attempted to have him reduce the distance to 30km, which plainly is not the case. The return trip is a distance of 100 kilometers. He said he took the short cut shown on EVD-D02-00076, which does not appear to be a significant saving in distance or time. As put to the witness in court:

Q [...] Now, shortcut or not, I mean even if we were to take the most optimistic measure and say 30 kilometres say, which I suggest is below the reality, but 30 kilometres, you say you left in the light and you told us you reached Bogoro at half past 8 in the morning – half past 8 to 9. You got there in two and a half, or three hours, at that rate. It gets light, doesn't it, at sort of 6 o'clock, 6 to 6.30, in Congo, in Ituri, at that time of the year; is that right?

Well, let me put this to you. I suggest a reasonable good-- good average walking speed is about five kilometres an hour, which would mean six hours to walk 30 kilometres without stopping and if you had left at 6 in the morning I suggest you would not have got there before midday.

And to walk back to Aveba, to get back in the light, you'd have had to immediately turnaround and walk back the 30 kilometres, and it may be more than 30 kilometres. You couldn't do it.³⁷⁹

He did not have anything to eat.³⁸⁰ At 5 kilometers an hour it would take 20 hours, without a break. He left in the light, and did not say he got back in the dark. The local terrain is hilly and difficult as could be seen from the helicopter on the recent judicial visit.

278. And what he said must be set against the background that the defence case is that he was not in Aveba and he did not go to Bogoro. He has said what he has said in order to be seen as a valuable witness. Saying he went to Bogoro was a necessary device in order for him to be in a position to be able talk about 'seeing' commanders, including the Zombe commanders. Without the opportunity of that trip he would be unable to provide what he knew the investigators were keen to hear. When he gets to Bogoro he sees 'all' the commanders and, in the little time he was there, is able to name no less than 14³⁸¹, and at paragraph 309 of his statement, no less than 28.³⁸²

279. Why go to Bogoro at all? He said it was not to pillage but out of 'curiosity'.³⁸³ He was unconcerned about the possible dangers, the mines, UPC counter-attack or random UPC soldiers.³⁸⁴ The route he took led him into Bogoro along the Kagaba to Bogoro road:

Q [...] the main road. It goes through Kagaba and continues to Bogoro. And when you entered Bogoro, was that by then the road that you were walking along or not, as you entered Bogoro?

³⁷⁸ D2-196-T-282-p.18: Q. approximate distance between Geti and Aveba? A. Approximately 15 kilometres. Thirty-five kilometres. That is the distance between Geti and Bogoro (FRA-p.17).

D2-259-T-286-p.42: the distance between Bunia and Bogoro is 25 kilometres.- The distance between Bogoro and Aveba is 50 kilometres. And I would like to make a clarification here, your Honor. When I say the distance is 50 kilometres, it's from the roundabout in Bogoro, because if you go to an area called the Diguna roundabout, you see a road sign on which is written Bogoro-Aveba, 49 kilometres. So I estimate the distance between the two roundabouts would be 1 kilometre so the total would make 50 kilometres. [...] The distance between Aveba and Geti is 15 kilometres, and that's an estimate (FRA-p.37).

³⁷⁹ P-219-T-209-p.8 (FRA-p.8).

³⁸⁰ P-219-T-209-p.10 (FRA-p.10).

³⁸¹ P-219-T-205-p.59 (FRA-pp.58-59).

³⁸² P-219-T-209-p.19 (FRA-pp.18-19).

³⁸³ P-219-T-209-p.10 (FRA-p.10).

³⁸⁴ P-219-T-209-p.10 (FRA-p.10-11).

A. I was on that road.³⁸⁵

280. In the defence submission that route would take the witness into Bogoro with the Bogoro Institute on his left, yet he described it as on the right:

I used the road that goes past the market heading towards Bunia. And when we arrived... at where the road meets before you get to the roundabout on the right-hand side, there was a school on that side.

If one was walking from the Bunia side of the village up towards the rondpoint, then indeed one would pass the market before coming to any school.

281. In his sketch produced during interview with the investigators - EVD-D02-00078 - he plainly places 'the school' in the spot occupied by the Kavali Institute. Is that just an error? Or is it, coupled with what he said about the market and the school being on the right, where one would expect to find the Kavali Institute. Several Prosecution witnesses have marked the Kavali Institute rather than the Bogoro Institute.³⁸⁶

282. The witness described his various movements in Bogoro which included him seeing all the commanders, walking to the central part of the town, looking around the school and seeing the bodies etc. In his December interview he said he had remained in Bogoro for "At most, some hours. I cannot say exactly how long".³⁸⁷ At transcript 205, page 56, line 20: "1 hour at most."³⁸⁸ But in February 2007, Fourth transcript, line 993, 'I couldn't stay there. I couldn't really resist to stay there 15 minutes'³⁸⁹ which he made plain to the investigators, when they asked him: "I do not know if it's a manner of speaking or whether you are saying it literally, and for this to be very clear for everyone who could listen to the recording"³⁹⁰ - was not said as a mere manner of speech but was his real estimate of the time spent there.³⁹¹

A. Yesterday, I told you I think I spent about 15 minutes in Bogoro. I did not stay for long in Bogoro. I spent only a few minutes. And later on, I went away.

CC: Very well. Today still, you said that you spent 15 minutes.

Interpreter: 15 minutes, because I did not stay on in Bogoro.³⁹²

283. Witness P-219 claimed to have gone to Nyankunde the day after the attack and seen Katanga. Though he said in evidence he went 'the next day', in his earlier interview he said, twice, that "I went there two days after the fall of the town."³⁹³ The witness sought to explain by saying that in French, one would say "two" or "deux", one and two, and that if you count

³⁸⁵ P-219-T-209-p.12 (FRA-pp.11-12).

³⁸⁶ P-219-T-209-p.14 (FRA-pp.12-13).

³⁸⁷ P-219-T-209-p.15 (FRA-p.15).

³⁸⁸ P-219-T-209-p.15 (FRA-p.15).

³⁸⁹ P-219-T-209-p.16 (FRA-p.15).

³⁹⁰ P-219-T-209-p.17 (FRA-p.16).

³⁹¹ P-219-T-209-p.16 (FRA-p.15).

³⁹² P-219-T-209-p.17 (FRA-p.16).

³⁹³ P-219-T-207-p.61 (FRA-p.63).

the first day as day one, then you would say you are going there on the second day.³⁹⁴ He claimed that he saw Katanga bring back pillaged goods to Aveba – a motorbike- but there is no mention of this in any of his previous accounts.³⁹⁵

284. Finally, on the issue of his reliability as a witness, is the issue of Mandro. In his evidence the witness claimed:

After Bogoro, Germain went with troops towards Zombe. He had a meeting in Zombe, and after they went and attacked Mandro.³⁹⁶

285. Later in evidence he said:

Q. Yes, thank you. Now, Mandro. Did you see Germain Katanga leave to attack Mandro?

A. Germain went to Mandro, but when he left to go there I did not see him.

Q. So you didn't see him leave?

A. I wanted to tell you the following: Aveba is not as big as The Hague.

Aveba is a small locality. If Germain leaves Aveba the news will get around, and when Germain returns to Aveba it will be public knowledge. So when Germain left to go to Mandro, the entire population was aware.

Q. That may be. My question is simply did you see him leaving for Mandro? And you said just a moment ago, "Germain went to Mandro, but when he left to go there I did not see him," and is that correct?

A. I think I have just answered that question by saying the following: I did not see him. I don't know if you understood that answer which I gave you previously.

Q. Well, it's just that I'm a little puzzled, because I'm looking at your paragraph 66. This is the statement you made just in December last year, ... and they are showing you a transcript and you say: "I saw the transcript that said that I did not see Germain leave for Mandro, but I also said that the question was ill-posed and badly translated. I want to say **that I saw Germain leave to attack Mandro.**" So which is it?³⁹⁷

There was a very long pause but no answer.

[REDACTED]³⁹⁸

286. [REDACTED]³⁹⁹ [REDACTED].

287. [REDACTED].⁴⁰⁰

288. [REDACTED]:

[REDACTED].⁴⁰¹

[REDACTED].

289. [REDACTED]:

[REDACTED].⁴⁰²

³⁹⁴ P-219-T-207-p.61 (FRA-p.63).

³⁹⁵ P-219-T-207-p.61 (FRA-p.63).

³⁹⁶ P-219-T-206-p.18 (FRA-p.18).

³⁹⁷ P-219-T-209-p.23 (FRA-p.23).

³⁹⁸ P-219-T-209-pp.69-73 (FRA-pp.67-72).

³⁹⁹ ICC-01/04-01/07-1739-Conf-Exp-Red, 23 December 2009.

⁴⁰⁰ EVD-D02-00077.

⁴⁰¹ P-219-T-209-p.29 (FRA-p.28).

[REDACTED].

290. [REDACTED].

291. [REDACTED]:

[REDACTED].⁴⁰³

292. The witnesses identified by the defence as ‘core witnesses’ have been dealt with above. The second tier of witnesses relating particularly to Katanga’s personal role, as identified by the defence, are witnesses P-12 and P-150.

293. Witness P-12 and P-160 are [REDACTED]. In the particular circumstances of this case it would, in the defence submission, be unsafe to treat them as mutually corroborative, [REDACTED].

P-12, [REDACTED]

294. Witness 12 introduced himself as [REDACTED].⁴⁰⁴ He is [REDACTED]. With the exception of two weeks in August 2002, he was not in DRC from April 2002 until mid March 2003. He has never visited Aveba or Gety, nor anywhere in Walendu Bindi so far as is known. He has never lived in a Ngiti community.⁴⁰⁵

295. He first heard the name ‘Germain Katanga’ in March 2003, and first met him at the fourth CCGA meeting in Kinshasa in 2003. Thereafter an association formed between them. He first heard of the existence of the FRPI, he said, on 8th March 2003.⁴⁰⁶

296. The witness’s relevance to the Katanga case is, essentially, evidence of incriminating statements allegedly made to him by German Katanga at the witness’s Kampala home in 2004. The defence disputes that those statements were made. Witness 12’s evidence that there was a conversation is supported by that of [REDACTED] P-160, though there is significant divergence on what was said. In particular, though [REDACTED] [P-160] claims Katanga did not claim he was at Bogoro, [REDACTED] [P-12] claims, or concludes, that he said he was there. As this contradiction goes to the heart of their relevance as witnesses it is difficult to see how much value can be attached to either.

297. The background of the witness was explored in evidence and is not repeated at length here. It presents, in the defence submission, a picture of a highly intelligent but manipulative man. [REDACTED] he had his finger in many pies. There were areas where the defence were

⁴⁰² P-219-T-209-p.70 (FRA-p.69).

⁴⁰³ P-219-T-209-p.68 (FRA-p.67).

⁴⁰⁴ P-12-T-194-p.31 (FRA-p.32).

⁴⁰⁵ P-12-T-198-pp.20-22 (FRA-pp.21-22).

⁴⁰⁶ P-12-T-198-p.29 (FRA-p.30).

necessarily limited through lack of information but where the witness was, on any view, keeping interesting company. He was [REDACTED], engaged in attempts at gaining large value contracts in gold mines.⁴⁰⁷ His political life was very active. [REDACTED] RCD-Congo, created by the Ugandans and based in Uganda. One document produced by the movement was a detailed intelligence review of militia forces with reference to 'our spies on the ground' and their deployment.⁴⁰⁸ The witness spoke of the context of the RCD-Congo being a project essentially of Museveni's brother Salim Saleh and agreed that an objective of the project was the recovery by Salim Saleh of the Kilo Moto gold mines.⁴⁰⁹

298. The witness had some association with a man called John King of 'Panama Investments', John Ndekesiri and the purchase of a formidable list of arms. He admitted meeting another arms dealer who ran a company called Sphere Resources. There was association with John Ndekesiri and RCD-K/ML New Look, the revamped party of Wamba dia Wamba who had been a founder of the original RCD K, and a plan to act jointly with Jean Pierre Bemba to get hold of Coltan depositions near Beni. That was, he said, the link with the arms dealers of Sphere Resources⁴¹⁰ - an arms for Coltan deal. There were documents relating to the sale of 150 tons of Coltan that the witness said he had obtained 'from someone else' so as to pass on to investigation panels.

299. He possessed a document produced by RCD Kisangani, dated 20/1/2003, Kampala, and relating to the seeking of an alliance with RCD-Goma, the Rwandan backed militia at that time involved in advancing on Beni. He said he got it from Ndekesiri:

Ndekesiri was a friend of mine. I would like to remind you of something. Everything that was operations, of documents, that could hinder peace in my country, all of those documents, wherever I got them from, I could photocopy them and I saw that they could be of use to the international community, to see how they could get on, so whatever document, whatever the matter at hand, whenever document that I saw could hinder peace in my country, or destabilize my country, I always felt involved. I'm sorry, but that's how it was.⁴¹¹

300. He had [REDACTED] with Heckie Horn, a South African, [REDACTED].⁴¹² [REDACTED].⁴¹³

301. [REDACTED].⁴¹⁴

⁴⁰⁷ DRC-OTP-0106-0023 an agreement [REDACTED] – See P-12-T-199-p.13: "To successfully conclude gold and other mineral exploration" [...] "to bring the projects into mineral production which is likely to be not less than 10 million dollars US" (FRA-p.10).

⁴⁰⁸ EVD-D02-00065.

⁴⁰⁹ P-12-T-199-p.33 (FRA-p.34).

⁴¹⁰ P-12-T-199-p.46 (FRA-pp.47-48).

⁴¹¹ P-12-T-199-p.50 (FRA-p.51).

⁴¹² P-12-T-199-p.54 (FRA-pp.55-56).

⁴¹³ P-12-T-199-p.55 (FRA-p.56).

⁴¹⁴ P-12-T-199-p.59 (FRA-P.60).

302. The witness was arrested for having paramilitaries staying in his home in Kampala. They had been seen doing army exercises in his garden and neighbours voiced their suspicions to the police. He said that his son was found outside ‘playing’ with a list of arms and munitions. There were also ‘fake’ number plates seized. [REDACTED]. Plainly a pre-established account. On his arrest record the witness was described as a businessman engaged in the sale of honey. The witness, in circumstances he elaborated upon, was kept in custody for two weeks over Christmas 2002 and the New Year by the Ugandan Security Services, the CMI.⁴¹⁵ The witness, on other occasions, had met the head of Ugandan External Security, Nobel Mayombo, several times.⁴¹⁶ The witness was aware of an agreement whereby Mayombo was to receive a \$340,000 bribe from Wamba dia Wamba, payable by mineral exploitation in Ituri. [REDACTED].⁴¹⁷

303. In January 2004 he went to the CMI in Uganda with a man called Dido who was plotting to displace Jerome Kakwavu in Northern Ituri, in order to get hands on the lucrative customs income to finance a revolt – the ‘New Rebellion’ aimed at establishing a common front against MONUC and Kinshasa. The witness drafted the letter and subsequently attended a meeting of New Rebellion members in Kampala.⁴¹⁸ Subsequently he visited Colonel Chimboa to negotiate arms for the Movement. The witness said that by that time he was in contact with the ICC investigator [REDACTED] and the ‘operation was a trap as I just explained’.⁴¹⁹ He could not recall when he met or told the investigator about it.

304. The witness explained all these references at length, or at least he presented an account to the Chamber. The defence is not in a position to go further into that history. But this is not a mud-slinging exercise, in the hope that some will stick. His declared, unselfish motives for his activities are not corroborated. And the defence submits that little of his activities had other than some degree of self interest at heart, the most successful of which was relocation.

305. His association with [REDACTED] is certainly not that of a man sitting on the sidelines. He assumed a significant position in that organisation, played a highly active role within it, and was engaged all of 2003 and 2004 in representing its interests. While he declared himself to “feel much closer to Ngitis and Lendus than to the Hemas”⁴²⁰ - the fact is that he was [REDACTED].⁴²¹ He clearly knew that the other officers of that organisation came straight

⁴¹⁵ P-12-T-199-pp.64-69 (FRA-pp.65-71).

⁴¹⁶ P-12-T-200-p.7 (FRA-p.6).

⁴¹⁷ P-12-T-200-p.9 (FRA-p.8).

⁴¹⁸ P-12-T-201-p.49 (FRA-p.52).

⁴¹⁹ P-12-T-201-p.50 (FRA-p.55).

⁴²⁰ P-12-T-200-p.36 (FRA-p.33).

⁴²¹ P-12-T-200-p.35 (FRA-pp.31-32).

[REDACTED], with its history of oppressing other ethnic groups and its extensive employment of child soldiers – 75% of its militia were children, he said. He was involved [REDACTED]⁴²² [REDACTED].⁴²³ [REDACTED] substantial sums to be paid by Uganda to the organisation, or its officers.⁴²⁴

306. It may be that, despite his protestations to the contrary, he bore some prejudice against the Lendu/Ngit. He said that:

To my knowledge, right from the beginning of the UPC of Ituri, I don't remember a village that was directly attacked by the Hema.⁴²⁵

Q. And coming to Bogoro, was it within your knowledge that there were many attacks launched from Bogoro against local communities, again large numbers of people were killed? Was that within your knowledge?

A. No.⁴²⁶

In light of the known history and various reliable reports, that is an unbalanced reflection of the situation, particularly coming from a man purportedly so knowledgeable of events. He stated he recognized that there had been many atrocities.

307. His claim of 'feeling closer to the Lendus/Ngitis' than the Hema should be set against document EVD-D02-00072. That is the document, [REDACTED], dated 5th April 2004, [REDACTED]. It reads, in part:

For strategic reasons, Ngiti people prefer to live at the border of Albert Lake and Semliki River, which constitute the border with Uganda. That land occupied by the Ngiti in the plain of Kasenyi, de facto and de jure, belongs to Hema people. PUSIC has decided to move the Ngiti away from the border with Uganda. To accomplish that, PUSIC will be going to move 400 troops from Shari cantonment and to concentrate them in the plain of Kasenyi; we mean from Nyamavi to Burasi localities. It asks for \$40.000 US for the job.⁴²⁷

The witness said it was just a ruse to get money. Either way, it is odd behaviour [REDACTED]. The defence submits that he was a man out for the main chance, and took any and every opportunity that came his way.

308. The witness claims that much of what he did was motivated by a sense of service to his country. However, the family has not been back to DRC since 2005, nor to Uganda, their other domicile. The witness and his wife were inducted into the ICC protection programme in 2006 and support themselves largely with 'a sum that is provided to the witness.'⁴²⁸ They,

⁴²² P-12-T-200-p.43; DRC-OTP-0106.0247.

⁴²³ P-12-T-200-p.65 (FRA-pp.59-60).

⁴²⁴ EVD-D02-00071/DRC-OTP-0106-0250: 'receipt of 77.694.937 shillings.'

⁴²⁵ P-12-T-200-p.26 (FRA-p.24).

⁴²⁶ P-12-T-200-p.33 (FRA-p.30).

⁴²⁷ P-12-T-200-p.50 (FRA-p.47).

⁴²⁸ P-12-T-199-p.14 (FRA-p.14).

together with their children⁴²⁹ have been relocated. The defence do not know where, nor the basis for relocation, other than that it was viewed as necessary for his and their security. It may be a relocation outside Africa. The defence queries the need for relocation being necessary in their case - unless it was as protection from the Ugandans or the DRC. Relocation can be seen as a massive prize and an incentive to give evidence, and more importantly, to inflate one's value as a witness to a case in order to 'qualify'. The witness gave evidence in the Lubanga case on essentially contextual matters. In other words, his value to the OTP may be centred on the current case. And a key part of the evidence he had to offer was an alleged conversation with Katanga where he claimed the latter spoke of the part he played in the Bogoro attack – which happened to be what the Investigators wanted to hear.

309. Katanga disputes the witness's account of visiting the witness's home in Kampala. He only recalls a short visit paid to the witness's home in Kinshasa later that year, but there was no meal, no significant discussion, and the witness's wife was absent.

310. It is possible, though unlikely, that Katanga could, given the years that have elapsed and his drinking, have simply forgotten about the visit or the discussion. It is possible that he, as a young man, may perceive [REDACTED] [P-12], [REDACTED], an intellectual and his social superior, as the sort of person whose evidence would be given more weight than his own, and be driven simply to deny the incident rather than to address it. Even in the event that a conversation did occur, at some time or place, in which Bogoro was discussed, it would be unfair to rely on it as incriminating evidence – as, in effect, a confession.

311. On the witness's account it was not a formal occasion but arose in a casual, spontaneous manner, over a meal, with Katanga and others, perhaps the witness too, drinking whiskey. In such circumstances, things can be said, particularly under the influence of alcohol, that are neither true nor accurate, or are exaggerated, or said out of boastfulness, or to mislead the witness, or to impress – whether it be the witness or his wife. Or misunderstood, and overlaid with subjective perceptions.

312. If a conversation took place, which is denied, then the witness's account is subject to all the difficulties of recalling a conversation held many years ago. No near contemporaneous note or record was made. The witness said that though he was in the habit of making notes of significant events on his computer he made no such record on this occasion. Our ability to recollect conversations over a short period, let alone over several years, varies. We have all been confronted in life with someone's recollection of things we are meant to have said that

⁴²⁹ He said he has four children, his wife says two, so unclear how many live with them in relocation.

we do not recall and which we dispute. Human memory is notoriously fallible. There was no particular reason why, at the time, the conversation should be of particular significance to either witness. Neither considered it merited recording in a note. Without such a record any conversation recalled years later becomes unreliable. It is particularly unreliable as evidence to incriminate an accused facing charges of such seriousness. Police or investigators worldwide, including those at the ICC, have a duty systematically to record or note any significant conversation. Without a near contemporaneous record it becomes hard, and even unfair, to expect an accused to be able to address it. [REDACTED] is a striking example of the necessity of having a clear record.

313. The failure to indicate what was actually direct speech in the conversation, and what was not, makes it impossible to judge what was actually said, as opposed to what a witness may have understood was said. The line ‘he was there’ is an example. Is that something that was said as direct speech, as in ‘I was there’, or is it something that Witness 12 concluded or thought he was being told, or came to believe? Witness P-12 includes it as part of his recollection of the conversation, whereas Witness P-160, allegedly hearing the exact same conversation, concludes that Katanga said he was not at Bogoro. Aside from being an example of the problems of accurate recollection, that difference of account means that no proper reliance can be placed on the conversation being an evidentiary basis for Katanga’s presence at Bogoro. In fact, given the evidentiary burden, the different account lends itself to supporting the defence contention that Katanga was not at Bogoro.

314. Witness P-12 was interviewed at great length –some 120 hours in all. Some four days of his interview has been lost. Surprisingly, the lost interview was conducted with just witness P-12 and one investigator, [REDACTED], present. No other interview that the defence has come across has one investigator present. It is particularly concerning as the defence is deprived of a record of exactly what was said, and in this case discrepancies of account have been, in the defence submission, particularly revealing.

315. In addition, there are indicia of unreliability in the evidence of witness P-12 that will be addressed further below, one of the most striking being his key assertion that Katanga was present at Bogoro, whereas [REDACTED] [P-160]’s recollection is that Katanga said he was not. Katanga’s case is that he was not present.

316. There were various areas where his ‘recollection’ is demonstrably inaccurate. He said that Katanga had told him that Kandro was ‘killed on the battlefield - He was dead on the battlefield in Nyankunde’. -- He told me that he was there and he told me that it was during

that battle when Colonel Kandro was killed.”⁴³⁰ He said, of Angaika, that Katanga “told me that his wife was his sister. That’s what he told me. And while we were having supper, he told me that if he had not married his sister he would have abandoned him ...in the presence of Angaika.”⁴³¹ Katanga has one sister, and she is married to Safari Mangala Ferdinand. There is no family relationship with Angaika. Why would Katanga claim that there was?

317. The witness claims that, on the same occasion, Katanga related a story of how Angaika Didi returned from the FIPI discussions in Kampala and had to be saved by Katanga from being killed by the people of Aveba, and that the attacks on Bogoro and Mandro were done in order to demonstrate Ngiti dissent with the FIPI process.

318. The defence submits that Bogoro was a strategic objective and the attack carefully planned in Beni and elsewhere. Neither attack was done to sabotage the FIPI discussions.

319. Also, Didier Angaika first appeared in Kampala on 8th March,⁴³² essentially after both the FIPI discussions and the Bogoro and Mandro attack. Those attacks could not therefore be motivated by Angaika going to Kampala, so why should Katanga say they were? Far from being treated as a traitor to be killed, Angaika attended the March meetings in Bunia as the FRPI representative.⁴³³

320. In his 2009 interview with the investigators the witness said that Germain told him:

[...] He had attacked Mandro. After having attacked Mandro, he had seen that he had managed to take Mandro, and once they gained entry they thought to themselves, well, why not do the same to Bogoro because the Ugandans had already asked them to do so, and for quite some time but they weren’t able to do so.⁴³⁴

Germain took his troops and Ngudjolo brought his troops, too. Because Germain told me we used the Zombe troops as we had previously [...]. As previously, they used the troops in order to attack Mandro.⁴³⁵

This reversal in the sequence in which the battles took place demonstrates the tenuous hold on what he alleges he heard.

321. It was unclear when the supper or meal took place. This witness alleges it occurred sometime in the period January-February 2004. Documents dated 8th February and 22nd February help identify when it is said to have taken place.

322. The first time the witness spoke of more than one visit to his home was during his evidence. He then said that he could not remember how many suppers there were.⁴³⁶

⁴³⁰ P-12-T-201-p.19 (FRA-p.19).

⁴³¹ P-12-T-201-p.17 (FRA-p.18).

⁴³² P-12-T-194-p.63-l.1, p.65-l.5, p.68-l.5-6, P-12-T-195-pp.4-5, P-12-T-198-p.4-l.3-11.

⁴³³ P-12-T-201-p.18 (FRA-p.19).

⁴³⁴ P-12-T-201-p.28 (FRA-p.29).

⁴³⁵ P-12-T-201-pp.28-29 (FRA-p.30).

A. I told you that all those dates I really can't remember. I can no longer remember exactly when and how. But, when you read -- well, I can't remember whether it was exactly on that particular date or that other date. I couldn't tell you because I don't remember exactly when. I don't remember the exact dates.⁴³⁷

323. He said that Katanga paid two visits to Kampala in 2004. His whole relationship with Katanga seems to have been largely directed or controlled by a man called Emmy Allio:

Emmy Allio was a journalist, first of all, a journalist from 'New Vision' in Uganda. But in addition to that, as I started to get to know him, I realised that he was also working with the external security forces of Uganda.⁴³⁸

324. It was on the second visit that Katanga had a meeting with Museveni, in his capacity as President of the FRPI as a political/military party. The defence case is that there was one visit made by Katanga to Kampala in 2004, on or about the 22nd February. On the first visit he remained near Lake Albert. This is significant as the witness places the time of the disputed meal as occurring at the time the 'official declaration' document was being created on 8th February.

325. That document, dated 8th February, EVD-D02-00046, is headed 'Declaration Politique', dated on the front page 'Kampala 8/2/2004' but signed by Katanga on the second page 'Fait a Aveba-Mkuba, 8/2/04'. It declares the 'total rupture' between the FNI and FRPI, and the latter 'an independent and autonomous political/military movement' with an intent to continue to cooperate with MONUC, the Transitional Government and the pacification process.' Katanga claimed that this document was not produced by P-12 but produced and signed at Port Royal, on the Uganda/DRC border.⁴³⁹ It was, he said, all done at the behest of the Ugandans, typed up in an internet café by a girl, then handed to 'us'. He said he left Port Royal on 9th February. P-12 disagrees, stating, "I typed it out in Kampala."⁴⁴⁰ Katanga says his visit to Kampala was later in February. He stayed in an hotel, met Museveni, and agreed that [REDACTED]. Relevant documents were produced – EVD-D02-00074 and EVD-D02-00080. They are both dated 22 February, Kampala, and signed by Katanga.

326. It is to be noted that the Font on the document EVD-D02-00046, dated 8th February, on the one hand, and the two documents dated 22 February, is plainly different. Why would witness 12, who claims he was working off his home computer, change the font if he produced both the 8th February and the 22nd February document? While not difficult to do, it makes little sense to have done it. The different font may suggest different computers were

⁴³⁶ P-12-T-201-p.12 (FRA-p.13).

⁴³⁷ P-12-T-201-p.8 (FRA-p.8).

⁴³⁸ P-12-T-200-p.77 (FRA-p.71).

⁴³⁹ P-12-T-319-pp.33-34 (FRA-pp.36-37).

⁴⁴⁰ P-12-T-201-p.7 (FRA-p.7).

used and supports Katanga's evidence that the 'declaration' document was produced at Port Royal on a different computer than P-12's home computer.

327. Witness P-160 states that Katanga visited Kampala once in 2004, not twice as [REDACTED] [P-12] maintained. She did not recognise the 'Declaration' document dated 8th February. Her evidence is dealt with below.

328. The account of the conversation, as recalled by witness P-12, is found at pages 24 to 28, and page 32 and 64. Much of the content is undisputed fact – the attack, the Lendu participation, the civilian casualties – and would have been generally known by 2004 and to the witness in any event.

329. He claims Germain stated that:

Our attack in Bogoro was a sign so that the people who were in the presence of discussing would understand that it suited the Lendu and not the FIPI, something that was to the advantage of the Lendu but not the Ngiti. We weren't involved in it; that's why we were not happy with all of that.⁴⁴¹

330. The attack on Bogoro was, the defence submits, because Bogoro was first and foremost a strategic objective. The attack was not done on some whim of Katanga or the Ngiti but had been carefully planned in Beni and elsewhere as part of the retaking and control of Ituri. Consequently, it is highly unlikely that the attack on either Bogoro or Mandro was motivated by a wish to undermine FIPI. If said by Katanga then he said something that was untrue. Why would he say it? Perhaps, and more likely, it is the witness's own impression of events. He was, after all, participating in the FIPI discussions. Also see [REDACTED] [P-160]'s different version when this subject was discussed with her originally, and where she said he said it was a revenge attack following attacks on local villages by the UPC.

331. The witness claims that Katanga told him that Dark led the attack:

Q. Did Mr Katanga tell you where he was at the time of the attack against Bogoro? A. He did not tell me where he was [...]. As for Bogoro, he was not in charge of operations. The operations were led by Dark. But he, too, had come along with other soldiers and all of them together started to attack, so I can't tell you exactly where he was. He was present and he took part.⁴⁴²

332. But Katanga's version of events is that it was Yuda. And if Dark, the second in command at Kagaba, was leading the attack, where would that have left Katanga in the scheme of things? This is a strange reply as it contains an inherent contradiction. On the one hand the witness is saying he was not told where Katanga was and that he was not in charge of operations, and then in the latter two sentences – that he was there. If the conversation took

⁴⁴¹ P-12-T-197-p.24 (FRA-p.27).

⁴⁴² P-12-T-197-p.25 (FRA-p.28).

place the last two sentences seem likely to be something the witness may have thought or concluded rather than something said by Katanga. It also conflicts with [REDACTED] [P-160]'s recollection who states that Katanga did not say he was at Bogoro.

333. While this witness says, in the context of whether any mention was made of the civilian population, that Katanga spoke of 'huge carnage' – 'a real massacre' – [REDACTED] [P-160] says Katanga made no mention of what happened to the civilians. P-12 says:

Q. Last question: In -- during your discussions with Mr Germain Katanga regarding the Bogoro attack, did he mention to you who had ordered the attack? Was that touched upon during the discussion, who had ordered the attack?

A. No.⁴⁴³

[REDACTED] [P-160] states that Katanga said he planned and ordered the attack. See below.

334. An interesting departure by this witness from the preponderance of reliable evidence concerning the Bogoro attack, and as argued by the Prosecution, is his involvement of the Ugandans in the attack. He did not mention this in his examination in chief, other than in saying:

A. Let me say in passing that Pascal Alezo told me, 'Yes, it's true we took the town but we had the assistance of the Ugandans. They helped particularly with arms and ammunition.'⁴⁴⁴

Asked if that was said during the meal, he replied "I think that afterwards he told me that they had been glad to receive the Ugandans' help, and I can't remember whether it was during that dinner or not."⁴⁴⁵ In his interview he had not distinguished learning of that information other than in the discussion on Bogoro.

335. In his earlier interviews he had said much more on the subject;

12 January 2009, fourth transcript, reference 1034-0173, at line 407:

Alezo Pascal, Germain's political adviser, told me that, "No, if we manage to win it was not us. It was the Ugandans who helped us. They pushed us to do it. They were saying 'Go to Bogoro.' We thought the Ugandans were favourable to the Hema, that they were setting us up. Finally, they gave us troops and Captain Kiza, a Ugandan captain. He gave us arms, munitions, et cetera, and the Ugandan military themselves. It was not only the Lendu who killed. There were also Ugandan soldiers who were behind them, helping them to kill the Hema."

A. Yes, I do remember saying that and it is correct.⁴⁴⁶

12th January, fifth transcript, reference 1030-1087, at line 482,

Germain told me it was the Ugandans who pushed him into doing it.⁴⁴⁷

Line 664: Q. And how is it that they acquired arms and ammunition in order to conduct the attack upon Bogoro?

⁴⁴³ P-12-T-197-p.31 (FRA-p.35).

⁴⁴⁴ P-12-T-197-p.24 (FRA-p.27).

⁴⁴⁵ P-12-T-201-p.23 (FRA-p.24).

⁴⁴⁶ P-12-T-201-p.24 (FRA-p.25).

⁴⁴⁷ P-12-T-201-p.28 (FRA-pp.28-29).

His reply at line 680, (Interpretation): However, during that operation they had been armed by Uganda. That is what happened, because one of the captains who died, I also know that Captain Kiza, he was the one who Uganda had sent in order to negotiate with the Ngiti. They negotiated with the Ngiti so that they could dislodge the UPC in Bogoro, and they gave them weapons.⁴⁴⁸

Line 683: MS MENEGON:⁴⁴⁹ The person heard: But that operation, they were armed by Uganda.

EM: How did that happen?

The person heard: It was done because the -- a captain who was --who died. Me, myself, I also know Captain Kiza. He is the one that Uganda sent to negotiate with the Ngiti. They negotiated with the Ngiti so that they could drive out the UPC from Bogoro.

EM: I see.

Person heard: And they gave the weapons. I was the one. I know I helped. I was there when they -- when he was given weapons and they were delivered. He crossed with Semiliki.

Person heard: And in this particular case, he is the one who said with Alezo, Pascal Alezo, who was his political adviser. They said Captain Kiza brought us ammunition. Everything, everything, everything. That was the first time they had everything.⁴⁵⁰

14 January, third transcript:⁴⁵¹

The question is: 'Q. Try to recall specifically what he said to you on the subject of Bogoro?'
 "Well, you see he had said -- I had already explained that to [REDACTED],⁴⁵² what he had said. He said they had suggested to them, they had suggested -- by the Ugandans because them, they didn't have the military resources to go to Bogoro, fight with the UPC. The UPC was really armed. And them, they couldn't. It was suggested to us by the Ugandan army if they could drive out the UPC people from there.

SG: Who suggested that exactly?

Person interviewed: The commander. He said to me the commander of the UPDF who was with them in their sector. But it was Alezo who added -- Alezo, during the discussion, he said, no, it was Commander Kiza. Captain Kiza from the Ugandan army.

SG: Did he tell you exactly how that contact was made?

Person interviewed: With Kiza?

SG: Yes. How? How did they Came into contact with one another....

Person interviewed: But they always would visit one another.⁴⁵³

14th January, 3rd Transcript - line 529,

SG: And more specifically, he gave you details about the Ugandans' participation?

Person interviewed: No, he didn't give me details about the participation of the Ugandans but I wanted to know, I wanted to know whether the Ugandans also were on their side. That was part of the work that I was doing. I wanted to know if they had taken part, the Ugandans had participated in that attack. Furthermore, you -- with regard to the heavy weaponry, they used the heavy weaponry and they didn't know how to use it. And the Ugandans knew; they had specialists. Since the UPC had mortars --they had mortars. And them, they had almost nothing. They had Kalashnikovs, but they --but at times they had looted some bombs and all of that. So they didn't have specialists for that. The Ugandans were the ones who had specialists, people who knew how to use heavy weaponry, and they used that to drive out the UPC.

SG: But does that -- because I'm trying to clarify. Was it the Ugandans who had Germain's people use the weapons or was it the Ugandans themselves?

The person interviewed: Themselves. Themselves...

⁴⁴⁸ P-12-T-201-p.30 (FRA-p.32).

⁴⁴⁹ Interpretation as recorded at P-12-T-201-p.34 (FRA-p.36).

⁴⁵⁰ P-12-T-201-p.34 (FRA-p.36).

⁴⁵¹ DRC-OTP-1034-0323-p.10-l.360-356.

⁴⁵² The reference to his having told Nicolas is a reference to and interview with [REDACTED] who interviewed the witness for four days, alone. The entire record of the four day interview has been lost.

⁴⁵³ P-12-T-201-p.36 (FRA-pp.38-39).

SG: And that, who told you that?

Person interviewed: Well, themselves, the – Germain's -- **they said to me the same day, they told us that the Ugandans had helped them.**

EM: Specifically during the attack on Bogoro?

Person interviewed: Yes.

EM: With heavy weapons?

Person interviewed: Yes, they used them.⁴⁵⁴

336. The reference to 'the same day' is a clear reference to the day when the 'Bogoro' conversation is alleged to have taken place. It was put to him that the Ugandans had not participated;

A. If they did not receive arms or support from Uganda, then I doff my hat to them. Then I would understand that they would have become very strong, and that's all very well and good, but do not ask me a thousand times to confirm. I have already confirmed and reconfirmed that they told me that they had received support from the Ugandans. So, don't ask me that question ten times because I am not going to answer again. I have just said that they told me that they had received assistance from the Ugandans.⁴⁵⁵

Q ... Can you think of any reason why they may have been lying to you about Ugandan involvement, or is it something that you can't help us with?

A THE WITNESS: He's asking me if I can give reasons why they lied, and my answer is they did not lie to me. They told me the truth and, to date, I believe that as the truth. I knew that they themselves do -- did not have the military capacity to dislodge the UPC from there. They did not have that military capacity. So if they told me that they did not lie to me. You, Counsel, are the one telling me that they lied. I believe that they did not lie to me. They told me the truth.⁴⁵⁶

337. The defence submits that his detailed recollection of an account involving Uganda, extending to providing heavy weapons and the men to fire them, runs counter to what is known to have happened at Bogoro. Where would he have got this information? If he claims to have been told this at the meal, then why would Katanga, or anyone, have told him this? It is difficult to conceive that he misunderstood what he was being told, given the detail he provides. A reasonable interpretation is that the witness has made it up. It is a gloss based on his misconception of where arms came from and added to his account of the conversation or conversations that he had with Katanga. It is interesting to note in this context that the witness appeared to have no appreciation of where in fact the arms and support had come from, or at least was unwilling to acknowledge the fact.

338. At this late stage in his evidence before the Chamber the witness had made no reference to EMOI or of supplies of arms from Beni and Kinshasa. He was referred to the following exchange in his interview when he had been asked by the interviewers, perhaps as a result of their surprise that it had not been mentioned, if EMOI supplied the Lendu/Ngiti before the Bogoro attack.

⁴⁵⁴ P-12-T-201-p.37 (FRA-pp.39).

⁴⁵⁵ P-12-T-201-p.41 (FRA-p.43).

⁴⁵⁶ P-12-T-201-p.41 (FRA-pp.43-44).

14th January, fourth transcript:⁴⁵⁷

Person interviewed: "Well, no, no, no, that is not true, because before the Bogoro attack the EMOI was not there. EMOI was not there."⁴⁵⁸

Person interviewed: "Yes, EMOI was not there because I remember that EMOI came afterwards. They were not there. The Bogoro attack took place in February. No, I do not think that EMOI was there, because in the press conference of Chef Kahwa in July, he talked about those weapons. But I do not know EMOI was not there to supply weapons since."

SG: "You do not think or do you know that they were not there?....If you do not know, that is okay."

Person interviewed: Wait, wait, wait. No, no, no. Since I remember when they came, I remember when they came, because people were complaining. I have to think about that date.

You had the Pretoria accords. The Pretoria accords, Ntumba. The problem of Ntumba Luaba. This was in August 2002 and, in any case, I really do not remember, but it cannot be EMOI.⁴⁵⁹

339. In evidence he was asked:

Q. Do you know now, with reflection - I know that's what you said last year - but is it not right that in fact EMOI was based in Beni from the -- towards the end of 2002?

A. I am not aware of that. I do not know about the period.⁴⁶⁰

Q. Do you accept the Walendu-Bindi were receiving arms not from Uganda but from Beni at the period that we're concerned with, because we're talking of course of the time up to the Bogoro attack. Do you accept that they weren't getting any weapons from Uganda; they were getting it from Beni? Do you accept that?

A. Well, I do not see the interest in knowing whether people received arms from Beni, from Kinshasa. I do not see the interest in finding that out, but they told me that they had received the support in a form of Ugandan arms were -- if they received weapons from Beni, well, very well. If they received weapons from the Ugandans, well, how does that help me? If they received weapons from Beni, so what? I am saying that they told me that they received weapons and that they received support from the Ugandans. That's what they told me.⁴⁶¹

340. His answers to the investigators clearly implicated the Ugandans and it is possible, given his circumstances, that that was his intention. There is no reliable evidence that the Ugandans were involved in the Bogoro attack and it is the defence case that they were not. There is, on the contrary, good and clear evidence that the ammunition and arms were being ferried from Beni to Aveba. Yet the witness, in his interviews, subsequently adopted in his evidence, was stating it was Uganda -- and that both Alezo and Katanga had told him so -- even to the extent of providing heavy arms and sending the specialists to use them. In his earlier interview it appears he claimed it was discussed during the meal.⁴⁶²

341. [REDACTED] [P-160] says no mention was made of supply or assistance by Ugandans at any time. Her only recollection was very different - that Mbusa, the RCD-K/ML leader based in Beni, was mentioned as the supplier of uniforms and arms. The defence submits that witness 12 may have omitted from his evidence his earlier reference to the Ugandans

⁴⁵⁷ DRC-OTP-1034-0346, at line 742.

⁴⁵⁸ P-12-T-201-p.44 (FRA-pp.47-48).

⁴⁵⁹ P-12-T-201-p.45 (FRA-p.48).

⁴⁶⁰ P-12-T-201-p.48 (FRA-p.48).

⁴⁶¹ P-12-T-201-p.48 (FRA-pp.51-52).

⁴⁶² P-12-T-201-p.24 (FRA-p.25).

providing arms because he was aware that [REDACTED] [P-160] had made no reference to them in her account.

342. Two defence witnesses spoke of unhappy experiences with witness 12.⁴⁶³

343. The defence submits he is a man out for the main chance. His has gained relocation, a huge prize for himself and his wife and family. That is a sufficient motive to make up a conversation. In any event, the different accounts of that conversation as between this witness and [REDACTED] [P-160] are such that they should not be held against Katanga.

P-160, [REDACTED]

344. P-160 made an effort to display her independence [REDACTED]. The defence submits that in many respects they should be viewed almost as one rather than as two, separate and distinct witnesses. It may be unfair to the accused to allow the one to corroborate the other in the particular circumstances of the case. It would be surprising if they had not discussed it, [REDACTED]. As to her recollection of the disputed conversation there are similarities and significant differences between their accounts. Some of the similarities may be the product of discussion between them, or of learning what the other one had said previously to investigators, or of shared knowledge of the background. The relevant event – the meeting in Kampala – took place a year after Bogoro. In any event the alleged conversation did not take long, so their differences are the more significant. Most striking among is that, according to her, Katanga did not say he was at Bogoro, while [REDACTED] [P-12] claims he did, or at least he concluded that he did.

345. She said [REDACTED] [P-12] had not been the one to suggest she become [REDACTED]. But why would she become [REDACTED]? It is difficult to see what motive the witness could have had in becoming [REDACTED] other than the possible opportunities that such an association may have brought with it – as with the Lake Albert fishing project, for example, and the interest for Uganda in Lake Albert was not limited to fish – there is oil there too.

346. The witness said that Katanga made two visits to Kampala – the first in October 2003, the second in late January or early February 2004.⁴⁶⁴ There was no third visit. Alezo, Muhito, Angaika, and Cobra came with him on the second visit, which lasted about a week and a half. He met with President Museveni. During the visit she claims, as did [REDACTED] [P-12], that Katanga spoke about the attacks on Bogoro and Mandro. She said this was during a visit

⁴⁶³ D2-236-T-243-p.49 (FRA-p.43) ; D2-176-T-255-p.54 (FRA-p.53).

⁴⁶⁴ The second time we met was in February, I think. Late January, early February of 2004. P-160-T-210-pp.66-67 (FRA-p.57).

paid by the group to the witness's home in Kampala at a time when they were drafting a declaration of FRPI independence from the FNI.

347. The defence refers to its earlier comments, made when discussing P-12, as to the unreliability and prejudice arising from this kind of evidence. If such a conversation took place then the accused is prejudiced by the lack of a reliable record. Even if such statements were made it does not mean that they are true. They could be the product of drunkenness, boastfulness or an attempt to impress.

348. P-160 said the conversation took place [REDACTED], not at an hotel.

A. We were [REDACTED] when he told us these things. There was this matter of Bogoro, Mandro, and the story of Angaika Didier. All these little stories, that was [REDACTED].⁴⁶⁵

A. Yes. It was the same occasion. We spoke a lot during that occasion. We were [REDACTED]. We were comfortable, we ate, and we stayed there for a long time. So during that occasion, we had a lot of conversations.⁴⁶⁶

Q. And this meeting when Mr. Katanga spoke about the attack on Bogoro, was this in the morning, afternoon, evening?

A. I no longer remember.⁴⁶⁷

A. [...] at that time we were either in my home or at the hotel, and at the hotel such discussions did not take place. We did not talk about that.⁴⁶⁸

349. Katanga does not recall the occasion and disputes visiting [REDACTED] home in Kampala and talking of Bogoro would have served no purpose⁴⁶⁹

350. P-160 says the reason for the group being at home was because they were preparing, with [REDACTED] [P-12], the 'Declaration' document on his computer over two days.⁴⁷⁰

That allows us to gauge when, according to their evidence, the visit to Kampala took place:

Q. And when were these words said?

A. We were at home. P-0012 was meant to write a political declaration, because they had just split from -- they had just separated from the Lendu.

A. [...] He helped them. They drafted that and P-0012 had to help them. Using his computer, he had to print out lots of versions of it, and in that way they could sign and give it to those people concerned to show them that now they were a political party, a separate political party. It wasn't just an armed wing but a political party as well.⁴⁷¹

⁴⁶⁵ P-160-T-210-p.76 (FRA-p.65).

⁴⁶⁶ P-160-T-210-p.79 (FRA-p.68).

⁴⁶⁷ P-160-T-210-p.77 (FRA-p.67).

⁴⁶⁸ P-160-T-210-p.79 (FRA-p.68).

⁴⁶⁹ P-300-T-319-p.41: Q. Joint during the trips to Uganda, did you ever discuss the Bogoro attack of 24 February with P-0012 or P-0160? A. Why, why talk about the Bogoro attack? Who was he? What was his status? Why should I have started chatting with him about things that are meaningless? No, no, not at all. (FRA-p.45).

⁴⁷⁰ P-160-T-210-p.79 (FRA-p.68).

⁴⁷¹ P-160-T-210-pp.77.76 (FRA-p.66).

351. The ‘Declaration document’ referred to is EVD-D02-00046, *Déclaration d’indépendance du FRPI*, 8.2.04.⁴⁷² The defence case is that they did not go to Kampala on that visit, so there would have been neither opportunity nor reason to visit the witness’s home. 12, unlike [REDACTED] [P-160], said that [REDACTED] went to Kampala on two occasions in 2004.⁴⁷³ [REDACTED] [P-160] says once. She confirms that there were only two periods when she met Katanga – the first in October 2003 and this second occasion in 2004. As the defence observed above, the font on the 8th February document is different to the font on the 22nd February documents, as discussed above.

352. The later documents, dated ‘Kampala 22 February’, concern the appointment of this witness as the FRPI representative in Uganda. Katanga states that he was in Kampala at the end of February but not there around the 9th when the Declaration was produced. It is therefore significant, in the context of Katanga’s account, that this witness claimed, when giving her evidence, never to have seen the Declaration document. Yet that document was the stated reason for the group being at the house and was verified by [REDACTED] [P-12] to be the document produced by him at home. She claims she has never seen it, saying after scrutiny, “I don’t know that.”⁴⁷⁴ She went on to say that this was not the document as she had [REDACTED] document:

It wasn’t just Germain who signed. We signed the document that had to be provided, and I saw [REDACTED] as well on it.⁴⁷⁵

Though why she should have signed it at that juncture, having regard to it, is unclear.

353. Turning to the later documents, dated 22nd February, [REDACTED], EVD-D02-00080, [REDACTED], and EVD-D02-00074, [REDACTED], the witness went so far as to say they could be fakes and forgeries. In fact, they were provided to the OTP by [REDACTED] [P-12] so their provenance is undisputed, other than by the witness who even denied knowing the telephone number on the head note. It had the code 256 – the code for Uganda which she also claimed not to recognize. The number, as she later came to admit, was her own telephone number.

JUDGE DIARRA: (Interpretation) Do you have an explanation for that with regards to this same number that was used at such different places?

THE WITNESS: (Interpretation) I, too, was wondering why my number, if that’s my number, why it was found there, and that -- why it was also found with PUSIC. I had nothing to do with what PUSIC was doing. Why was my number there? That’s what I was going to ask myself.⁴⁷⁶

⁴⁷² EVD-D02-00046, *Déclaration politique d’indépendance de la présidence du FRPI*.

⁴⁷³ P-160-T-197-p.19 (FRA-p.21).

⁴⁷⁴ P-160-T-212-p.36 (FRA-p.33).

⁴⁷⁵ P-160-T-212-p.38 (FRA-p.34).

⁴⁷⁶ P-160-T-212-p.62 (FRA-p.55).

354. The defence postulate that one reason for the evasiveness may be because the witness realized that by saying the opportunity for the disputed conversation was the drafting of the 8th February independence document, and knowing Katanga was in Kampala only once in 2004, then she could not explain how the later [REDACTED] documents came into existence. It would have meant a second visit. The witness found it easier to say they were forgeries. In fact, the defence submits, there was no visit by Katanga on or around the 8th February, the date on the declaration document made in Fort Portal, and consequently there was no reason for him to visit [REDACTED] home for the purpose of drafting it.

355. She says Katanga did not say he was at Bogoro. This is strikingly different to [REDACTED] [P-12]'s account who claims Katanga 'was present and took part'.

Q. Did Germain Katanga talk about his role during that attack?

A. I believe that he said that he himself was in Mandro but that in Bogoro it was his soldiers.⁴⁷⁷ [...]

A. The plan, well, he had made the battle plan, drawn up the battle plan. And I asked, "Did you do it yourself", He said "No. It's my little ones"⁴⁷⁸, but I made the plan. I did that, and I gave the orders, and they went. They went."⁴⁷⁹

356. [REDACTED] [P-12] said that Katanga did not say who had ordered the attack – but here she is claiming Katanga ordered it. [REDACTED] [P-12] said that Katanga was 'not in charge of operations at Bogoro' while she is saying he gave the orders. She says no mention was made of the civilians, whereas [REDACTED] [P-12] makes reference to the discussion referring too many having died, to 'huge carnage' – a massacre.

357. She said he gave details of the plan, though she did not take it all in:

There were different things that he explained, how it was organized. Some of this was lost on me, and it's still lost on me.⁴⁸⁰

358. She gave differing accounts of the reason Katanga allegedly gave for the attack ;

Q. What were the reasons for this attack?

A. The reasons, firstly, there was this hatred between the two camps. They were looking for opportunities to attack each other. There were two enemy camps. They didn't tolerate each other. That was mainly the point. Germain, he spoke about how he was angry with the Hema when he thought how -- well, thought about the time that they had attacked Bunia. Ndromo camp, the Ugandans really attacked the Lendu, the Ngiti. When you think of that -- when he thinks of that, he does not pardon the Lendu -- as well.⁴⁸¹

This is contrary to [REDACTED] [P-12] who stated that Katanga gave the motive for the attack on both Mandro and Bogoro being to demonstrate to FIPI the Ngiti opposition to

⁴⁷⁷ P-160-T-210-p.78 (FRA-p.68).

⁴⁷⁸ P-160-T-211-p.39 (FRA-p.35).

⁴⁷⁹ P-160-T-210-p.73 (FRA-p.63).

⁴⁸⁰ P-160-T-210-pp.73-74 (FRA-pp.63-64).

⁴⁸¹ P-160-T-210-p.74 (FRA-p.64).

reconciliation with the Hema. However, before the start of the second day of her evidence the witness wanted to say something and added the following:

And a second meeting, well, I received -- I was given the question as to why they attacked Bogoro, and I clearly remember that Germain had said that he really wanted to sabotage what had happened in Uganda. The -- the -- this meeting between PUSIC, FNI, and others, this platform, he wanted to sabotage it, and that was the main reason why -- or main reason that he gave.⁴⁸²

She had not 'clearly remembered' when giving evidence the day earlier nor in her earlier interviews and the defence is concerned as to why she suddenly felt compelled to add it. In cross examination she confirmed this position:

A. Germain said clearly, and I remember very clearly, very well, that he was supposed to sabotage. They sabotaged that agreement that was done there. He said that.⁴⁸³

359. In her interview with investigators she made no mention of this 'sabotage' being a motive, and had said, paragraph 96:

Germain Katanga told me that the attack had been done to avenge massacres that the Hema had committed in another village. I don't know exactly which massacre he was speaking about.⁴⁸⁴

When asked why there was this new element in her account she said that 'both things were said.'⁴⁸⁵ However she had made no mention of the 'FIPI' motive until in court, when she returned for the second day's testimony, as related above.

360. Dealing with Mandro she said:

A. He said that in Mandro the people had fled. They had already left the village when they heard that the Lendus were coming given what had happened in Bogoro. It was just a few days after that, so given what had happened in Bogoro, everyone had fled. That is how come they went with their anger to indicate to the chef that they were not agreed and went as far as removing his father's remains from the grave.⁴⁸⁶

Her reference to 'it was just a few days after' is in contrast to the account she provided to the investigators, where she said it was two months after Bogoro, paragraph 105:

I'd already heard of the Ngiti attack on Mandro before Germain had spoke to me about it. They had sacked the village, and they had also disinterred the bones of Kahwa's father. At Mandro, they had not had the deaths that occurred at Bogoro. The attack took place two months after Bogoro, perhaps about the months of March or April 2003.⁴⁸⁷

The witness is clearly placing the Mandro attack a significant time after that on Bogoro. It is not a mere slip that passed unnoticed and uncorrected when she reviewed her statement, as she had tried to argue in court, but is deliberate, specifying 'the months of March or April

⁴⁸² P-160-T-211-p.34 (FRA-p.32).

⁴⁸³ P-160-T-212-p.42 (FRA-p.37).

⁴⁸⁴ P-160-T-212-p.42 (FRA-p.37).

⁴⁸⁵ P-160-T-212-p.42 (FRA-p.37).

⁴⁸⁶ P-160-T-210-p.78 (FRA-pp.68-69).

⁴⁸⁷ P-160-T-212-p.48 (FRA-p.42).

2003’.⁴⁸⁸ There is a change in her position, particularly significant given what may have been her recent adoption of [REDACTED] [P-12]’s account that the two attacks were motivated by a desire to destabilize FIPI. Strangely, the witness then reverted to her earlier position on dates:

[...] But I know that there was the attack on Mandro, the attack on Bogoro, and the Mandro attack took place just after the other one, and it might have been two months, but I’m no expert on the time-line. I don’t know exactly when it took place.⁴⁸⁹

361. She spoke of Angaika, presenting a similar account as [REDACTED] [P-12] – and the defence refers to its comments on that subject found in the revue of witness P-12.

362. Finally, a further striking feature of difference of account between this witness and [REDACTED] [P-12] is the absence, in her account, to any supply of arms, men or expertise from the Ugandans. That features at length in [REDACTED] [P-12]’s account. She was referred to her earlier statement – DRC-OTP-0153-0006, at paragraph 70, Delivery of arms and finances of the FRPI:

“I have no information concerning delivery of arms or other things to the FRPI. Even in the meetings in February 2004 with the FRPI representatives, one did not speak of the finances of the movement, nor of the arms, et cetera.” And is that correct? Madam Witness, is that correct?

A. That is what is written.

Q. Yes. And is it correct? Do you still agree with your statement?

A. In any case, yes, there was no talk about weapons or how arms were received. Maybe it depends on how the question was phrased at the time that I gave this answer in this form.⁴⁹⁰

363. The only reference she recalls having been made on the subject concerned, not the Ugandans that [REDACTED] [P-12] spoke of at length, but the RCD KML based at Beni.

Q. Yes, well, it’s pretty clear. Now let me read the second bit and I’m going to ask you again whether you agree with what you say in the statement. I recall that Germain Katanga spoke of the fact that he had received support from Mbusa Nyamwisi who sent him some uniforms and some arms when the FNI and FRPI were still together. I do not know anything else on the subject. And again, do you agree with what’s contained in your statement? A. I recognize my statement.⁴⁹¹

P-161, a/0196/08, [REDACTED]

364. Much of what witness 161 had to relate as to the events of 24th February passed uncontested by the defence. He is a [REDACTED]. He had [REDACTED]. It is not disputed that he suffered the loss of members of his family and had to flee. Given the loss he suffered it is unsurprising that his evidence now reflects a prejudice against the two accused. He is not impartial and clearly demonstrated he was pro UPC – “It was the UPC who helped the

⁴⁸⁸ P-160-T-212-p.48 (FRA-p.42).

⁴⁸⁹ P-160-T-212-p.48 (FRA-p.44).

⁴⁹⁰ P-160-T-212-p.47 (FRA-pp.41-42).

⁴⁹¹ P-160-T-212-p.47 (FRA-p.42).

Bahema to still live. If now in Ituri there are still Hema people, it's due to the UPC.”⁴⁹² He was reluctant to acknowledge UPC attacks on neighbouring villages.

365. The Defence raises concerns as to various aspects of his evidence. The defence submits that the witness was partial and prejudiced by what he may have heard subsequent to the attack and by the simple fact that Katanga is accused of this crime. The witness suffered personal and economic loss. He demonstrated a degree of exaggeration as to what he saw. This is particularly true when one comes to that part of his evidence that most concerns Germain Katanga, but there are other significant discrepancies of account.

366. The geography is important when considering various aspects of this witness's testimony. It was difficult to locate the precise position of his house or farm in court. On the judicial site visit the Chamber visited both his present home and the site of his home at the time. He had described it as: “I was very close, 1 kilometre away from the institute. I could even see the institute”⁴⁹³ and “Well, I would say about 15 minutes on foot.”⁴⁹⁴ It is accepted that one could see the Institute from near his home, though not at the site of his home. But it was a considerable distance – certainly too far to identify somebody, let alone somebody the witness had never met.

367. The witness gave a rather confused account of his movements on the morning of the 24th. It appears that he remained at home until about 8 a.m. when he moved to a hiding place by the Waka river, though he later stated: “I had left that place around 5.00 in the morning.”⁴⁹⁵ He claimed that he could view the Institute from the Waka river hiding place:

Q. From your hiding place were you able to see the Bogoro Institute?

A. Yes. I could see the institute very well.⁴⁹⁶

368. This hiding place he described as being three minutes downstream from the source⁴⁹⁷ and would necessarily be even further from the Institute than his home. The location was identified on the judicial site visit and was not only further away than the site of his home but down and out of line of sight. There was no possibility of viewing the Institute, or anything else further than a few metres from the stream as the land rose steeply in the direction of the Institute, barring all view. The hiding place was in fact in the narrow channel dug by the stream. The vegetation and concealment would further restrict the view. Later the witness appeared to change his account – “But where I was hidden, I just heard the noises, the shouts

⁴⁹² P-161-T-109-p.45-l.16 (FRA-p.44-l.23-24).

⁴⁹³ P-161-T-109-p.27-l.6 (FRA-p.26-l.20-21).

⁴⁹⁴ P-161-T-111-p.38 (FRA-p.36).

⁴⁹⁵ P-161-T-111-p.15-l.6 (FRA-p.14-l.17).

⁴⁹⁶ P-161-T-109-p.53-l.25, p.54-l.1 (FRA-p.53-l.13-14) and P-161-T-112-p.73-l.2 (FRA-p.63-l.13-14).

⁴⁹⁷ P-161-T-112-p.59-l.1 (FRA-p.60-l.13).

of persons. People were screaming, and there was gunfire.”⁴⁹⁸ He said ‘I stayed there from 8.00 a.m. up till 1.00 p.m.’⁴⁹⁹ though later, that he left at 19 00 to go to Bunia.

369. The deaths he recounts is not in dispute but his personally witnessing them is thrown into doubt, not only because he could not see but also by the intrinsic contradictions of his account.

370. One of his most graphic descriptions is the death of Ndora’s wife: [REDACTED].⁵⁰⁰ [REDACTED]-⁵⁰¹ [REDACTED].⁵⁰² [REDACTED]-⁵⁰³ yet later stated–“when Ndora’s wife was killed, I was alone.”⁵⁰⁴ Later he appeared to refer to Ndora’s wife in another context – the finding of bones - and said she was not Bira but Ngiti: “she was a young Ngiti woman. [...] It was Ndora’s wife, and her name was Regine.”⁵⁰⁵

371. The witness described seeing [REDACTED].

[REDACTED].⁵⁰⁶

372. Later he said that he did not see [REDACTED] die –“When she was killed I didn’t see it myself with my own eyes because I was 1 kilometre away”⁵⁰⁷ - and had merely been told of it by the woman’s daughter. When asked about this discrepancy of account he merely stated he had heard his [REDACTED] voice.

373. There were a number of observations unique to him – such as the presence of women PMF’s among the attackers:

A. Some of them were military police and they were carrying weapons, they were PMFs.⁵⁰⁸

374. He also spoke of seeing children: There were several children. There were also women and young girls. You couldn’t count how many they were. Those -- some came from Zumbe, others came from Gety, from Nombe, from Soke, from Bavi, all had one objective: That was to exterminate Bogoro.⁵⁰⁹ He was not in a position to identify where they came from. He also

⁴⁹⁸ P-161-T-113-p.25-l.3 (FRA-p.28-l.7-8).

⁴⁹⁹ P-161-T-113-p.24: A. I stayed in the same place until sunset. I stayed there until 1.00. THE INTERPRETER: At 1900 hours, corrects the interpreter (FRA-P.24-l.13-14).

⁵⁰⁰ P-161-T-110-p.54-l.9 (FRA-p.51-l.18-19).

⁵⁰¹ P-161-T-110-p.54 (FRA-p.52).

⁵⁰² See for the French version DRC-OTP-0164-0488-para.53.

⁵⁰³ P-161-T-110-p.54-l.6 (FRA-p.52-l.17-18).

⁵⁰⁴ P-161-T-113-p.53-l.12 (FRA-p.52-l.12).

⁵⁰⁵ P-161-T-113-p.17-l.17 (FRA-p.17-l.12-16).

⁵⁰⁶ P-161-T-111-pp.6-7 (FRA-p.6).

⁵⁰⁷ P-161-T-110-p.52-l.8 (FRA-p.49-l.17-18).

⁵⁰⁸ P-161-T-111-p.13-l.12 (FRA-p.13-l.5-7).

⁵⁰⁹ P-161-T-111-p.53 (FRA-p.51).

claimed the children were armed with RPG's, SMG's and a weapon he could not name but "these weapons had a chain."⁵¹⁰

375. He also spoke of trucks being used for pillage: There were trucks there and they would use the trucks. They loaded everything they had taken onto the trucks.⁵¹¹

376. His history of his [REDACTED] movements that day and their hiding by the Waka stream is confusing. It is unclear when she was with him and when not. That is relevant to her potential as a possible witness to corroborate his testimony or not.

377. In his statement, he stated that he remained hidden in Bogoro viewing the events for several days:

During several days, I was hidden in the forest and could see all that was going on in Bogoro. It was like that I was the witness to the summary executions done by the Ngiti with the help of machetes.⁵¹²

Yet his evidence was that he left Bogoro at 19 00 that same night and went to Bunia arriving at 08 00 on the 25th.⁵¹³

378. He claimed, as to his cattle that;

There were Ngitis and Lendus mixed together. They came and they took all the cows and they took them to their camp and I saw them do it. They were beating their drums and dancing at the same time and I saw them do it.⁵¹⁴ The attackers had taken away my 68 cows.⁵¹⁵

Given the history of attacks and insecurity the defence submits it unlikely that the witness lost such a large number of cattle on the 24th. No other witness speaks of such a substantial theft.

P-166 stated that a farmer called [REDACTED] had his cows pillaged on 16 December 2002. That happens to be P-161's name. By Notice of Admission the parties to the case admitted that P-161's nickname is [REDACTED].⁵¹⁶ [REDACTED] stated that local cattleowners had moved their cattle far away from the possibility of rustling.⁵¹⁷

379. In his written statement the witness made very specific reference to Ugandans being present. But in his evidence he said they were fighting the attackers:⁵¹⁸

Q. Is it your evidence that the attackers of Bogoro, on the 24th of February, included UPDF soldiers?

⁵¹⁰ P-161-T-111-p.52 (FRA-p.50).

⁵¹¹ P-161-T-111-p.15-l.20 (FRA-p.15-l.5-6).

⁵¹² P-161-T-113-p.54-l.1 (FRA-p.54-l.2-4).

⁵¹³ P-161-T-113-p.47-l.11-12 (FRA-p.46-l.12-13), p.49-l.2 (FRA-p.48-l.2), pp.54-55 (FRA-pp.53-54); P-161-T-116-p.39-l.24-25 (FRA-p.39-l.6-7); P-161-T-111-p.12-l.2-4 (FRA-p.11-l.25, p.12-l.1).

⁵¹⁴ P-161-T-111-p.14-l.8 (FRA-p.13-l.21-24).

⁵¹⁵ P-161-T-111-p.33-l.23 (FRA-p.32).

⁵¹⁶ ICC-01/04-01/07-3202-Conf.

⁵¹⁷ D2-176-T-255-p.48 (FRA-p.48); D2-176-T-256-pp.41-42, 48 (FRA-p.36-37; 41).

⁵¹⁸ P-161-T-113, P-161-T-114 and P-161-T-115.

A. The day on which the Lendu-Ngiti coalition attacked, yes, the UPDF elements were there.

Q. And when you say they were there, whose side were they fighting on?

A. No. The Ugandans had stayed there on the spot. When the others attacked to kill people in Bogoro, the Ugandans fought against them and chased them away. When they started killing people, the Ugandans were saying the following: "This is not possible. Why is it that you are killing each other, you Congolese?"⁵¹⁹

380. And, paragraph 30 where he states:

I recall that the Ugandans were saying to the Ngiti and the Lendu that they were not there to intervene. They were there just to chase away the UPC.⁵²⁰

381. To which he said:

A. No. They did not understand me well. They took what I said down wrongly. It was the Lendus I was talking about.

Q. You say this a little later: "I'm certain there were Ugandans soldiers, as I saw them with my own eyes. They had uniforms in dark green, and I could see that some of them had rank markings on top of their shoulders. The Swahili that they used was different to that spoken in the Congo, and this fact contributed to convincing me that they were Ugandan soldiers."

A. Yes, I recognise at that statement.

Q. And do you stand by that today? Do you agree with that today?

A. To say that the Lendus were conversing on the day that that woman was killed, that is one thing, but the information about the Ugandans is something else.⁵²¹

382. His present position appears to go no further than:

They were mixed with some very tall people who wore uniforms, who wore clothes like the Ugandans.⁵²²

383. Moving to the specific allegations concerning Katanga, the witness introduced an entirely new line of evidence which the defence submits is a recent fabrication. Part of that evidence concerns the witness's knowledge of the Ngiti language.⁵²³ While he may know some words, particularly in the context of the simple words he demonstrated, the defence submits that that is far from demonstrating a facility for the Ngiti language in respect of the wider vocabulary employed in the other statements he professed to have understood.⁵²⁴ His basis for knowing Ngiti appears based on his having had a [REDACTED]. In his introduction he stated that:

⁵¹⁹ P-161-T-113-p.33 (FRA-p.33).

⁵²⁰ See for the French version DRC-OTP-0164-0488-para.30

⁵²¹ P-161-T-113-p.35 (FRA-pp.34-35).

⁵²² P-161-T-111-p.16 (FRA-p.16).

⁵²³ P-161-T-109-p.17-l.25 (FRA-p.16-l.22).

⁵²⁴ P-161-T-109-p.37-l.6: "Hit them, hit them, don't let them go" (FRA-p.36).

P-161-T-109-p.46-l.20: "You, inhabitants of Bogoro, today you're going to see. Today Germain Katanga himself, in person, has taken possession" (FRA-pp.45-46: « Vous, les habitants de Bogoro, aujourd'hui, vous allez voir. Aujourd'hui, Germain Katanga lui-même en personne a pris possession »).

P-161-T-109-p.49-l.11: "They have brought us here to do the work. We have come to do the work, and there is no question of saying do this, don't do that. We came here to carry out the work" (FRA-p.48).

P-161-T-111-p.55-l.18: [...] "Germain Katanga and Ngudjolo today have done something. Ngudjolo and Ngudjolo (as interpreted) have today done something which is remarkable." Before the people in Bogoro were drunk, and today -- Mathieu Ngudjolo (FRA-pp.53-54).

I [REDACTED]. Well, I do have difficulties speaking that language, but I do understand it. I also understand [REDACTED] because [REDACTED] who died was [REDACTED]. I speak also some Ngiti.

384. The first mention he made of the implicating words was:

The people who were killing them were the Ngiti, as well as the Lendus, as well as the Bira, and after that they started to shout, "You, inhabitants of Bogoro, today you're going to see. Today Germain Katanga himself, in person, has taken possession." This women and children - their women and their children, they shouted. They said, "Germain Katanga, Ngudjolo (o yee) (indiscernible)." They shouted in this way. I heard these cries -- I heard these shouts with my own ears.⁵²⁵

385. When and where he heard these words was unclear. He was asked for clarification by the Chamber.

PRESIDING JUDGE COTTE: (Interpretation) Can you confirm that you heard this with your own ears, these women and these children shouting the words that I have just said?

A. Yes, that happened in the following way. I can't deliberately impute crimes to them that they haven't done or say it was them who killed them. I heard this with my own ears; women and children said that. When the militia killed the wife of Laurent, it was at this time that I heard what they said. There were the Lendu, there were the Ngiti, and they found themselves in the place that the wife had been killed. The Lendu and the Ngiti were saying, "Where is the money that you confiscated from this woman? We should all share this money." And the Ngiti said, "Why? I'm not going to give it." And they said, "We are going to take this money. Find your money in your own way." The Lendu answered in the following way: "If it is not us, the people from Ngudjolo who came to help the Ngiti, are you able to defeat them? It was the people from Zumbe who came to help us. If not, you wouldn't be able to defeat the UPC," and they started to speak between themselves. And afterwards, the women and children started to shout and sing in Kingiti, and they said, "Germain Katanga and Ngudjolo today have done something. Ngudjolo and Ngudjolo (as interpreted) have today done something which is remarkable." Before the people in Bogoro were drunk, and today -- Mathieu Ngudjolo.' they sang, and they banged tom-toms, and I heard this with my own eyes -- with my own ears.⁵²⁶

386. He said he was then hiding by the river.⁵²⁷ He was asked by the Chamber whether he heard the words once or more than once. He replied that:

At one point after they had driven away everybody they were celebrating. They were celebrating. They even slaughtered cows and they were singing. Women and children -- even the adults had a great celebration. They started singing from 9.00 till 6.00 p.m. How could I not have heard what they were saying?⁵²⁸

387. He was further asked by the Chamber whether he was the only one who heard those shouts. He replied that:

I'm not the only one to have heard those noises. Everyone who was hiding heard those noises. Even the chief of the Babiase groupement spent the night there.⁵²⁹

⁵²⁵ P-161-T-109- p.46-l.18 (FRA-pp.45-46).

⁵²⁶ P-161-T-T111-p.55 (FRA-pp.53-54).

⁵²⁷ P-161-T-T111-p.56-l.4 (FRA-p.54-l.10).

⁵²⁸ P-161-T-T111-p.57-l.1 (FRA-p.55).

⁵²⁹ P-161-T-111-p.57-l.22 (FRA-p.56-l.8-10).

388. He was asked by the chamber whether other people were near him. He said “everyone hid in their own place”⁵³⁰ (his wife was not with him at the time of the killing of Laurent’s wife, - A. I saw my wife at 1500 hours.⁵³¹)

389. On being asked whether he could name anybody else who heard the utterances he claimed he knew people but could not name them, even in private session, as they would think he was against them.⁵³² The defence submits that is untrue and said to hide the fact that he can not name anyone.

390. It is to be noted that the words he recalls hearing changed significantly. They changed further in cross examination when he stated the words uttered were.

Today these children have done some work. That is what they were saying. “Today you have worked.”⁵³³

391. He stated that the words were said in his own compound:

They were saying that today Germain Katanga and Mathieu Ngudjolo have done some work. It was a celebration in my compound. There were cows and goats and chickens. There was everything.⁵³⁴

392. He then placed that as having been said “at the institute. It was a feast. Even the women who had been taken were able to see that.”⁵³⁵

393. No other witness has given evidence of the uttering of such shouts or words. Nor had witness 161 prior to this oral testimony. The Chamber recognised this evidence as being spontaneous and a surprise to the defence and rendered an oral decision permitting the defence some latitude in their conduct of the witness’s testimony. In terms of investigating the testimony further his evidence is such as to forestall any constructive efforts on the part of the defence to investigate his testimony given the vagueness of much of it and his statement that he was alone at the critical time when he heard the shouts. His wife, he said, had not yet joined him by the stream.

394. The witness attempted to bolster his evidence against Katanga further. He said, in response to questions from the bench as to whether there were other utterances concerning the two accused, and again with no prior mention of it:

A. [...] I know Germain Katanga very well. He also knows me [...]. As for Germain Katanga, he knows me. [REDACTED].⁵³⁶

⁵³⁰ P-161-T-111-p.57-l.14 (FRA-p.55-l.21-22).

⁵³¹ P-161-T-113-p.45-l.8 (FRA-p.46-l.9).

⁵³² P-161-T-111-p.65 (FRA-p.63).

⁵³³ P-161-T-113-p.58-l.17 (FRA-p.57-l.17-18).

⁵³⁴ P-161-T-113-p.58-l.2 (FRA-p.57-l.1-3).

⁵³⁵ P-161-T-113-p.59-l.1 (FRA-p.57-l.1-2).

⁵³⁶ P-161-T-111-p.58-l.13 (FRA-pp.56-57).

395. This was disputed and he was invited by the defence to substantiate these remarks as to his knowledge of Katanga. At first he appeared to try to maintain this essentially false impression.⁵³⁷ It eventually transpired that he had not met Katanga, did not know which village he came from, had never heard of him before the war and conceded that “It was only after the war that I heard people talking about him.”⁵³⁸

396. If he had not heard of Katanga until after the war it makes it all the more unlikely that he heard the name Katanga shouted on 24th February.

397. Crucially, the defence must emphasize that the witness never mentioned the utterances before doing so in court. Spontaneous remarks can be honest and truthful additions to evidence. But in the present context it would be very surprising for such pointed and relevant evidence to have been omitted. After all, it goes to the heart of his evidence in respect of Katanga. He was invited by the Chamber to explain.

PRESIDING JUDGE COTTE: [...] Is it possible for you to tell us why you did not mention those shouts, those utterances [...] when you were interviewed by the Office of the Prosecutor in October 2006, do you remember why you did not mention that at the time?

A. I said it, but it seems to me that the people I was speaking to did not note it down on paper. And I expressed myself normally at that time and I said it.⁵³⁹

398. The witness repeated this later in cross examination.⁵⁴⁰ The witness was seen on several occasions and plainly interviewed with care. It would be very surprising for a prosecution investigator to overlook such a piece of evidence. The witness had the opportunity to review his statement before signing it.

399. The evidence is highly significant and he was asked by the defence what he felt the relevance of it was.

Q. Well, let me put it again. When you were being interviewed by the Prosecutor, wasn't it obvious to you that he was interested, he'd like to know, who you thought was responsible for what had happened at Bogoro?

A. You want to say those who came to attack Bogoro, those who came to massacre in Bogoro?

Q. Well, those who were responsible for the attack. That was an important point of interest, wasn't it, an important thing, who was responsible for the attack?

A. There you have finally asked your question. Ngudjolo and Germain Katanga came to Bogoro, attacked Bogoro.

Q. So why didn't you tell the Prosecutor that during those ten hours of interview?

A. Can I mention their names without knowing how the -- everything is going to be done afterwards? They are in Bogoro until today. They drove out the people. They built houses in Bogoro and didn't go back. They didn't want to go back. We are living there with Ngiti,

⁵³⁷ P-161-T-112- pp.21-26 (FRA-pp.20-).

⁵³⁸ P-161-T-112- p.27-l.3 (FRA-p.26-l.15-16).

⁵³⁹ P-161-T-111-p.58-l.19 (FRA-p.57-l.6-13).

⁵⁴⁰ P-161-T-113-p.62 (FRA-p.61).

Lendu. Why? Why didn't they go home? Even their wives, women of this ethnic group, are there.⁵⁴¹

400. He obviously had no explanation. The defence submit it is because it is a recent concoction, further and amply demonstrated by what the witness stated in his written statement, as put to him in court :

Q. [...] I'm going to come now to paragraph 66, which is almost the last of the paragraphs of your statement, and this paragraph has been headed with these words: "Those responsible for the attack." And I'll read it all to you for completeness, and then will ask you a question about it [...]. "Those responsible for the attack. "I do not know what was the name of the commander of the fighters who attacked us in 2003. I know, on the other hand, that the Lendu belonged to the FNI, and the Ngitis to the FRPI. I do not know what those letters stand for. I only know that that is the name they are called on the radio. I believe that the name of the chief of the FNI at that time was Ndjabu. I heard people say that the chief was called that, but I do not know him, and I have never seen him. In respect of the FRPI, I believe the chief was called Cobra. Again, I do not know more."⁵⁴²

401. And in not knowing more, his evidence in respect of Germain Katanga, and in particular of his hearing those shouts alluding to him, is rendered, on that ground alone, unreliable, even incredible.

B- Review of the credibility of victim witnesses

402. As a preliminary submission, the Chamber must exercise caution with respect to the testimony of victims for a variety of reasons. First, it must be remembered that their status and the fact that they are seeking compensation from the court gives them a special and personal motive to seek convictions.

403. Second, as crime based witnesses while not knowing much if anything about the accused or the line of responsibility, such witnesses have an incentive to point the finger at someone, especially if the persons suggested are from the same ethnic group as their attackers.

404. Thirdly, it must not be forgotten that the circumstances in which they came to give their evidence differs from that of prosecution witnesses from a procedural point of view. The defence did not have the benefit of notice of their testimony before the commencement of the trial. This presents a significant disadvantage in terms of investigations and the ability to test their assertions through other prosecution witnesses. The defence was restricted in the time for cross-examination. While this also applied to the victim's counsel, it should be remembered that it does not require much time to make a false allegation, but it requires a lot more time to unravel and undermine it.

⁵⁴¹ P-161-T-113-p.62-l.23 (FRA-p.62-l.4-20).

⁵⁴² P-161-T-113-p.64-l.16 (FRA-p.63-l.17-25).

405. Lastly, account should be taken of the fact that the victims are not meant to be there as prosecutor *bis*, filling in the holes for the prosecution.

(1) V-02 – [REDACTED]

406. V-02, [REDACTED] gave evidence that she was living in Bogoro in February 2003 and that someone came to warn her parents that they were about to be attacked by Lendu from Zumbe.⁵⁴³ On the 24th February 2003, she was sleeping at her house [REDACTED] minutes walk away from the Institute, when she heard shooting from the direction of the Institute.⁵⁴⁴ She went outside and then after a few minutes got her husband up.⁵⁴⁵ The family then headed in the direction of the Institute with their [REDACTED] children.⁵⁴⁶ She intended to go to the camp but there was no way of getting in.⁵⁴⁷ She then took a different direction from the rest of the family⁵⁴⁸ and [REDACTED] was killed.⁵⁴⁹

407. V-02 stated that according to her Germain Katanga and Mathieu Ngudjolo were responsible.⁵⁵⁰ Her conclusion about Germain Katanga was based upon information obtained from women coming to the market of Bogoro. In response to a leading question from the legal representative she also includes no 2 on EVD-V19-00003 as one of her sources, without clarifying whether this was first or second hand hearsay.⁵⁵¹

408. The Chamber should also have regard to the fact that on the witness's admission during cross-examination, at the time she was seen by the legal representative, other victim's expressed their opinions as to who was responsible. This could have influenced the witness who had a strong incentive to identify those responsible.

409. The defence accepts that this woman lost her child and that this may have occurred on the 24th February at the battle of Bogoro.⁵⁵² Otherwise, issue is taken with the reliability and credibility of her evidence in so far as it seeks to incriminate Germain Katanga.

410. The only assertion in her evidence that incriminates Germain Katanga is that he, together with Mathieu Ngudjolo, was responsible for the attack at Bogoro.⁵⁵³ Since this statement does not specify what the witness saw or heard, but rather what she believes, and

⁵⁴³ V-02-T-231-p.28-l.16-19 (FRA-p.25-l.3-6); and p.30-l.7-18 (FRA-pp.26-27).

⁵⁴⁴ V-02-T-231-p.32-l.19-20 (FRA-p.28-l.22-24).

⁵⁴⁵ V-02-T-231-p.34-l.11-13 (FRA-p.30-l.12-14).

⁵⁴⁶ V-02-T-231-p.33-l.2-12 (FRA-p.29-l.2-13).

⁵⁴⁷ V-02-T-231-p.33-l.16-17 (FRA-p.29-l.18-19).

⁵⁴⁸ V-02-T-231-p.33-l.13 (FRA-p.29-l.15).

⁵⁴⁹ V-02-T-231-p.41-l.4-10 (FRA-p.36-l.5-11).

⁵⁵⁰ V-02-T-231-p.57-l.23-25 (FRA-p.50-l.21-23).

⁵⁵¹ V-02-T-231-p.58-l.1-6 (FRA-p.50-l.26-27).

⁵⁵² Dr O'Shea stated this in court: V-02-T-231-p.41-l.23-25 (FRA-p.36-l.25-28); and p.42-l.1-2 (FRA-p.37-l.1).

⁵⁵³ V-02-T-231-P.57-l.23-25 (FRA-p.50-l.21-23).

since it uses the term responsibility as opposed to any specific conduct on the part of the accused, it is opinion evidence rather than a statement of fact. To that extent, it is inadmissible as evidence against the accused and should not be taken into account. In any event, the broad and unspecific nature of that evidence renders it unreliable.

411. She bases her opinion on what she heard ‘thanks to’ n°2 and from women who came to the market from Beni and who gave the inhabitants of Bogoro information. The nature of the information was that ‘Germain Katanga gave training to these soldiers.’⁵⁵⁴ This evidence is unreliable for the following reasons. It is second or third hand hearsay. It is not clear whether the witness heard this information directly from these women or through other inhabitants who spoke to the women. The women are not identified and the witness did not know them.⁵⁵⁵ It is therefore impossible to evaluate their reliability. The fact that they were from Beni and not Aveba implies that they probably did not personally observe the conduct of Germain Katanga but heard about it from others.

412. As evidence of Germain Katanga’s involvement with respect to the attack on Bogoro, this evidence can have little weight since, according to the witness, the women must have come at the end of 2002. She specified during cross-examination that they were scared to come at the beginning of 2003.⁵⁵⁶ This means that these women could only have been talking about conduct at least two months old. Even then it is not clear how stale the information was at the time it was given. Therefore such training was not necessarily for the attack on Bogoro. It is also unclear which soldiers are being referred to, and how many they were.

413. Apart from the lack of reliability of this witness with respect to her evidence on Germain Katanga and the minimal weight that could be attached to it, there are problems with the credibility of her account. There is an essential difficulty with believing her account. She says she was living by the road to Bunia, [REDACTED] minutes walk away from the Institute, and she heard shots emanating from that direction.⁵⁵⁷ It is thus very surprising for her to take the direction of the gunfire rather the opposite direction towards Bunia. Making the choice she claims to have made places her [REDACTED] children in unnecessary danger and at risk of separation. When it was put to her that this made absolutely no sense she did not provide a satisfactory explanation.⁵⁵⁸

⁵⁵⁴ V-02-T-231-P.58-l.7-8 (FRA-p.51-l.1).

⁵⁵⁵ V-02-T-233-p.11-l.2-6 (FRA-p.9-l.21-24).

⁵⁵⁶ V-02-T-232-P.39-l.11-12 (FRA-p.34-l.6-7).

⁵⁵⁷ V-02-T-231-p.23-l.6 (FRA-p.20-l.12).

⁵⁵⁸ V-02-T-232-p.44-l.20-25; and p.45-l.1-11 (FRA-pp.38-l.26-28; p.39-l.1-5).

414. The other troubling aspect of her story is that she would wake up to gunfire, go outside to check it out and only after a few minutes get her husband up.

415. The witness's propensity to lie was revealed when she was asked about whether she had ever been told by anyone that if Katanga was convicted this might assist her claim for compensation.⁵⁵⁹ She stated in quite emphatic terms:

At one particular time I asked the question whether -- if after the statements that I'd just given, what the outcome would be. That is the question that I asked, but up until now I have not had any answer to that question.⁵⁶⁰

416. Then later after an objection from the legal representative to the follow up question, a discussion around it and a break, she was asked again whether it had ever been explained to her by anyone what the consequences for her would be if Katanga was convicted. Her answer then was:

This is a question which I've never had the opportunity to talk about, given that the Court has not yet given its decision on this.⁵⁶¹

417. The witness was also inconsistent in her statements about the relations between the Hema and other ethnic groups in Bogoro. During the examination-in-chief, she stated that relations were good between the groups in 2003.⁵⁶² During cross-examination she admitted that relations were not good but things were controlled by the soldiers.⁵⁶³ During re-examination, she confirmed that her reference to good relations related to Bogoro specifically and not Ituri generally.⁵⁶⁴ The witness's claim that Lendu and Ngiti men and women lived in Bogoro immediately prior to the Bogoro attack was contradicted by the evidence of victim V-04 who stated that Hema, Gegere and Alur were the only ethnic groups living in Bogoro.⁵⁶⁵

418. Another inconsistency arose when the witness was asked whether she had seen [REDACTED] while she was in The Hague. Her first answer to the question was an emphatic 'no'.⁵⁶⁶ Later, she stated that 'I saw her the day we arrived. We saw one another but after that, each one of us was housed separately.'⁵⁶⁷

⁵⁵⁹ V-02-T-232-p.31-l.5-7 (FRA-p.26-l.14-16).

⁵⁶⁰ V-02-T-232-p.31-l.8-11 (FRA-p.26-l.18-20).

⁵⁶¹ V-02-T-232-p.38-l.8-9 (FRA-p.33-l.1-2).

⁵⁶² V-02-T-231-p.24-l.5-6 (FRA-p.21-l.7-8).

⁵⁶³ V-02-T-232-p.40-l.24-25 (FRA-p.35-l.15-16).

⁵⁶⁴ V-02-T-233-p.36-l.17-25 and p.37-l.1-5 (FRA-p.32-l.23-28; p.33-l.1-7).

⁵⁶⁵ V-04-T-233-p.71-l.2-7 (FRA-p.62-l.22-27)

⁵⁶⁶ [REDACTED].

⁵⁶⁷ [REDACTED].

419. The defence put it to her that she was not visiting and not living in Bogoro at the time but in Kasenyi where her husband was [REDACTED]. Her motive to lie on this aspect rests in her wish to obtain compensation for her losses.

420. There are various factors that undermine the credibility of her claim that she was living in Bogoro in February 2003. She went to [REDACTED] to obtain [REDACTED]'s death certificate, a fact she would have known was verifiable. She stated that this was the office for the collectivity.⁵⁶⁸

421. Central to her claim that she lived in Bogoro was the fact that she had a restaurant there. When asked the name of the restaurant, she did not state that it did not have a name. She simply stated that one forgets things.⁵⁶⁹ It is submitted that this was a witness who did not portray herself as having a bad memory. She remembered the date of the attack, and the names of individuals whose names had been mentioned at the market of Bogoro in 2002. It is extraordinary that she would not remember the name of her own restaurant.

422. One would think that in a small community like Bogoro with a military camp being a central feature of the village in a time of war that the locals would know the name of the commander of the camp. This is supported by evidence from those who lived in Bogoro, who stated that his name was Commander Germain.⁵⁷⁰ This witness could not provide the name of the commander of the UPC camp in 2003. She said she had forgotten it.⁵⁷¹ So she could remember the names of enemy commanders mentioned,⁵⁷² but not the name of the commander who was living at the camp [REDACTED] minutes walk away from where she lived and who was protecting her village.

(2) V-04 – [REDACTED]

423. V-04 gave evidence that she was living in Bogoro on the 24th February 2003. She was [REDACTED]. At 4.00 am she heard firing coming from the direction where the Lendu lived and from the direction where the Ngiti lived. She fled from the house where she was to the Institute. It took [REDACTED] minutes. She entered one of the classrooms. Her [REDACTED] was also in there with his children. She says that she fled the classroom round the back of the institute and into the bushes. She kept going until she reached Bunia. She later

⁵⁶⁸ V-02-T-232-p.21-l.2-14 (FRA-p.18-l.8-9)

⁵⁶⁹ V-02-T-232-p.19-l.22-24 (FRA-p.16-l.26-28)

⁵⁷⁰ EVD-OTP-00202/P-166' statement/paras50-52 ; P-166-T-226-p.14-l.23-to-p.15-l.8, p.59-l.4-6 (FRA-pp.12-l.28-p.13-l.10, p.54-l.14-17) ; D2-176-T-255-p.26-l.1-2 (FRA-p.25-l.28-p.26-l.2.); D2-176-T-256-p.53-l.13-18 (FRA-p.45-l.8-12); P-323-T-117-p.2-l.20-to-p.3-l.15 (FRA-p.2-l.15-p.3-l.11).

⁵⁷¹ V-02-T-232-p.28-l.3 (FRA-p.23-l.25-26).

⁵⁷² V-02-T-232-p.30-l.1 (FRA-p.25-l.15).

heard from others that her uncle and children were killed.

424. She claimed that Germain Katanga and Mathieu Ngudjolo were responsible for both this attack and the one of 2001. The preponderance of the evidence whether from the prosecution or the defence simply does not support Germain Katanga's responsibility in 2001. Further, other than a reference to them fighting, these assertions remain unexplained. No detail is provided as to the basis of her belief. For this reason and because she has embraced 2001 in her assertion, it is submitted that this general reference to the involvement of Germain Katanga cannot be considered as reliable or probative and should not be relied on.

425. It is suggested that given the lack of foundation or detail attached to her assertion about Germain Katanga there is a reasonable possibility that her references to Germain Katanga are based on what she has heard about the trial rather than any specific recollection about the attack. Her ability to fill in unknown facts with subsequently obtained details is aptly illustrated by her confident pronouncement of the date of 24th February 2003 in court.⁵⁷³ She was asked in cross-examination whether she personally recollected this date or it was something she had heard since. Her response was quite firm:

No. I personally lived through the war, and I cannot forget it. I know very well that there was fighting on that day.⁵⁷⁴

426. Yet, as was put to her in cross-examination, in her statement of September 2010, at paragraph 6, she quite clearly stated: 'The attack of 2003 took place at the beginning of the year. I no longer remember the exact date.'⁵⁷⁵

427. Similarly, another illustration of the witness filling in the gaps was when she was asked whether her statement that it was the UPC in the camp was something she had heard since the events. She again clearly stated that 'nobody recalled that fact to me'.⁵⁷⁶ Yet, again, as put to her in cross-examination, in her statement of September 2010, she had said that 'the soldiers were Lubanga's soldiers. I don't remember any more what the group was called'.⁵⁷⁷

428. Putting her general assertion of Germain Katanga's involvement aside, she cannot in our submission be treated as a reliable or credible witness because of the profound and poorly explained shift in her account.

⁵⁷³ V-04-T235-p.35-l.7-8 (FRA-p.31-l.4).

⁵⁷⁴ V-04-T235-p.3-l.9-10 (FRA-p.3-l.2-3).

⁵⁷⁵ V-04-T235-p.3-l.11-15 (FRA-p.3-l.4-8).

⁵⁷⁶ V-04-T235-p.4-l.5-17 (FRA-p.3-l.25-28; p.4-l.1-9).

⁵⁷⁷ V-04-T235-p.4-l.18-21 (FRA-p.4-l.10-13).

429. She made an application to participate⁵⁷⁸ and an application for reparations⁵⁷⁹ in 2008. In September 2011 she was interviewed and again in January 2011, when she corrected her previous statements radically altering her account. Her account in court was in line with her last statement.

430. Her two accounts are so incompatible and the possibility of her making a mistake is so remote in the circumstances that it is submitted that she must have lied the first or the second time round. Alternatively, the differences are so radical and the mistake so extraordinary that she cannot be considered as a reliable witness. Accordingly, her credibility and or reliability cannot be trusted. In cross-examination, she was confronted with the differences in her various statements and it is submitted that her explanations do not cure the fundamental unease created by this shift in account.

431. Essentially, the difficulty with her evidence centres around the loss of her family members. Her first account, which she maintained in 2008 and 2010, was that her father was killed together with her uncle and others at the Bogoro attack on the 24th February 2003 and that this constituted part of her losses. Her second account was introduced for the first time in 2011 in January and maintained during the hearing in February. It consisted of saying that her father was killed in 2001, while her uncle was killed in 2003 in the February attack. This would imply that her uncle and father were not killed at the same time, as previously stated, but three years apart. It would also imply that [REDACTED].

432. When she gave evidence in court she explained that when she was orphaned in 2001, it was her uncle who became her new father figure. In these circumstances, placing her father's death on 24th February 2003 could not reasonably have been a simple error. This is borne out by her answers in cross-examination, which fail to provide a satisfactory explanation, but in fact contribute to underlining her lack of credibility and or reliability.

433. The witness confirmed that both her signed application in 2008 and signed interview statements of September 2010 were read back to her. In her application she gave a very specific account to the effect that on the 24th February 2003, they woke up to gunshots, rushed to where the UPC soldiers were at the school and on the way FRPI and FNI soldiers killed several members of her family [REDACTED]. This account was read out to witness during

⁵⁷⁸ EVD-D02-00112.

⁵⁷⁹ EVD-D02-00113.

cross-examination.⁵⁸⁰

434. The explanation she gave for this account, which she claimed to be false, was that she wanted to draw out the fact that it was done by the same people, Germain Katanga and Mathieu Ngudjolo.⁵⁸¹ It is submitted that this explanation does not reveal a mistake but a deliberate distortion of the facts. This is corroborated by the fact that annexed to the application to participate is a death certificate in the name of her father recording his date of death as the 24th February 2003.⁵⁸² She claimed that this was the fault of the people who filled in the application because they gave it to the person in charge who looked at the forms and stamped the document,⁵⁸³ but it is submitted that it is hard to accept that she had no participation in the obtaining of a death certificate for her father or that she would not notice the problem with the document once obtained. Her statement is also inconsistent with what she had said a few minutes earlier when she said that the person in charge ‘listened to my statement and on the basis of my statement delivered the document to me.’⁵⁸⁴ The difficulty is compounded by the fact that there is another death certificate for her aunt also recording the date of death as 24th February 2003, when in court she stated that her aunt died in 2001.

435. Her explanation about the accused also reveals an enthusiasm to lay the blame on the accused by trying to link her misstatement of fact to them. This explanation is also inconsistent with what she says later: ‘What I meant was when I thought about this for a long time, and I realized the first version was not correct, I corrected it on my own initiative and that is to be found in my last statement’.⁵⁸⁵ So this suggests, not that she wanted to bring out the fact that it was the same attackers but that she made a mistake and did not realize until later. It is suggested that the fact that she thought about it for a long time before realizing her mistake just makes the notion of a mistake more incredible. How could it be necessary to think about it for a long time to realize that her uncle and father were not killed on the same date but at different attacks, in different circumstances and in different years, 3 years apart?

436. Indeed the witness admits that she knew that they died on different dates between 2008 and 2010.⁵⁸⁶ So she thought about it a long time, knowing the position, and she repeated the same false statement in 2010 that she had made two years earlier in 2008. The manner in which she repeated it, with knowledge and having the statement read back to her,

⁵⁸⁰ V-04-T-234-p.54-l.4-25; and p.55-l.1-9 (FRA-p.47-l.7-28; p.48-l.1-13).

⁵⁸¹ V-04-T-234-p.56-l.3-11 (FRA-p.49-l.3-11).

⁵⁸² EVD-D02-00112

⁵⁸³ V-04-T-234-p.63-l.24-25 (FRA-p.56-l.12-14).

⁵⁸⁴ V-04-T-234-p.63-l.17-18 (FRA-p.56-l.6-7).

⁵⁸⁵ V-04-T-234-p.58-l.9-22 (FRA-p.51-l.1-13).

⁵⁸⁶ V-04-T-234-p.59-l.2-4 (FRA-p.51-l.19-21).

demonstrates that she was either deliberately not telling the truth at that time or was not telling the truth in court. This is reinforced by the content of her 2010 statement where she adds the significant detail of the attendance of her [REDACTED]:

The day before -- rather, the evening before the attack, it was [REDACTED].⁵⁸⁷
 437. This was read to her during cross-examination.⁵⁸⁸ Her only explanation then was that it was a mistake that she corrected in her last statement. In the light of the implausibility of these differences amounting to a simple error and the unsatisfactory and inconsistent explanations for this error, it is submitted that the evidence of this witness was not credible or reliable.

438. Finally, V-04's last answer in cross-examination by counsel for the first accused also revealed her economy with the truth. When asked when was the last time she met [REDACTED], her answer was at Kinshasa airport before coming to The Hague.⁵⁸⁹ This is contradicted by [REDACTED] who stated, herself after some prevarication, that they were with each other on their first day in The Hague, having been on the plane together.⁵⁹⁰

III- EVALUATION OF EVIDENCE

A- General Principles

(1) Burden and standard of proof

439. It is a general principle of law adopted in international criminal proceedings that the burden of proof rests on the prosecution. The presumption of innocence is enshrined in Article 66(1) of the Statute:

Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law

440. The expression 'in accordance with the applicable law' implies that each element of a crime must be proved before a finding of guilt can be reached.

441. According to Article 66(2):

The onus is on the Prosecutor to prove the guilt of the accused.

442. It follows that the defence is under no obligation to prove anything. If the prosecution evidence on a particular issue does not prove guilt then no explanation is required from the

⁵⁸⁷ Statement of September 2010, EVD-D02-00111.

⁵⁸⁸ V-04-T-234-p.59-l.19-24 (FRA-p.52-l.4-9).

⁵⁸⁹ V-04-T-235-p.6-l.10-13 (FRA-p.5-l.28;p.6-l.1-2).

⁵⁹⁰ See discussion regarding V-02 above.

defence. Where an explanation is offered then the question of whether guilt has been proved must be viewed in the light of the evidence as a whole, prosecution and defence. However, the question remains whether in the light of all the evidence the prosecution has proved guilt, not whether the defence has disproved it.

443. In line with the principle applied in prior international criminal proceedings, Article 66(3) provides that:

The Court must be convinced of the guilt of the accused beyond reasonable doubt.

444. One can see in the jurisprudence the alternative expressions used: beyond all reasonable doubt, beyond any reasonable doubt or beyond a reasonable doubt. It is submitted that there is no difference in these formulations, since from the moment there is any degree of doubt as to guilt which may be considered as reasonable it would be reasonable doubt.

(2) Evaluation of items of evidence

445. The evaluation of the evidence during deliberations may be divided into two phases. First, the Chamber may rule on the relevance of evidence admitted to a particular issue. In a second phase, the Chamber must determine the actual degree of probative value to be accorded to each item of evidence in a determination of an issue.

446. In order for an item of evidence to have been admitted into evidence the Chamber would have accepted that it possesses some probative value. The extent of probative value actually accorded to the evidence will depend on its reliability and the extent to which it assists the Chamber to make a determination on a particular issue, taken together with other evidence.

447. In this respect, the principle of *in dubio pro reo* will apply. It is submitted that this implies that if the evidence is capable of pointing to the existence of a fact suggesting guilt, but it is also consistent with another possible interpretation of the facts, then the accused should be given the benefit of the doubt.⁵⁹¹

⁵⁹¹ *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 319: “the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected.” See also *Prosecutor v. Limaj*, IT-03-66-T, Trial Judgment, 30 November 2005, para.10: “Where, in such cases, more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that count.” *Prosecutor v. Celibici*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 458: “It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.” *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 67: “It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion cannot be drawn.” *Prosecutor v. Blagojević*, IT-02-60-T, Trial Judgment, 17 January 2005, para. 21: “The Trial Chamber follows the Appeals Chamber when

(3) Corroboration

448. While Rule 63(2) directs the Chamber to refrain from imposing as a legal requirement corroboration to prove a crime has been committed by the accused, it does not exclude that there may be cases where relying on one item of evidence would be too dangerous in the absence of corroboration.

449. It is submitted that one unreliable or inconclusive piece of evidence cannot constitute corroboration for another unreliable or inconclusive item of evidence.

B- Specific issues on the evaluation of evidence

Deficiencies in the prosecution investigation

450. The defence submits that there were serious deficiencies in the investigative process conducted by the prosecution. Included here is the failure to visit any of the relevant villages in Ituri. Most notably the prosecution never set foot in Aveba, Zumbe, Kagaba, Lakpa, Bavi-Olongba, Nyakunde, Gety, Mandro, Tchomia or Kasenyi for the purpose of collecting evidence. Similarly, the prosecution never visited the Walendu-Bindi collectivité, which is at the heart of this case. The prosecution also failed to conduct an investigation at Bogoro diligently and thoroughly. Instead of conducting its own onsite investigations, the prosecution relied excessively on unqualified and unaccountable intermediaries. These deficiencies undermine the quality of the prosecution evidence.

451. Article 54(1)(b) is quite plain in its direction to the Prosecutor to investigate all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute. He has an obligation to investigate incriminating and exonerating circumstances equally. There may therefore be a range of exculpatory evidence which the prosecution has failed to discover and disclose as a result of his deficient investigations. The effect of these deficiencies is to undermine the confidence that the judges can place in the results of that process. It is submitted that the judges should take this into account when having regard in particular to whether the prosecution has proved beyond all reasonable doubt who were the planners of the Bogoro attack.

*considering that “[s]uch a conclusion must be established beyond reasonable doubt. [...] It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is [as] consistent with the [innocence of an accused as] with his or her guilt], he or she must be acquitted.”*⁵⁹¹ *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007, para.98: “In making that determination, the Trial Chamber has been careful to consider whether more than one inference was reasonably open from the facts and, if so, whether there was an inference inconsistent with the guilt of the Accused. If so, the onus and the standard of proof require that an acquittal be entered in respect of that particular count”. See also *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 35.

Failure to investigate in Aveba and Zumbe

452. If the prosecution were conducting an impartial investigation against Katanga, one would have thought it obvious that it was important to visit Aveba and Zumbe, the localities where the accused were based at the relevant time period, and interview people there. Any investigation into exonerating evidence starts within the proximity of the accused. This was not done at all.⁵⁹² By not including Aveba and Zumbe within its investigations this created a serious lacuna in the range of information and evidence available to the Prosecutor, the defence and ultimately the Chamber.

Failure to investigate in Kagaba and surrounding villages

453. It would appear that the Prosecutor's Office never deemed it appropriate to visit Kagaba or other villages like Lakpa for investigations,⁵⁹³ notwithstanding the importance of these locations to their theory of common plan. According to several witnesses the Bogoro attack was launched and the details were planned in Kagaba. It is thus a significant flaw in the prosecution case that it did not undertake this exercise. It may have led to the discovery of significant evidence, some of which may have been exculpatory.

Failure to investigate Bogoro diligently and thoroughly

454. The prosecution chief of investigations testified in closed session from the 25th November 2009. She testified that the investigations began around May 2006, and that she was only present from September 2007.⁵⁹⁴ Only one investigative mission was made to the village of Bogoro before issuing an arrest warrant against Katanga for crimes committed in Bogoro.⁵⁹⁵ After that first mission to Bogoro, which took place in February or March 2007, it took the prosecution two years to return. This is despite the fact that the Court's jurisdiction was in place from 1 July 2002, more than 6 months before the Bogoro attack. The Prosecutor had indicated in July 2003, 6 months after the attack, that he would follow the situation in the DRC closely and that it would be a priority for his office.⁵⁹⁶ The ICC was dealing with no other cases at the time and the DRC formally referred the situation in March 2004.⁵⁹⁷ It can therefore be presumed that the Prosecutor was aware of the fact that there had been atrocities committed in Ituri with a corresponding urgent need to preserve evidence, probably in 2003, but at the latest in 2004. However, it took a further 2 years before investigations began.

⁵⁹² CHM-001-T-81-p.65-l.24-25 (FRA-p.82-l.10-13).

⁵⁹³ CHM-001-T-81-p.68-l.4-6 (FRA-p.85-l.5-7).

⁵⁹⁴ CHM-001-T-81-p.57-l.9-12 (FRA-p.71-l.19-23).

⁵⁹⁵ CHM-001-T-81-p.21; 40 (FRA-pp.27-28, 52).

⁵⁹⁶ See ICC Press release April 2004, ICC website.

⁵⁹⁷ ICC-01/04-1, Decision assigning the situation in the Democratic Republic of Congo to Trial Chamber I, 5 July 2004, p.4.

455. When Bogoro was visited a decision was made by the Prosecutor's Office to do a partial exhumation rather than a general one, because 'it was for corroborative' purposes.⁵⁹⁸ Given the issues of whether the Bogoro attack was in itself a widespread or systematic attack against civilians (see section V1-B of Crimes against Humanity), and whether the attack was directed against the civilian population (see section V1-B of Directing attack against civilian population), it is submitted that it was essential to take steps to determine as at early a stage as possible the numbers and identity of the dead as well as the causes and time of their death, and whether they were attackers or defenders.

456. This was particularly important in the light of the fact that there were military and civilians at Bogoro and having regard to the fact that the obligation of the attacker is to distinguish between the military and the civilians. So it is important to know who were military and how many, who were civilians, and that the evidence was not largely a question of incidental losses. The time of death was important because of the problem that there had been earlier attacks on Bogoro.

457. A general exhumation would have been important as it could have uncovered evidence which not only corroborated the prosecution evidence, but also the evidence of the accused revealing substantial numbers of UPC soldiers and attackers. The bodies may have carried clues as to their identities through the presence of articles of clothing or other items.

458. The timing of the exercise was also crucial. The visit and exhumation could have been done at a time much closer to the events.

Failure to include within the investigative process the government's *Maison Militaire*, the RCD-K/ML or the army

459. It would appear that no contacts were undertaken with the government *Maison Militaire*, the RCD-K/ML, or the army with respect to events on the 24th February 2003.⁵⁹⁹ Timely pursuit of this avenue by the prosecution could have led to the revelation of significant exculpatory material. The Defence has subsequently had serious difficulties in obtaining the cooperation of the DRC authorities in this respect. The Chamber has heard evidence about the involvement of the RCD-K/ML and the APC and that the attack was planned from its headquarters in Beni. The issue of the involvement of the DRC as well as the role of the RCD-K/ML are both crucial and fatal to the prosecution's theory of common plan.

⁵⁹⁸ CHM-001-T-81-p.64-l.14-18 (FRA-p.80-l.16-23).

⁵⁹⁹ CHM-001-T-81-p.70-l.1-6 (FRA-P.87-l.18-24).

Use of intermediaries

(i) General nature of the problem

460. The prosecution has thought it appropriate to use the services of local individuals who were not professional investigators and employed within the Office of the Prosecutor. These included P-143, P-316, P-183, and P-310.

461. Such persons are not accountable or impartial and the nature of their use cannot be completely transparent. It is not clear that they understand the ethical and legal obligations imposed upon the Prosecutor. These individuals have been used extensively in the prosecution's investigative process in particular with regard to contact and arrangements with witnesses in this case. The defence submits that this practice was highly inappropriate and capable of leading to situations of injustice where inappropriate incentives might be offered, confidential information may be shared and collusion encouraged. It significantly undermines the quality and trustworthiness of the prosecution investigations and the witnesses connected to those investigations.

462. In the Katanga case, the prosecution made specific use of intermediaries with respect to 15 of the prosecution witnesses and 2 further witnesses had contact with an intermediary. More precisely, P-143 ([REDACTED])⁶⁰⁰ was intermediary with P-28, P-279 and P-280, P-267, P-132, P-287, P-243 (withdrawn) and was in contact with P-30. P-316 ([REDACTED]) was an intermediary for P-249, P-268, P-159 (testified but withdrawn afterwards), P-161, P-166, P-28, P-250, P-258 (withdrawn). P-183 ([REDACTED]) was an intermediary with P-28 and P-250. P-310 (identity redacted) was intermediary for P-323, P-353 and also with [REDACTED].⁶⁰¹ P-267 acted at some point as intermediary since he was requested to pre-select three alleged child soldiers for a screening purpose.⁶⁰² These intermediaries were in contacts.⁶⁰³

463. It is accepted that mere contact with an intermediary would not necessarily lead to the non-reliance on that witness's testimony by the Chamber. However, where the prosecution employs unsupervised and unaccountable individuals to enlist witnesses into the case, the systemic dangers inherent in that process, combined with indications in the testimony of those

⁶⁰⁰ P-143's identity ([REDACTED]) was disclosed by the Prosecution by mail on 13 September 2010 only, almost a year after the start of the trial (which started on 24 November 2009, T-80), therefore, the Defence could not put his name to all the Prosecution witnesses who testified before and confront them to his name.

⁶⁰¹ Cf. ICC-01/04-01/07-1848-Conf, ICC-01/04-01/07-2204-Conf-Exp-AnxA; ICC-01/04-01/07-2214-Conf-AnxB; ICC-01/04-01/07-1561-Conf-Exp-para.12; *Lubanga* Trial Judgment, paras 209, 295; T-141-p.67 (FRA-pp.68-69); P-30-T-183-pp.26-28 (FRA-pp.24-26) and P-30's statement EVD-OTP-00128/paras.99-101; EVD-D02-00138, paras 2-7, 14, 16-19.

⁶⁰² EVD-D02-00245, p.2.

⁶⁰³ ICC-01/04-01/07-2204-Conf-Exp-AnxB, ICC-01/04-01/07-2214-Conf-AnxB; ICC-01/04-01/07-2214-Conf-AnxA; *Lubanga* Trial Judgment, para. 209, 295, 321.

witnesses that there is a problem with their reliability, may lead to the conclusion that it is no longer safe to rely on the evidence of those witnesses for the purposes of a conviction. The defence submits that this is what the Chamber is faced with in the particular circumstances of this case.

464. The affected witnesses were 28, 279, 280, 267, 243, 249, 268, 159, 161, 166, 250, 258, 323, 353 and 157. P-267 was himself used as an intermediary with respect to the selection of child soldiers and he was good friends with intermediary P-31. Of the 15 witnesses affected, four have been withdrawn: 243, 258, 157 and 159 (withdrawn after testifying and not to be relied on by the Chamber for purposes of incrimination). It is submitted that the remaining 11 witnesses primarily affected who have come to give evidence following extensive contact with intermediaries should not be relied on by the Chamber because of the inherent dangers attached to the manner in which they have come into the process. In the alternative, the danger associated with the unsupervised actions of intermediaries is a factor to be taken into account in deciding upon the probative value to be attached to the witnesses affected.

(ii) Findings in *Lubanga*

465. In the *Lubanga* case, the Trial Chamber held that ‘the prosecution should not have delegated its investigative responsibilities to the intermediaries.’⁶⁰⁴ It concluded that ‘a series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on’.⁶⁰⁵

466. Intermediaries 143 and 316 acted in both the *Lubanga* and *Katanga* cases. In relation to 143, the *Lubanga* Trial Chamber concluded that there was a risk that he ‘persuaded, encouraged, or assisted witnesses to give false evidence’.⁶⁰⁶ In relation to 316 the *Lubanga* Trial Chamber concluded that ‘there are strong reasons to believe that P-316 persuaded witnesses to lie as to their involvement as child soldiers within the UPC.’⁶⁰⁷

467. Article 74(2) of the Statute provides that the Court may base its decision only on evidence submitted and discussed before it at the trial. Here the trial must be interpreted to refer to the proceedings, at least up to the point of sentencing. This is supported by the fact that article 74 relating to the judgment and article 76 relating to the sentence both fall under the section of the Statute dealing with the trial. Article 74(2) itself begins by stating that the Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire

⁶⁰⁴ *Lubanga* Trial Judgment, para. 482.

⁶⁰⁵ *Lubanga* judgment, para 482.

⁶⁰⁶ *Lubanga* judgment, para 483.

⁶⁰⁷ *Lubanga* judgment, para 483.

proceedings. In the light of article 74 and its requirements and having regard to the findings on intermediaries 143 and 316, common to both cases, the defence hereby requests that the portions of the *Lubanga* judgment that address these two intermediaries be admitted as evidence in this case.

468. These portions of the judgment are relevant to the issue of the reliability of the evidence of witnesses 28, 161, 250, 279, 280, 267, 132, 287, 249, 268, and 166, all being witnesses for which these two were intermediaries. The findings have probative value because they constitute the conclusions of professional ICC judges having heard testimony from these individual intermediaries, and having conducted an in depth investigation into the activities of these individuals. It is in the interests of the fairness of the trial to admit them because of the manifest injustice which may be caused if 143 and 316 are not treated with a similar degree of circumspection as they were before the Trial Chamber in the *Lubanga* case. As noted above by our Trial Chamber, the behaviour of the intermediaries cannot be artificially dissociated from one case to another. It cannot simply be ignored, especially because it is also supported in the present case.

469. In the alternative, it is submitted that the Chamber may have regard to these findings as the findings of another Chamber on a question of fact relevant to this case. Since the Statute and Rules of Procedure and Evidence do not expressly address this issue, it is submitted that this may fall under the general power of the Trial Chamber to ensure that the trial is fair under article 64(2) of the Statute.

470. The Defence did not seek the admission of the *Lubanga* transcripts because it considered that it would be difficult to draw any meaningful conclusions from these transcripts, in any event extensively redacted, without appreciating the full context of the case. It would have been difficult for the defence or this Chamber to confidently make any findings on the credibility of witnesses testifying in the *Lubanga* case without access to the full dossier, which in any event would not have been practical. The findings of Trial Chamber I, however, are meaning, probative and consequential.

471. The prosecution submits that the findings in the *Lubanga* case cannot be taken into account in this case because no issues were raised about the role of intermediaries, despite the defence continuously receiving information and the Defence did not show the influence of intermediaries during the prosecution or defence phase of the case.⁶⁰⁸ They further state, extraordinarily, that no evidence was admitted in relation to intermediaries.

⁶⁰⁸ Prosecution Brief, paras 18-25.

472. These assertions are quite incorrect. To begin with the onus always rests on the prosecution to prove its case and therefore to establish the reliability of its own witnesses. The defence only has to raise the prospect of a reasonable doubt, which it can do at this stage of the proceedings without ever having raised the issue.

473. In fact, the *Katanga* Defence filed numerous motions on the issue in both the *Lubanga* and the *Katanga* case,⁶⁰⁹ questioned the prosecution witnesses about their relations with the intermediaries, and called witnesses who spoke, *inter alia*, about the improper behaviour of intermediary 143. (see *infra*) The evasiveness of the prosecution witnesses on this issue was clearly revealed. Some witnesses even denied contacts with intermediaries while the Prosecution had submitted admissions in this regard. (see *infra*) P-28 himself confessed that P-183 told him to lie.⁶¹⁰ The Defence showed that P-143 acted improperly, in particular toward P-279 and P-280, leading them to lie. Three prosecution investigators reports were tendered on the attitude of P-316, P-143 and P-31.⁶¹¹ The transcript of interview of P-159 about his contacts with P-316 was tendered as evidence⁶¹² and P-28's transcript of interview about his contacts with P-183 was put to him by the Defence during cross-examination.⁶¹³ The improper behaviour of P-143 toward P-279 and P-280 was clearly established by the Defence through these two witnesses and [REDACTED]' testimony.

474. The defence did not possess sufficient information throughout the proceedings to address this important issue. While it was disclosed the identity of P-316 quite early, the identity of P-143 was disclosed at a very late stage of the prosecution case,⁶¹⁴ which prevented the defence from cross-examining effectively several prosecution witnesses on their contacts with him.

⁶⁰⁹ All the following Katanga Defence motions dealt with the disclosure of information related to intermediaries: ICC-01/04-01/07-1089, ICC-01/04-01/07-1146, ICC-01/04-01/06-2150, ICC-01/04-01/07-1533-Conf-Exp, ICC-01/04-01/07-1576-Conf-Exp, ICC-01/04-01/07-1589, ICC-01/04-01/07-1705-Conf-Exp, ICC-01/04-01/07-1874-Conf, ICC-01/04-01/07-1960-Conf-Exp+Corr, ICC-01/04-01/06-2361-Conf-Exp, ICC-01/04-01/07-2013-Conf, ICC-01/04-01/07-2014-Conf, ICC-01/04-01/06-2512-Conf, ICC-01/04-01/07-2260, ICC-01/04-01/07-2499-Conf, ICC-01/04-01/06-2605-Conf-Exp, ICC-01/04-01/07-2582-Conf.

⁶¹⁰ P-28-T-221-p.24-l.16-p.25-l.8 (FR-p.21-l.8-27), p.36-l.1-p.37-l.4, p.38-l.6-9 (FRA-p.31-l.6-25) (P-316 is N°12 and P-183 is N°14 in the list which is referred to); *Lubanga* Trial Judgement, para. 321.

⁶¹¹ EVD-D02-00241, EVD-D02-00242, EVD-D02-00245.

⁶¹² EVD-D02-00023.

⁶¹³ P-28-T-221-p.25 *et seq* (FRA-p.22 onward) and DRC-OTP-1046-0198-R02 dated 3 July 2009.

⁶¹⁴ The TCII ordered, on 7 June 2010, the disclosure of the identity of P-143 (T-150-p.8-l.14-17), pending the implementation of the protective measures ordered by TCI, which occurred only on 13 September 2010 (*Cf.* VWU report ICC-01/04-01/07-2383-Conf indicating that P-143 has been moved to another location), after several postponements caused by P-143 (*Cf.* the VWU reports on the implementation of protective measures for P-143, ICC-01/04-01/07-2295, ICC-01/04-01/07-2299-Conf, ICC-01/04-01/07-2302, ICC-01/04-01/07-2303, ICC-01/04-01/07-2310, ICC-01/04-01/07-2346-Conf, ICC-01/04-01/07-2377-Conf.) Thus the Prosecution disclosed the identity of P-143 to the Defence by mail on 13 September 2010 only (T-186-p.13-l.24, p.15-l.18 (FRA-pp.11-12)).

475. Apart from the issue being directly addressed during the proceedings, the Chamber will note that the testimony of a number of prosecution witnesses who were in contact with P-316 or P-143, *ie* P-28, P-250, P-279, P-280, P-132, P-287, P-249, P-161, P-159, is incoherent, incredible and unreliable (See section II on Reliability and Credibility of witnesses). This in itself highlights the nature of the problem.

(iii) Specific evidence relating to intermediaries in this case

The system

476. The Director of Courtroom Services indicated that '[t]he same intermediary may be used by five different units of the Court'; the OTP 'may enter into confidential agreements with an intermediary.' 'Nothing governs the amount that is provided to these intermediaries. One might think that it would be between 30 and 60 dollars per day, but nothing would keep a unit from paying more or less. Furthermore, the Registry is in no way able to determine what the OTP may have paid an intermediary or what all the five various units have paid to an intermediary. There is no requirement through the agreements or through the arrangements made to disclose. That can be criticised, of course.'⁶¹⁵ The defence submits that the intermediaries have a strong monetary incentive in bringing potential witnesses of alleged crimes and that this may lead them to encourage witnesses to lie, as confirmed by P-28 who said that P-183 encouraged him to lie.

477. The prosecution chief of investigations said that they tried to ascertain the reliability of the intermediaries through a background check, but admitted that their information could be very limited, so it was difficult.⁶¹⁶ She claimed that the prosecution tried to find the witnesses themselves and not the intermediaries. Yet, it would appear that it might be the intermediary who would approach the witness, as confirmed by P-250⁶¹⁷ for example.

478. As to the conduct of the intermediaries not being professionally trained, they did not follow ethical protocol, so for instance they did not systematically introduce themselves.

479. It is noteworthy that out of the 12 prosecution witnesses relocated, 8 were in contact with P-143 or P-316 (P-132, P-287, P-250, P-28, P-268, P-279, P-280, P-249).

Intermediary P-183

480. P-28 testified that his account of his being abducted by [REDACTED] from Aveba was a fiction; asked why he lied, he replied:

⁶¹⁵ P-30-T-180-pp.8-9 (FRA-pp.7-8).

⁶¹⁶ CHM-001-T-81-pp.37-38 (FRA-p.47-48).

⁶¹⁷ P-250-T-102-p.50-l.5-7 (FRA-p.48-l.13-15).

I did not make up anything. I did not look for any officers from the OTP or from the Defence teams or from any service at the ICC. I did not look for anyone. There was one person who put me in contact with the investigators, and it is that individual who told me that I had to say that I was returning from school, to give this account about the school. I am not the one who made it up. I am not the person who invented all of this. It was an account that I was told to relate. So do not tell me that I made up anything. I did not. I did not make up anything in this whole story.⁶¹⁸

481. He confirmed that the person who looked for him, put him in contact with the prosecution and told him to tell these lies was intermediary P-183 (name 14 on the list). The defence noted that P-183 denied that.⁶¹⁹ Then the defence put to P-28 the transcript of an interview of the 3rd July 2009 where P-28 confirmed that P-183 put him in contact with the prosecution but denied that he told him to lie. P-28 could not explain why he said in Court that P-183 told him to lie while he denied it in July 2009 and started to be hostile, refusing to discuss the previous years.⁶²⁰ P-28 confirmed that P-183 (number 14) introduced him to [REDACTED] (number 12, *ie* P-316) – they went to his house.⁶²¹ Then the Defence put to P-28 that in his last statement of October 2010, he changed his story because he had learnt what the Defence had found out, and that is why he asked for this interview; in this statement, P-28 said:

I don't know if [REDACTED] was your employee or was paid, but he told me things had to be said that way. [...] Didn't tell me why he wanted me to lie about the circumstances surrounding my abduction. He told me he had already put several people in contact with those human rights guys. He said those white people left with those persons and that their names haven't been disclosed. He told me if you tell them that, that's fine. They'll take you, you'll live well, you'll go to school, your name won't be disclosed, and no one will hear that you collaborated.⁶²²

482. P-28 confirmed in Court that P-183 told him to tell a specific story regarding his schooling. He added:

I will say this gentleman raised my hopes. He said this was something very confidential and that no one would get to know about it. That is what he said. However, nothing was made up with respect to the events that took place in Bogoro. I do confirm that with respect to that statement, the statement about schooling was made up by number 14. No, it is false.⁶²³

483. The defence submits that P-28's testimony confirms that P-28 lied to the prosecution to be 'protected', *ie* relocated, and his confidence was further reinforced by the fact that he was

⁶¹⁸ P-28-T-221-pp.22-23 (FRA-p.20).

⁶¹⁹ P-28-T-221-pp.24-25 (FRA-pp.19-20) ; P-28-T-223-pp.8-10 (FRA-p.7-9).

⁶²⁰ P-28-T-221-pp.25-32 (FRA-p.22-27).

⁶²¹ P-28-T-221-pp.35-38 (FRA-pp.30-32).

⁶²² P-28-T-221-pp.38-39 (FRA-p.33) and DRC-OTP-1058-0110.

⁶²³ P-28-T-221-pp.39-40 (FRA-p.34).

guaranteed that his name will not be revealed to the public – P-28 explicitly testified that what convinced him to become a witness was the confidentiality.⁶²⁴

484. The defence also highlights that P-183 benefited from protective measures, including relocation.⁶²⁵

Intermediary P-143

485. P-287 said that someone told her that another person wanted to contact her to talk about the Bogoro attack and asked for her phone; a few days later, someone called her and they stayed in touch. The Prosecution said that it was P-143 and the defence could not ask for his identity.⁶²⁶ P-287 said that she did not know his name, but had already seen him once or twice: he was a young person and not very slender. The defence was not permitted to ask further details.⁶²⁷

486. While the Prosecution admitted that it is P-143 who first met P-132 and introduced her to the prosecution,⁶²⁸ in Court P-132 said that it was the OTP that came to get her. The defence was not permitted to ask further questions which could lead to the identification of P-143.⁶²⁹

487. The prosecution informed the defence that P-279 had been introduced by P-143. P-279 stated that he was in contact with the prosecution thanks to [REDACTED].⁶³⁰ P-143 told him that if he gave a statement, safety officers would provide him with protection.⁶³¹ It was put to P-279 that he testified for relocation, and the money [REDACTED]⁶³² - he did not reply.⁶³³ He also denied knowing [REDACTED] [P-280], that they grew up together and that he used to meet P-143 with him.⁶³⁴ When shown the picture with himself and 280 together,⁶³⁵ P-279 said he did not know the person on a picture.⁶³⁶ [REDACTED] testified that they grew up together [REDACTED],⁶³⁷ that P-143 used to meet P-279 and P-280 together there,⁶³⁸ and

⁶²⁴ P-28-T-223-p.8-l.13-p.9-l.2 (FRA-p.7-l.27-28-p.8-l.1-20).

⁶²⁵ ICC-01/04-01/07-2001-Conf-Exp, paras 13-19 and DRC-OTP-1059-0070/para.13.

⁶²⁶ P-143's identity ([REDACTED]) was disclosed by the Prosecution by mail on 13 September 2010 only, almost a year after the start of the trial (which started on 24 November 2009, T-80), therefore, the Defence could not put his name to all the Prosecution witnesses who testified before and confront them to his name.

⁶²⁷ P-287-T-130-pp.49-55 (FRA-pp.50-57).

⁶²⁸ P-132-T-141-p.67 (FRA-pp.68-69).

⁶²⁹ P-132-T-142-pp.17-18 (FRA-pp.17-18).

⁶³⁰ P-279-T-151-pp.45-46, 48-49 (FRA-pp.44-45 ; 47).

⁶³¹ P-279-T-151-pp.49-50 (FRA-p.48)

⁶³² D2-147-T-261-p.15-l.9-15 (FRA-p.14-l.2-10).

⁶³³ P-279-T-152-p.43 (FRA-pp.43-44).

⁶³⁴ P-279-T-151-pp.48-51 (FRA-pp.47-50).

⁶³⁵ EVD-D02-00128 and D2-147-T-261-pp.59-61 (FRA-pp.53-55); where D2-147 confirmed that the picture shows [REDACTED] P-279 and his friend [REDACTED] (P-280).

⁶³⁶ EVD-D02-00039 and P-279-T-152-pp.43-46 (FRA-pp.44-46).

⁶³⁷ D2-147-T-261-p.42-l.3-23 (FRA-p.38-l.1-23); D2-146-T-264-p.42-l.24-p.43-l.3 (FRA-p.39-l.15-28).

that [REDACTED] welcomed P-280's family in Aveba after they fled.⁶³⁹ Both Nathanaël Bachueki Mbakama and Jean-Marie Akurotho Obia testified that [REDACTED] had lied and that they were never in the militia.⁶⁴⁰ Last but not least, P-279 and P-280 were interviewed the same days in March 2007 at Beni, by the same prosecution investigators.⁶⁴¹

488. Nathanaël Bachueki Mbakama (D2-147), [REDACTED] testified that he used to see [REDACTED] (P-143) close to his compound, and in particular P-143's motorcycle parked [REDACTED] they answered that he [REDACTED] told them that they were going to study.⁶⁴² P-143 came again and Bachueki asked him why he talked [REDACTED] but P-143 did not reply and fled. P-279 went to Kisangani [REDACTED]. Then he asked [REDACTED] to go there because they needed him there, but P-279 had difficulty explaining why.⁶⁴³

489. [REDACTED].⁶⁴⁴ [REDACTED].⁶⁴⁵ [REDACTED].⁶⁴⁶ [REDACTED]. P-279 disappeared a few days after, [REDACTED], and Bachueki has not been in contact with him since then.⁶⁴⁷ Similarly, P-280 disappeared and they don't know where they are.⁶⁴⁸

490. The Defence submits that these two testimonies confirm the improper behaviour of P-143 who encouraged P-279 and P-280 to lie about their age⁶⁴⁹ and their alleged enrolment with the combatants.

491. While the Prosecution admitted that P-143 put P-280 in contact with the prosecution,⁶⁵⁰ P-280 testified that he had no idea as to how he came in contact with the prosecution, and then that he did not have the name of the person who took him to Beni; he could not describe him, and did not know whether he was the only person from his home area that that person put in

⁶³⁸ D2-146-T-264-p.46 (FRA-p.42) ; D2-147-T-261-p.49-l.10-p.52-l.23 (FRA-p.44-l.17-p.47-l.24).

⁶³⁹ D2-147-T-261-p.45-l.7-p.46-l.7 (FRA-p.41-l.28; p.42-l.1-19); D2-146-T-264-p.43-l.19-24 (FRA-p.40) (Martin is P-279)

⁶⁴⁰ D2-146-T-266-p.3-l.21, p.4-l.18-20 (FRA-p.3-l.12; p.4-l.8), p.6-l.15-19 (FRA-p.5-l.24-27), p.8-l.2-5 (FRA-p.7-l.5-7) (about P-280); D2-147-T-261-p.38-l.8-11, p.41-l.10-15 (FRA-p.34-l.17-20; p.37-l.11-16) (about P-279), p.44-l.7-10 (FRA-p.40-l.1-4) (about P-280); D2-147-T-262-p.5-l.10-21 (FRA-p.5-l.2-13) (about P-279), p.18-l.9-12 (FRA-p.16-l.5-12) (about P-280).

⁶⁴¹ P-279-T-151-p.51 (FRA-p.50), P-279-T-152-pp.47-48 (FRA-pp.47-48), P-280-T-161-p.26 (FRA-pp.26-27).

⁶⁴² D2-147-T-261-pp.49-50 (FRA-pp.44-45).

⁶⁴³ D2-147-T-261-pp.50, 52 (FRA-pp.45-46 ; 47).

⁶⁴⁴ D2-147-T-261-p.53 (FRA-p.48).

⁶⁴⁵ D2-147-T-261-pp.54-55 (FRA-p.49-50).

⁶⁴⁶ D2-147-T-261-pp.55-57 (FRA-pp.50-51).

⁶⁴⁷ D2-147-T-261-p.57 (FRA-p.52).

⁶⁴⁸ D2-147-T-261-p.58 (FRA-p.52).

⁶⁴⁹ According to the Prosecution Investigator Note EVD-D02-00242, dated 21 January 2008, the Prosecution asked P-143 to find the birth certificate of P-279 and gave him the date of birth of [REDACTED]. P-143 went to the office of the municipality of Bunia which was not able to find the birth certificate and therefore issued a new one with the information and date of birth given by the intermediary.

⁶⁵⁰ P-132-T-141-pp.66-68 (FRA-pp.68-69).

contact with the ICC.⁶⁵¹ The defence submits that he lied: first, one would easily not forget such circumstances, and secondly, he was with P-279 at the time, as noted above.

492. Jean-Marie Akurotho Obia (D2-146), [REDACTED] said that he knew [REDACTED], whose exact name was [REDACTED] (P-143),⁶⁵² and that he [REDACTED] was somebody who would go here and there to try to enrol the children into a white man's programme, so that they could study somewhere.⁶⁵³ He saw P-143 [REDACTED] speaking with P-280 [REDACTED] and P-279 [REDACTED] together [REDACTED].⁶⁵⁴ Then P-280 disappeared. P-143 told Akurotho that the children went somewhere to study, but he could not tell him when they would return; he simply said that when they would return, they would be people who would have a certain value. Akurotho did not see P-280 after that. Akurotho did not at first appreciate that this all concerned the ICC.⁶⁵⁵

493. [REDACTED].⁶⁵⁶ [REDACTED].⁶⁵⁷ [REDACTED].⁶⁵⁸ [REDACTED].

494. [REDACTED].⁶⁵⁹

495. [REDACTED].⁶⁶⁰

496. [REDACTED]:

[REDACTED].⁶⁶¹

497. Both D-146, Akuroto and D-147, Bachweki testified that [REDACTED] were never part of the militia.⁶⁶²

498. While the Prosecution indicated that P-143 facilitated initial contact with OTP investigators and P-267,⁶⁶³ P-267 indicated the name of another person, not disclosed to the

⁶⁵¹ P-280-T-161-p.26-28 (FRA-p.26-28).

⁶⁵² D2-146-T-264-p.39 (FRA-p.35); D2-146-T-265-p.38-l.20, p.39-l.19-25 (FRA-pp.34-36).

⁶⁵³ D2-146-T-264-p.45 (FRA-p.42).

⁶⁵⁴ D2-146-T-264-p.46 (FRA-p.42).

⁶⁵⁵ D2-146-T-264-pp.46-47(FRA-pp.42-43). ; D2-146-T-266-p.10-l.10-17 (FRA-p.9-l.13-15), p.22-l.4-13 (FRA-p.20-l.19-26).

⁶⁵⁶ D2-146-T-264-pp.48-50 (FRA-pp.44-45).

⁶⁵⁷ D2-146-T-264-p.54 (FRA-p.50); D2-146-T-265-p.79-l.23-25, p.80-l.6-7.

⁶⁵⁸ D2-146-T-265-p.79-l.23-25 (FRA-p.72-l.5-6), p.80-l.6-7 (FRA-p.72-l.12-13); D2-146-T-266-p.12-l.20-p.14-l.15 (FRA-p.11-l.21-p.18-l.23), p.20-l.8-17 (FRA-p.18-l.19-27), p.21-l.10-17 (FRA-p.19-l.19-25), p.22-l.4-13 (FRA-p.20-l.17-26).

⁶⁵⁹ D2-146-T-265-p.78-l.4-10 (FRA-p.70-l.17-23).

⁶⁶⁰ D2-146-T-265-p.33-l.17-21 (FRA-p.30-l.14-17), p.36-l.18-24, p.37-l.2 (FRA-p.33-l.11-15; p.33-l.18-19)..

⁶⁶¹ D2-146-T-266-p.6-l.3-7 (FRA-p.5-l.14-17).

⁶⁶² D2-146-T-266-p.3-l.21, p.4-l.18-20, p.6-l.15-19, p.8-l.2-5 (FRA-p.3-l.11; p.4-l.7-8; p.5-l.24-27; p.7-l.5-7) (about P-280); D2-147-T-261-p.38-l.8-11, p.41-l.10-15, p.44-l.7-10 (about P-280) (FRA-p.34-l.17-20; p.37-l.14-16; p.40-l.1-4) (about P-279); D2-147-T-262-p.5-l.10-21 (FRA-p.5-l.2-13) (about P-279), p.18-l.9-12 (FRA-p.16-l.9-12) (about P-280).

⁶⁶³ ICC-01/04-01/07-2204-Conf-Exp-AnxA, ICC-01/04-01/07-2214-Conf-AnxB.

defence, as the main person who put him in contact with the prosecution;⁶⁶⁴ when shown the name of P-143, he then said that P-143 and him worked in the same context, had meetings, and that when P-143 informed him (about the prosecution), P-267 contacted this other person who gave him the green light.⁶⁶⁵ P-267 also confirmed that he knew intermediaries [REDACTED] (P-321) and [REDACTED] (P-31).⁶⁶⁶

499. In court, the prosecution admitted that P-30 and P-143 were in contact; P-30 said that a native of Bunia introduced him to the prosecution, whose name he did not know; a friend of him gave him videos, but it is not the same person as the one who introduced him to the prosecution. The defence could not ask further questions.⁶⁶⁷

500. P-143 was relocated and seems to have tried to delay the implementation of the protective measures to obtain more protection (*i.e.* relocation) and to delay the disclosure of his identity.⁶⁶⁸

Intermediary P-316

501. P-159 testified that [REDACTED] (P-316) put him in contact with the Office of the Prosecutor for the first time.⁶⁶⁹ P-159 said that P-316 stayed at his house for less than 20 minutes but did not talk, and then P-316 showed him a car where [REDACTED], of the prosecution, welcomed him and they left, implying they were alone together. However, when shown the transcript of his interview with the prosecution EVD-D02-00023, according to which the first time he met P-316 he was with another person, P-159 acknowledged that he mentioned [REDACTED], deceased, and that P-316 removed him from their group because [REDACTED] was revealing secrets; but P-159 could not mention any other members of the group.⁶⁷⁰

502. While the Prosecution informed the defence that it was P-316 who introduced P-249 to them, in court, P-249 denied it, saying that she did not know any [REDACTED] [P-316]. Asked whether she told the prosecution, in a previous interview, that [REDACTED] was involved, she confirmed it; asked whether she told that she had met a colleague [REDACTED] who gave her a phone, she first replied by the affirmative and then denied it,

⁶⁶⁴ P-267-T-173-pp.57-58 (FRA-pp.53-56).

⁶⁶⁵ P-267-T-173-pp.60-61 (FRA pp.58-59) [*Divergences constatées*].

⁶⁶⁶ P-267-T-173-p.64 (FRA-pp.61-62).

⁶⁶⁷ P-30-T-183-pp.26-28, 35-37, 41-42, 57-58 (FRA-pp.24-26; 33-34; 38-39; 53-54). See also EVD-OTP-00128-para.99.

⁶⁶⁸ Cf. the VWU reports on the implementation of protective measures for P-143, ICC-01/04-01/07-2295, ICC-01/04-01/07-2299-Conf, ICC-01/04-01/07-2302, ICC-01/04-01/07-2303, ICC-01/04-01/07-2310, ICC-01/04-01/07-2346-Conf, ICC-01/04-01/07-2377-Conf, ICC-01/04-01/07-2383-Conf

⁶⁶⁹ P-159-T-125-pp.37-38 (FRA-pp.35-36).

⁶⁷⁰ P-159-T-125-pp.40-46 (FRA-pp.37-44).

saying that she came by herself to [REDACTED] to meet security officers and then went to [REDACTED].⁶⁷¹

503. It is submitted that the above evidence supports the *Lubanga* findings according to which P-143 and P-316 may have tried to corrupt some prosecution witnesses; In this case there is very clear evidence that P-183 may have done so. This taints the reliability of the testimony of all the witnesses that these three came into contact with and raises doubts over the process in relation every witness where an intermediary was used. This is a systemic problem undermining the very process by which the testimony of witnesses is secured. In the particular circumstances of this case where the witnesses in question demonstrated problems of reliability in any event, it is submitted that the Chamber should rule that it would not be safe to rely on their testimony.

504. Finally, it must be noted that P-316 has been benefited from relocation.⁶⁷²

Relocation as undermining credibility

505. Relocation is a protective measure that entails a large number of benefits granted to relocated witnesses, including “travel arrangements to the new location, assistance in settling in the new environment, financial assistance in the form of subsistence allowance, and security monitoring of the witness and his/her family.”⁶⁷³ Caution must therefore be exercised when considering the value of evidence provided by such witnesses, including “any possible underlying motive for the witness’s testimony”, as noted by the ICTY Appeals Chamber in *Haradinaj*.⁶⁷⁴ The trial chamber in *Lubanga* has similarly noted that it had approached the evidence of a witness with a degree of caution, because he provided a detailed and untruthful account to a party with a view to financial gain.⁶⁷⁵

506. Such caution is also evidenced by the obligation of the prosecution at the various international tribunals,⁶⁷⁶ to disclose evidence that can affect witnesses’ credibility, including interest by witnesses for financial gain, as confirmed in *Lubanga*.⁶⁷⁷

⁶⁷¹ P-249-T-137-pp.11-16 (FRA pp.12-16).

⁶⁷² ICC-01/04-01/07-1674-Conf-Exp-AnxC, transcript DRC-OTP-0216-0451-R01 at 1.500-590.

⁶⁷³ ICC-01/04-01/07-423-Conf-para.14.

⁶⁷⁴ *Prosecutor v. Haradinaj*, Case No. IT-04-84-A, Judgment, 3 April 2008, para.12. See also *Prosecutor v. Martić*, Case No. IT-95-11, Judgment, 12 June 2007, para.36-37 (“The Prosecution accepted that the evidence of Witness MM-003 should be examined ‘with care’ since ‘he sought and received assistance from the OTP in order to remain in the country where he is now living’. [...] In its Final Trial Brief, the Prosecution acknowledged that the evidence of Witness MM-079 should be ‘scrutinized with care’ since ‘he said that he hoped to receive the assistance of the OTP to remain in the country where he is relocated’”).

⁶⁷⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, para.364.

⁶⁷⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-294-pp.27-29. See also *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Decision on Kanu Motion to Disclose Prosecution Material and/or Supporting material and/or other information pertaining to rewards to Prosecution trial witnesses, 16 March 2005; *Prosecutor v. Karemara*, Decision on Nzirorera’s Motion for request for Governmental Cooperation, Case No. ICTR-98-44-T, 19 April

507. Additional caution is all the more necessary in the light of the circumstances of the present case, given that the number of applications for relocation of witnesses was “unprecedented”⁶⁷⁸, that the pre-trial chamber recognised that relocation could impact on the credibility of witnesses, and given the temptations engendered by poverty. In neighbouring North Kivu the family income of poorer households in 2003 was approximately 140 USD a year.⁶⁷⁹

508. Unauthorised, unilateral, preventive relocation by the Prosecution, in violation of the Statute, has already led to the statements of two witnesses, P-132 and P-287, being excluded at the pre-trial stage because the prosecution impinged upon the central role given to the Registry by the Statute. This role specifically aims at “prevent(ing) the credibility of the relocated witnesses from being affected by the fact that they are receiving financial assistance from one of the parties in the proceedings.”⁶⁸⁰ The Appeals Chamber has also condemned this practice of preventive relocation.⁶⁸¹ Of the prosecution witnesses who testified at trial, almost half were relocated: P-28, P-132, P-12, P-160, P-250, P-287, P-249, P-279, P-280, P-219, P-268, including four preventively.⁶⁸²

509. The impact of the assistance sought and received by relocated witnesses on their credibility must be taken into account, because they are often relocated with their entire

2005, para.6; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Scheduling Order – In Camera Hearing On Prosecutor’s Motion To Permit Limited Disclosure Of Information Regarding Payments And Benefits Provided To Witness Ade And His Family Rules 66(C) And 68(D) Of The Rules Of Procedure And Evidence, 19 January 2006, para.11; *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Decision on Defence Motion for Disclosure of Statements of Prosecution Payments to DCT-097, 23 September 2010, para. 21.

⁶⁷⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-294-pp.27-29 (“[...] The expression of interest on 22 April 2009 that the witness, certainly at that point in time, was hoping for assistance as regards his dowry. It seems to us that that could be interpreted properly as expressing a somewhat unusual financial interest in giving evidence before this court. One wouldn’t ordinarily associate the fact that he was going to be giving evidence with the expectation that a dowry would be paid. And therefore, on material reflection, and looking at what you’ve provided us with, we consider that that indication by him was always disclosable material to the Defence. There could have been proper questions put to the witness based on that indication”).

⁶⁷⁸ ICC-01/04-01/07-423-Conf-para.15 (Prosecution requested that twenty witnesses be relocated for the purpose of the confirmation hearing).

⁶⁷⁹ P-267-T-173-pp.9-10 (FRA-pp.9-10).

⁶⁸⁰ ICC-01/04-01/07-423-Conf, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, paras 28, 34-39.

⁶⁸¹ ICC-01/04-01/07-776, Judgment on the appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I, 26 November 2008, paras 1, 91-92.

⁶⁸² See, for P-28, T-141-p.67 (FRA-pp.68-69), P-28-T-222-p.53-56 (FRA-p.47-49), P-28-T-223-p.58-l.6-22, p.60-l.8-14 (FRA-pp.52, 54) (where P-28 said that it is Number 14 who organize his relocation to Kinshasa), for P-132, T-141-p.67 (FRA-pp.68-69), for P-12, P-12-T-198-pp.66-67 (FRA-p.70), for P-160, P-160-T-211-p.50-l.5-12 (FRA-pp.44-45), for P-250, P-250-T-106-p.61-l.7-11 (FRA-p.60-l.14-17), for P-287, P-287-T-131-p.38-l.3-7 (FRA-p.38-l.15-21), p.39-l.1-13 (FRA-p.39-l.13-20) and T-132-pp.58-59 (FRA-p.59) (where OTP affirmed that P-287 was relocated outside of Ituri), for P-249, T-141-p.17-l.12-19 (FRA-p.17-l.19-25), for P-279 and P-280, T-141-pp.66-67 (FRA-pp.68-69), for P-219, P-219-T-207-p.37-38 (FRA-pp.38-39), for P-268, ICC-01/04-01/07-2365-Conf-para.2. P-28, P-132, P-287 and P-250 were preventively relocated by the Prosecution (ICC-01/04-01/07-716-Conf-p.52).

family⁶⁸³ to a more favourable environment. This is particularly so, given, for example, that P-28 was assured, prior to his giving evidence, that he would be relocated outside Africa upon completion of his testimony,⁶⁸⁴ despite his denying in his evidence that such was the case.⁶⁸⁵ In fact, the Chamber noted its surprise with regard to that relocation, given that in the VWU's assessment, the level of risk to P-28 at the relevant time did not warrant international relocation.⁶⁸⁶

510. It is the position of the defence that P-28 was internationally relocated only because he threatened, until the very last minute, not to testify,⁶⁸⁷ as illustrated by the lengthy postponement of his evidence. Similarly, whilst P-250 was initially relocated, these very "risks" for which he was relocated did not prevent him from returning to [REDACTED], from where he had been relocated, in violation of the VWU instructions, whereupon he was removed from the protection programme.⁶⁸⁸ Clearly, P-250 sought protection for private gain; otherwise, his fear, if properly founded, would have been such that he would not have exposed himself to any risks. That P-28 and P-250 sought protection for private gain must be assessed accordingly when affording weight – if any – to their evidence.

511. Relocation can therefore constitute an improper financial inducement for testimony, which would critically jeopardise the credibility of the evidence in question and to lead to abuses, as confirmed by the trial chamber in *Lubanga*.⁶⁸⁹ In this respect, it must be noted that P-250 and P-28 have benefited not only from international relocation measures but have also received guarantees from the prosecution that they will not be prosecuted for any crimes that

⁶⁸³ For instance, P-12 was relocated with his wife [REDACTED] and children: P-12-T-199-p.15-l.12-16 (FRA-p.16-l.10-16). See also ICC-01/04-01/07-1194-para.19 where the Prosecution indicates that P-249 was relocated with her family. The Director of the Court said in average, the international relocation of a witness includes seven members of his family (P-30-T-180-p.7) (FRA-p.6).

⁶⁸⁴ P-28-T-222-p.53 (FRA-p.47) ("Q. it's DRC-OTP-1059-0060, and it's a report, an investigator's report [...] relating to a meeting held on the 6th of September 2010 [...] in The Hague and one where you took part with a lawyer called Maitre Mbida Kanzi Tah and there were members of the Registry staff and members of the Prosecution & from the VWU. You may remember in that meeting you were told that you were going to be relocated after you gave your evidence and that you would be relocated outside Africa.

⁶⁸⁵ See ICC-01/04-01/07-2528-Conf-Anx1-pp.2, 5, and P-28-T-222-p.53-56 (FRA-pp.47-49).

⁶⁸⁶ ICC-01/04-01/07-2305-Conf, Decision on the Report of the Victims and Witnesses Unit of 31 May 2010 regarding the situation of Witness 28 (ICC-01/04-01/07-2147-Conf-Exp), dated 18 August 2010, para.24.

⁶⁸⁷ See ICC-01/04-01/07-2528-Conf-Anx1, Unit's minutes of the meeting of 6 September 2010 between the OTP, the VWU, witness DRC-OTP-WWWW-0028 and his Counsel, 11 October 2010, p.5.

⁶⁸⁸ ICC-01/04-01/07-2641-Conf-Red, Second Rapport de l'Unité d'aide aux victimes et aux témoins sur la situation du témoin DRC-OTP-P-0250 (ICC-01/04-01/07-2641-Conf-Exp soumis le 7 janvier 2011), 12 January 2011.

⁶⁸⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, para.147. The Director of the Services of the Court in the present case estimated this substantial, financial aid to approximately 20,000 Euros for re-establishment within a country and 65,000 Euros for international relocation (P-30-T-180-pp.5-7) (FRA-p.6). More precisely, see P-132-T-141-pp.66-68 (FRA-p.69): "As of April 2010, the immediate costs of the Office of the Prosecutor expended for Witness 132 were of \$6,635.89." See also P-279-T-147-pp.2-3 (FRA-p.2): "Witness 279 was relocated on the 15th of March, [2008]. This was done in the month of April, 2010, and it cost over \$4,000, namely 4.281. Now, Witness 280 was relocated on the 1st of April, 2008. The costs thereby go to -- the costs involved were \$2,808."

they may have committed within the framework of the armed conflict in Ituri, on account of their having “cooperated” with the Court.⁶⁹⁰

In-court protective measures as undermining credibility

512. Caution is required also with regard to the use or over-reliance of in-court protective measures, where such measures may be abused by witnesses seeking to veil themselves from public scrutiny. An example is P-28, who reiterated, whilst on the stand, that he did not like his testimony to be broadcast worldwide,⁶⁹¹ for fear, the defence submits, of having the untruths of his evidence exposed to his community.

513. Public hearings are a guarantor of fair trial rights. The use of protective measures impact on the evidence proffered. That the majority of Prosecution witnesses and both victim witnesses testified with pseudonyms, and other such protective measures, is contrasted with their very limited use by defence witnesses, and where resorted to, only where strictly necessary. Of the 24 prosecution witnesses that testified, only four did so publicly and their evidence related specifically to the events at Bogoro. Only two defence witnesses testified with protective measures. The use of such measures, and their relative absence in the case of defence witnesses, is a factor to take into account when assessing the reliability and credibility of witnesses.

Evaluation of defence evidence

General considerations

514. The prosecution states that the defence rests on four main assertions. It lists these as (1) Katanga was not leader of the Ngiti combatants of Walendu Bindi at the time of the attack on Bogoro; (2) he did not participate in the attack; (3) the RCD-K/ML and EMOI were the ones responsible for the planning and execution of the attack, and (4) there were no children under the age of 15 in the FRPI. The prosecution then states that the defence evidence is not credible in regard to the above allegations and consequently raises no reasonable doubts as to the guilt of the accused.

⁶⁹⁰ ICC-01/04-01/07-1614-para.5: « S’agissant des autorités congolaises, l’Accusation est en possession d’un engagement écrit (classé confidentiel) du ministère de la justice de la République Démocratique du Congo (« RDC ») aux termes duquel « les témoins appelés à déposer, à charge comme à décharge, devant [la Cour pénale internationale], dans le cadre de l’enquête en cours sur la situation en République Démocratique du Congo, ne seront pas poursuivis devant les juridictions congolaises pour les actes et faits infractionnels dont ils auront révélés la connaissance ou la participation à l’occasion de leur déposition devant cette Cour » . See also T-216-p. 31 (FRA-p.26) after the solemn undertaking of P-28, the following statement by the prosecution: “I think you should remind the witness that if he tells the truth, he will not be accused of anything at all. In accordance with Statute, if the witness speaks the truth, he will not be prosecuted for any crimes that he might have committed within the framework of the conflict that he’s going to give testimony on. That is a guarantee which is reserved for all witnesses who come before the court and not only Witness 0028, all witnesses co-operate with the court.”

⁶⁹¹ See P-28-T-216- pp.26-27 (FRA-pp.21-22).

515. The first observation is that it is not for the defence to prove its case but for the prosecution. Thus, the defence does not have to establish any assertions. It merely has to raise a reasonable doubt as to the allegations put by the prosecution. The assertions that Katanga was leader of the Ngiti combatants at the time of the attack, that he participated in the attack, that he planned and executed the attack, and that there were child soldiers in the FRPI – these are all prosecution allegations which it has to prove and which the defence submit it has not succeeded in achieving.

516. The second observation is that the defence does not rest its case on the assertion that there were no child soldiers within the FRPI. It asserts that the FRPI was not a fully structured organization at the time of the Bogoro attack and that there were no children under the command or control of Germain Katanga. The prosecution has not proved the contrary.

517. With regard to the question of credibility of defence evidence, the onus rests on the prosecution to demonstrate the unreliability of the defence witness's evidence. It has not properly undertaken this analysis in its closing brief if at all. Indeed, the defence submits that it would have little material to draw on because the prosecution attempts to undermine the principle defence witnesses for Mr Katanga were largely unsuccessful. Cross-examination was often very limited.

518. The prosecution submits that the defence witnesses 'largely testified in a mechanical or artificial fashion following a script learnt by heart.'⁶⁹² This comment is not substantiated by reference to any concrete examples and it is submitted does not accord with the reality in the courtroom.

519. The defence was under no obligation to produce signed written statements. Yet, it did so in an attempt to provide the court and other parties with adequate information. It thereby gave the prosecution an opportunity to prepare itself for cross-examination. The prosecution's original application was for statements to be provided to it.

520. The prosecution then asserts that their 'testimonies were riddled with half truths and inconsistencies.'⁶⁹³ This is not borne out by the evidence or the prosecution's analysis of that evidence. It is natural that witnesses will show some inconsistencies. It would be much more suspicious if everyone remembered the events in exactly the same manner. The prosecution contradicts itself in suggesting, on the one hand, that they all learned their script by heart, and

⁶⁹² Prosecution brief, para 239.

⁶⁹³ Prosecution brief, para 239.

on the other hand, that they were inconsistent. Inconsistency is not the issue so much as the nature and depth of the inconsistency.

521. The prosecution asserts that the defence witnesses ‘displayed a selective recollection, remembering mainly facts that were intended to exonerate Katanga, whilst claiming forgetfulness or ignorance with regard to potentially incriminating material.’⁶⁹⁴ One has to stop and ask why they would not give exonerating information and express ignorance of incriminating matters if the prosecution allegations were untrue. The defence submits that its witnesses were coherent and convincing witnesses that answered the questions put to them directly and clearly. They contrasted very well with most of the prosecution witnesses.

522. The victim representative of the victims of Bogoro has devoted 28 paragraphs to undermining the credibility of defence witnesses, while accepting the credibility of prosecution witnesses without any criticism. In doing so, the victim representative has shown a clear lack of neutrality. The brief reads like a prosecutor *bis* brief, contrary to the clear instructions from the bench throughout the proceedings to refrain from playing such a role.⁶⁹⁵ Most interestingly, the victim representative is very selective in his criticism. For instance, he accepts the credibility of D-176 to the extent that he provides details about the attack. However, when it comes to his submission relating to the absence from Bogoro on 24 February 2003 of P-233 and V-04, the victim representative requests the Chamber to disregard his testimony.⁶⁹⁶ It should, however, be borne in mind that D-176, who lost a significant number of his own family members, has no interest in claiming certain people were not present during the attack if in fact they were.

523. The victim representative is also highly critical of defence witnesses, most notably D-134, D-147, D-160, D-501, and D-259,⁶⁹⁷ who claim not to have known the details about Katanga’s position in the militia despite them being close to Katanga, or living in the neighbourhood for a significant period of time. However, the victim representative fails to appreciate the fact that they were all civilians. It is not at all a foregone conclusion that they should have any knowledge at all concerning the ins and outs in the militia. In addition, there was general confusion about Katanga’s position in the militia. Many events occurred in a short period of time about ten years ago. It then only goes to their truthfulness that they do not pretend to know more than they do.

⁶⁹⁴ Prosecution brief, para 239.

⁶⁹⁵ See, for instance, *Prosecutor v. Katanga & Ngudjolo*, hearing of 12 July 2010, page 15; 14 May 2010, 28-34; 23 June 2010, 20.

⁶⁹⁶ ICC-01/04-01/07-3253-Conf-Corr, Conclusions finales, para. 35.

⁶⁹⁷ ICC-01/04-01/07-3253-Conf-Corr, Conclusions finales, paras. 27-30.

Evaluation of the evidence of Germain Katanga

524. The prosecution alludes to the fact that Germain Katanga testified after his witnesses had testified. It notes that he could have testified first but chose to testify at the end. It concludes from this that the accused was in a position to adapt his testimony to the evidence given by his own witnesses and that this is an important factor for the Chamber to take into account.⁶⁹⁸

525. The defence invites the Chamber to consider that Katanga had the right not to testify but chose to do so. Article 67(g) affords the right to the accused not to testify and his silence is not to be taken into consideration in the determination of his guilt or innocence. It would therefore be wrong for his choice to testify or when to testify to be taken into consideration in the determination of his guilt or innocence.

526. Katanga's choice to testify last, rather than first or not at all, was made in consultation with counsel. It is to be noted that in a case with two accused it would be unfair on one accused to have to give evidence without the benefit of hearing the evidence called by his co-accused.

527. His evidence should not be given significantly less weight simply because he has heard the evidence of his witnesses. The prosecution has not demonstrated any area of his extensive evidence where Katanga presented a case reactive to other testimony. The principle elements of the defence case were clearly sign posted by cross-examination and a clear 'putting of the defence case'. It is to be noted that the prosecution makes the assertion that Katanga contradicted his own witnesses⁶⁹⁹ which on the prosecution's own logic should be an indication of truth.

528. The defence submits that Katanga's evidence was measured, coherent and detailed. It remained relatively unscathed by the lengthy and determined cross-examination of the lead prosecution counsel.

Evaluation of defence witnesses closely related to each other or to the accused

529. The prosecution spent significant proportions of its opportunity to cross-examine defence witnesses exploring personal connections that may exist between them and the accused. It is submitted that the relations of witnesses with the accused cannot, in themselves, undermine the possible weight of their evidence. While it may be a factor to take into account, it is more important to assess the actual strength of a witness's evidence having regard to his

⁶⁹⁸ Prosecution brief, para 237.

⁶⁹⁹ Prosecution brief, para 238.

or her demeanour, the consistency of their account internally and with respect to other evidence, as well as the extent to which their credibility has been undermined through cross-examination.

530. Each witness should be viewed as at least capable of providing truthful and credible evidence, whatever the nature of their relationship with the accused. It is submitted that this also follows from the principle enshrined in the right of the accused to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him.

531. In considering what constitutes equal conditions for the treatment of evidence it is submitted that it cannot be ignored that the position of the defence is not the same as that of the prosecution. There is no ‘accused’, no single person, on the side of the prosecution to which prosecution witnesses could be close to. It follows that in considering what amounts to equal conditions this situation of inequality must be taken into account. It would therefore not be right to place too much emphasis on the relationship of witnesses to the accused. The burden rests on the prosecution to establish that a witness is giving false evidence. If, as it is the case here, cross-examination has not succeeded in undermining defence evidence which has been given under oath, then potential motives to lie cannot be considered in the absence of an indication through answers to questions that the witness has lied.

532. Germain Katanga was in Aveba, a village. It is to be expected that the people who can account for his activities are those who were close to him and close to each other. The witnesses did not seek to hide the fact that they knew each other, which demonstrates their willingness to be truthful to the Court.

533. In addition, it is not always easy for a defence to find witnesses willing to testify in a case, as anyone with experience of a criminal process will know. This is all the more so given the distances and cultural differences present in a situation like the present. It may also be the case that there is a natural reluctance for persons to give evidence that they may perceive will bring them into conflict with the authorities or other interested parties. Nor does the defence have the opportunity for relocation to the extent that appears available to the prosecution. Despite these limitations, the defence succeeded in calling a variety of different types of witnesses. Many of the defence witnesses were not very close to the accused. For instance, Katanga barely knew, if at all, D-146, D-147, D-148, D-176, and D-259. In any event, the Chamber has seen the witnesses for the prosecution and the witnesses for the defence and will bear in mind that while the defence need prove nothing the prosecution must prove its case.

534. The victim representative suggests that D-147 is close to Katanga's family.⁷⁰⁰ However, this does not fairly represent the witness's testimony.⁷⁰¹ The victim representative further suggests that the main motive for D-146, D-147 and D-176 to testify was to be reunited [REDACTED].⁷⁰² The question is, did the prosecutor demonstrate that they did not tell the truth, or another way of expressing it, do you think they may have been telling the truth?

535. Last but not least, the defence wishes to point out that most defence witnesses testified publicly. This is a lot more frightening than to testify in closed session and under a pseudonym, as most prosecution witnesses did. The entire experience of testifying is more intense when people in the public gallery are focused on what the witness is saying. More importantly, people in DRC can follow what the witness is saying. Thus, there is a lot more scrutiny, which decreases the risk that a witness gives false testimony. Thus, the fact that the large majority of defence witnesses have testified publicly increases their credibility.

Weight to be attached to documents

536. There have been a variety of documents which have been submitted into evidence, both through witnesses and bar table motions. When the Chamber decided to admit certain documents, it had regard to three questions: that is the relevance of the document, its probative value and finally how any probative value weighs as against any prejudicial effect it might have on the accused.⁷⁰³

537. At the time of deliberations, when analysing admitted documents, the first question of the relevance of the document no longer needs to be addressed in a general manner. However, in reviewing the submissions of the parties the Chamber may still need to enquire into whether a document is relevant to the issue for which it is cited. The question of how any probative value weighs against any prejudicial effect to the accused remains of importance. If the document has been admitted then this implies that its prejudicial effect does not outweigh its probative value. Nonetheless, a document's admission does not mean that the Chamber does not recognize any prejudicial effect. Where there is prejudicial effect arising out of the use of a document then the balance between the documents prejudicial effect and its probative value is still of importance to the determination of the extent to which the Chamber should rely upon it, especially where its content is not corroborated by other evidence.

⁷⁰⁰ ICC-01/04-01/07-3253-Conf-Corr, Conclusions finales, para.23.

⁷⁰¹ P-0147-T-261-p.6 (FRA-p.5).

⁷⁰² ICC-01/04-01/07-3253-Conf-Corr, Conclusions finales, paras. 22-23, 36.

⁷⁰³ ICC-01/04-01/07-2635, para. 14: "In evaluating the Motions, the Chamber will follow the three-step approach adopted by Trial Chamber I. Accordingly, the Chamber will first assess the relevance of the material, then determine whether it has probative value and finally weigh its probative value against its potentially prejudicial effect."

538. The principal question, however, at this stage of the proceedings is the measure of probative value that a document brings to the determination of the issues at trial. It is submitted that in line with the Chamber's previous findings when addressing admissibility and assessing probative value, the Chamber should, at this stage of the proceedings, consider the reliability of the document and the measure in which it *does* influence the determination of a particular issue.⁷⁰⁴

539. In this case a variety of documents have been admitted, including Security Council resolutions and United Nations reports.

540. The prosecution and victim's legal representatives have relied extensively on certain reports of UN agencies. With respect to the reports of UN agencies, the Chamber has stated that insofar as such reports emanate from independent observers of the facts being reported, they are *prima facie* reliable. This is with the proviso that the author's identity and the sources of the information provided are revealed with sufficient detail.⁷⁰⁵

541. This latter observation still applies at this stage of the proceedings since certain UN documents admitted contain a wealth of information, some of which or much of which is not backed up by sufficient sources. The information contained therein is also often second and third hand anonymous hearsay with no indication of just how large the chain of hearsay extends. The same observation applies to NGO reports. A striking example of a UN document of this nature is the Special Report of the Secretary General on the events in Ituri, January 2002-December 2003 (EVD-OTP-00285). An example of an NGO report exhibiting these difficulties is the Human Rights Watch Report: *Le Fléau de l'Or* (EVD-OTP-00222).

542. The Eritrea Ethiopia Claims Commission has noted why UN documents should be viewed with scepticism.⁷⁰⁶ This analysis was not only in regard to reports from UN bodies, but also, to reports from the ICRC, the U.S. State Department, the British Home Office, and international human rights NGOs.⁷⁰⁷

⁷⁰⁴ ICC-01/04-01/07-2635, para. 20: "Probative value is determined by two factors: the reliability of the exhibit and the measure by which an item of evidence is likely to influence the determination of a particular issue in the case."

⁷⁰⁵ ICC-01/04-01/07-2635, para. 29.

⁷⁰⁶ Partial Award, Civilian Claims – Eritrea's Claims 15, 16, 23 & 27-32 (Eth. V. Eri), p. 34, Eritrea Ethiopia Claims Commission, 17 December 2004 ("[...] the Parties also noted the potential pitfalls and limitations of uncritical reliance on such materials, which were not prepared as evidence in legal proceedings . . . Third-party reports may indeed be based on incomplete or inaccurate information that the reporting entity cannot test or verify, including information provided by one or the other of the Parties. Such reports may reflect the interests or agendas of the reporters or those who provided them with information").

⁷⁰⁷ Partial Award, Civilian Claims – Eritrea's Claims 15, 16, 23 & 27-32 (Eth. V. Eri), p. 33, Eritrea Ethiopia Claims Commission, 17 December 2004.

543. M. Cherif Bassiouni details the deficiencies in UN human rights reports. To begin with, the “UN was established as a political organization, and, as such, it is largely governed by political considerations [...] the Security Council is unbridled in its determination of peace and security issues. These considerations are elevated above judicial or other forms of review, although always subject to self-review whenever considerations of power and interest require it.”⁷⁰⁸

544. Because the UN is process-driven, the emphasis is then on processes as opposed to on substantive outcomes.⁷⁰⁹ Justice has become so intertwined with politics, that it is actually just “another card for the *real politician* to play and eventually barter away, in a mostly hidden manner, when in pursuit of achieving a political goal.” Thus, according to Bassiouni, fact-finding missions are in reality efforts designed not to achieve politically unwanted results while appearing to be efforts at truth and justice. The relevant players have devised ways to accomplish this.

545. At the time of Bassiouni’s writing in 2001, there was “no standard operating procedure for fact-finding missions.”⁷¹⁰ This lack of standardized methods precludes any way to test the validity of the research and conclusions. Missions rely heavily on NGOs, government reports, and the media. Reports on human rights violations in South Africa, Iran, Iraq and Israel were made by people who had never set foot in the country.⁷¹¹

546. The ICJ in *DRC v Uganda* declined to rely on a MONUC report tendered by DRC government, because of its use of second hand hearsay.⁷¹² Similarly, the ICTY has held in relation to evidence from members of international organizations (i.e, peacekeeping missions), that their impartiality cannot be verified, that their knowledge of events was limited and contradictory in nature; that their information came from what was learned from representatives of warring factions; that they did not have access to the relevant headquarters or camps; that they were unable to observe the warring parties’ combat operations up close; and that their knowledge of how events unfolded was at times limited.⁷¹³

547. Another category of document that has been admitted is the Security Council Resolution. Security Council Resolutions have been used sparingly in international courts.

⁷⁰⁸ M. Cherif Bassiouni, *The UN and Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions*, 5 Wash. U. J.L. & Pol’y 35, 37-38 (2001).

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*

⁷¹² *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, para.159, December 19.

⁷¹³ *Prosecutor v. Hadzihasanovic*, Case No. IT-01-47, Trial Chamber Judgment, 15 March 2006, paras 303, 578-579.

They have been controversial at the ICTR and at the SCSL.⁷¹⁴ A resolution represents “invariably a mixture of posited facts, propositions of law, and opinions of the Secretary General or the powers that be in the Security Council.”⁷¹⁵

IV- CONTEXT OF THE BOGORO ATTACK OF 24 FEBRUARY 2003

A- Context in Ituri before the Bogoro Attack of 24 February 2003

548. There is no history book yet written on Ituri. Those involved in this trial have not had the advantage of being able to read themselves into the subject through reliable histories and documentation. Information becomes almost non-existent when one turns to the area of Walendu Bindi. In the course of the events that concern this Chamber there is not one, reliable record of what happened in Ituri. Even when the United Nations became involved, slowly and piecemeal, they did not come to the area until after February 2003 and to Aveba only at the end of 2003. The NGO's came even later. Most of the background information we have is second hand, often based on a partisan view, scattered through various documents, often unsourced. The prosecution chose not to call an expert or experts to provide the court and parties with a foothold on this history.

549. The defence do not intend to review the history of the first and second Congo wars and their consequence, nor the exacerbation of interests they provoked. The deeper background is not a trial issue and the main themes seem generally accepted.⁷¹⁶ The first Congo war of October 1996 to May 1997, apparently provoked by Mobutu's failure to deal with the Hutu forces that fled Rwanda into Eastern Congo, saw the removal of Mobutu and his replacement by Laurent Desire Kabila, father of the current President. Rwanda and Uganda played a joint role in supporting Kabila pere, whose AFDL forces were largely Rwandan trained and backed. Ituri was little effected. By early 1998, ethnic warfare overtook the Kivu area to the south of Ituri; Kabila fell out with his sponsors, and the RCD rebel force, opposed to Kabila and again supported by Rwanda and Uganda, emerged and advanced towards Kinshasa. The Second Congo War -1998 to 2002- followed, creating great loss and hardship - estimates of

⁷¹⁴ See *Prosecutor v. Fofana*, Case No. SCSL-2004-14-AR73, Fofana – Decision on Appeal Against “Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence,” 16 May 2005, para.49. *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali* (ICTR-97-21-T), *Prosecutor v. Sylvain Nsabimana and Alphone Nteziryayo* (ICTR-97-29A and B-T), *Prosecutor v. Joseph Kanyabashi* (ICTR-96-15-T), *Prosecutor v. Elie Ndayambaie* (ICTR-96-8-T) (Case No. 98-42-T), Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002, para.133.

⁷¹⁵ *Id.* at pp.13, 28.

⁷¹⁶ A general account of the wars can be found in ‘From Genocide to Continental War –the ‘Congolese’ Conflict and the Crises of Contemporary Africa’, Gérard Prunier, Hurst and Company, London, 2009.

five million dead are common, most of them victims of disease. The war drew in Rwanda, Uganda, Angola, Sudan, Burundi, Namibia and even Zimbabwe. Kabila *père* was assassinated, his son took over and a stalemate of sorts left the country divided. Rwanda and Uganda were left deep in Eastern Congo. They took the opportunity to exploit the local mineral and other wealth⁷¹⁷ and eventually fell out and fought one another – notably at Kisangani. By the time with which this case is concerned, they are still entrenched in Eastern Congo, with a mutual simmering hostility, ready to take advantage of any situation that will damage the other. The Ugandans did not withdraw from Ituri until early June 2003. The Rwandans withdraw, officially, from the Kivus in late 2002, but have been back since and exercise a heavy influence on the Kivu region. The events concerning Bogoro were played out against the backdrop of the ending of a major conflict. It is against that background, and the DRC's slow recovering of its sovereignty in the area, that the trial events occurred.

550. Ituri is a mere district of Orientale Province but is larger than Belgium, a little smaller than the Netherlands – and hillier. It is a sizeable place made 'bigger' by lack of infrastructure.⁷¹⁸ There are no tarmac roads. There are many ethnic groups.⁷¹⁹ Its capital is Bunia. It is composed of five territories, Aru, Mahagi, Djugu (with mainly Hema/Gegere and Lendu) and Irumu (with mainly Hema and Ngiti), themselves divided into *collectivités*. The *collectivité* Walendu Bindi is 90% Ngiti.⁷²⁰ The Ngiti are a Lendu sub group but speak a different language - Ndruna. The Ngiti are herdsmen and pastoralists. They are noted individualists. They do not take to being led easily.⁷²¹

551. The defence submits that there is a danger that the ethnic nature of the problem between Hema and Ngiti, in and around the district of Walendu Bindi, may be too over-emphasised. There is no significant history of such a problem there.⁷²² The two communities have lived together peacefully⁷²³ and, by all accounts, the two communities again live peacefully together since at least mid 2003.⁷²⁴ There has been no evidence of the land conflict that

⁷¹⁷ EVD-OTP-00206/MONUC Special Report/paras4, 7, 16; EVD-OTP-00205/MONUC Final Report/p.0291/para.2; EVD-OTP-00222/HRW report, '*Le Fléau d'or - RDC*', 2005/pp0364, 0367-0369, 0379-0381, 0388.

⁷¹⁸ D2-300-T-317-pp.15-17 (FRA-pp.13-15).

⁷¹⁹ EVD-OTP-00206/MONUC, Special Report on the events in Ituri, January 2002-December 2003/para.12; EVD-OTP-00205/MONUC Kinshasa, Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003, June 2003/p. 0291/para.2.

⁷²⁰ EVD-OTP-00206/MONUC Special Report/para.13; EVD-OTP-00205/MONUC Final Report/p.0291/para.2; D2-300-T-314-p.52-l.18-24 (FRA-p.46-l.10-15); EVD-D02-00217/Sketch of Ituri where Katanga draw a circle representing the Walendu-Bindi.

⁷²¹ P-12-T-198-p.47 (FRA-pp.49-50), noting that they have difficulty obeying a leader, contrary to the Hema.

⁷²² D2-300-T-314-p.50-l.14-18 (FRA-p.44-l.8-14).

⁷²³ D2-136-T-240-p.23 (FRA-pp.20-21). See also, for the Lendu, D2-176-T-256-p.48-l.2-7 (FRA-pp.40-41).

⁷²⁴ P-166-T-225-p.20-21 (FRA-pp.16-18).

appears to have dominated relations between Gegere and Lendu further to the north.⁷²⁵ The problems caused by the Hema dominated UPC were not visited on the area until after the fall of Lopondo in August 2002, that brought the conflict in the Walendu Bindi. The events of Walendu Bindi and the role of its people in facing their plight is unique to the area and should not be judged by the events elsewhere.

552. Uganda, under the Museveni regime, has played a bloody role in Ituri, including Walendu Bindi. As an occupying power Ugandan authorities played a direct role in political and administrative changes in Ituri from 1998 to 2003, stimulating new political parties and militia groups.⁷²⁶ The International Court of Justice ruled that, between August 1998 and 3 June 2003, Uganda engaged ‘in military activities against the DRC on the latter’s territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC’.⁷²⁷

Attacks by Ugandans in Walendu Bindi

553. Problems started to arise in Walendu-Bindi from 1998. The Ugandan army was based in Gety and Boga and attacked the local people.⁷²⁸ People fled to the bush and stayed there for significant periods of time.⁷²⁹ At that time, the schools, the hospital, and the markets were closed in Aveba.⁷³⁰ When Katanga first arrived in Aveba in October 1998,⁷³¹ he found the Ugandans in Gety and his family hiding in the bush and witnessed the killing of fellow school children in 2000.⁷³² Towards the end of 2000 the Ugandans left Walendu-Bindi only to return in January 2001.⁷³³ They inflicted terrible things on the ordinary people. The *collectivité* of Walendu Bindi was the object of mass killings and destruction of hundreds of localities.⁷³⁴ They caught and buried alive the administrative advisor to Chef Akobi, chief of the Walendu-Bindi *collectivité*.⁷³⁵ Katanga said his behaviour in the face of one Ugandan attack earned him a reputation for bravery.⁷³⁶ The MONUC Special report states that from 9 February to 24 April 2002, the UPDF based in Gety, together with Hema and Bira militia groups, carried out

⁷²⁵ See, regarding the Lendu, D2-176-T-256-p.47-l.1-6 (FRA-pp.40-41).

⁷²⁶ Admissions n°1 and 2 of the parties taken into account by the Trial Chamber in its Decision on Agreements as to Evidence, ICC-01/04-01/07-2681, 3 February 2011, confirmed by EVD-OTP-00229, ICJ - Case concerning Armed Activities on the Territory of the Congo, DRC v. Uganda, 19 December 2005, para. 175.

⁷²⁷ EVD-OTP-00229, ICJ - Case concerning Armed Activities on the Territory of the Congo, DRC v. Uganda, 19 December 2005, paras 54, 149, 167, 178-180, 250, pp.101-102.

⁷²⁸ D2-136-T-240-p.18 (FRA-p.16).

⁷²⁹ D2-136-T-240-p.19 (FRA-p.17).

⁷³⁰ D2-136-T-240-p.20 (FRA-p.18).

⁷³¹ D2-300-T-314-p.34-l.2-11, p.41-42 (FRA-p.30-l.2-11, 35-36).

⁷³² D2-300-T-314-p.58 (FRA-pp.51-52); D2-136-T-240-pp.19-21 (FRA-p.17-19).

⁷³³ D2-300-T-314-pp.59-60 (FRA-p.52-54).

⁷³⁴ D2-300-T-314-pp 45-49, 60-63 (FRA-pp.40-43, 54-56); EVD-OTP-00206, MONUC Special Report, fn 22.

⁷³⁵ D2-300-T-314-pp.62-63 (FRA-pp.55-56).

⁷³⁶ See, for instance, D2-300-T-314-p.65-l.1 (FRA-p.57-l.20), D2-300-T-324-p.79-l.15-22 (FRA-p.72-l.25-p.73-l.5).

large-scale operations against the Ngiti villages in the Walendu Bindi *collectivité*. Hundreds of Ngiti localities were completely destroyed during bomb attacks by Ugandan army helicopters together with Hema militia on the grounds. A local NGO reported a total of 2867 civilians killed and 77 localities completely destroyed, resulting in the displacements of 40 000 civilians.⁷³⁷

Germain Katanga

554. Germain Katanga was born on 28th of April 1978 in Mambasa.⁷³⁸ He lived there until the age of 14.⁷³⁹ He was raised by his uncle and aunt and considered them as his parents.⁷⁴⁰ His uncle was a soldier in the National Army of Zaire. They moved to Isiro, Upper Uele when he was fourteen.⁷⁴¹ He attended school and trained in the civil guard in 1996.⁷⁴² His uncle was killed in 1996 during the AFDL advance.⁷⁴³ Katanga went to Lolwa to search for his biological mother, Elizabeth Regine. He met her but as she could not help with his studies, he returned to Isiro to sell his uncle's house and then returned to Lolwa where he bought a motorbike.⁷⁴⁴ He met his father and his brothers and sister for the first time in Aveba in October 1998.⁷⁴⁵ Katanga started his fourth year in humanities and pedagogy at the Bajanga institute in November 1998, though failed the annual exam.⁷⁴⁶ He was living in his father's house at Atelengba, also known as Atele 2. In September 1999, Katanga started the normal school year and progressed through school up to the sixth year.⁷⁴⁷ There was no militia in Aveba at the time,⁷⁴⁸ but with the events related above it was not long before resistance to the Ugandans became an obligation.

Self defence and 'combattantisme'

555. Slowly, self defence groups began to organise. The young men who participated in 'combattantisme' called themselves combatants.⁷⁴⁹ They fought in self-defence with traditional weapons, spears, machetes, bows and arrows.⁷⁵⁰ The 'sages' called them the

⁷³⁷ EVD-OTP-00206/MONUC Special Report/para. 42.

⁷³⁸ D2-300-T-314-p.21 (FRA-p.19); EVD-D02-00118/Map indicating Mambasa.

⁷³⁹ D2-300-T-314-p.23 (FRA-p.20).

⁷⁴⁰ D2-300-T-314-pp.37-38 (FRA-p.33).

⁷⁴¹ D2-300-T-314-pp.31-32 (FRA-pp.27-28).

⁷⁴² D2-300-T-314-pp.35-36 (FRA-pp.31-32); D2-300-T-320-p.46 (FRA-pp.47-48).

⁷⁴³ D2-300-T-314-p.34 (FRA-p.30).

⁷⁴⁴ D2-300-T-314-pp.39, 41 (FRA-pp.34, 35-36).

⁷⁴⁵ D2-300-T-314-pp.41-42 (FRA-p.36).

⁷⁴⁶ D2-300-T-314-pp.42-43 (FRA-pp.36-37).

⁷⁴⁷ D2-300-T-314-pp.43-45 (FRA-pp.37-39) and EVD-D02-00215/Photograph of his father's house. Public.

⁷⁴⁸ D2-136-T-240-p.20-l.19 (FRA-p.18-l.21).

⁷⁴⁹ D2-300-T-315-pp.46-48, 50-51 (FRA-pp.41-43, 44-45).

⁷⁵⁰ D2-300-T-315-pp.41-42, 47-48, 50-51 (FRA-pp.36-38, 42-43, 44-45); D2-136-T-240-p.19-l.10-14 (FRA-p.17-l.17-20).

youngsters.⁷⁵¹ Many people from Kobhu in the north fled to the Walendu-Bindi *collectivité*. Anyone in Aveba who was physically able would defend the village against the Ugandans⁷⁵² to prevent them from exterminating the population,⁷⁵³ using mainly traditional weapons. There was nobody in Aveba to organise the defence.⁷⁵⁴ Over time, combatants managed to obtain weapons from Ugandan fighters on the battlefield.⁷⁵⁵ The *auto défense* began predominantly with combatants who came from other regions such as Aveba Yuda who came from Bavi⁷⁵⁶ and was killed by the Ugandans,⁷⁵⁷ and others.⁷⁵⁸ In Aveba, however, there was no self-defence group as such – ‘one might hear an explosion, and go to assist’.⁷⁵⁹

556. The real force between the local defence groups were the sages. Kasaki Banduru, who was a *féticheur*, a traditional healer from Aveba,⁷⁶⁰ was the most powerful sage in Walendu-Bindi collectivité after Kakado.⁷⁶¹ Kasaki encouraged resistance when the local chief, Akobi, opposed it⁷⁶² and the Ugandans suffered a defeat⁷⁶³ which won Katanga much credit, particularly perhaps with Kasaki.

557. One particular group that emerged was the group led by Kandro. D-148 was [REDACTED] and described his situation. Chased out of Talolo by Bira in early 2001, Kandro, a former Mobutu and AFDL and RCD soldier,⁷⁶⁴ took refuge in the mountains near Songolo.⁷⁶⁵ D-148 and others then followed Kandro to Tche where Kakado organized a group of combatants.⁷⁶⁶ D-148 also spoke of Kisoro, who had set up camp at Kaswara and, even at that time, would go to Aveba, to cause disorder.⁷⁶⁷ D-148 testified that after the battle at Aveba, Bayonga authorised Kandro to build a camp in Songolo.⁷⁶⁸ D-148 and the other combatants in Kandro’s group moved with him to Songolo and acted under his orders. He

⁷⁵¹ D2-300-T-315-pp.50-51 (FRA-p.45).

⁷⁵² D2-136-T-240-pp.18-20 (FRA-pp.16-18).

⁷⁵³ D2-501-T-260-p.14-l.23-24 (FRA-p.16-l.20-21).

⁷⁵⁴ D2-136-T-240-p.20 (FRA-p.18).

⁷⁵⁵ D2-300-T-317-pp.45-46 (FRA-p.40).

⁷⁵⁶ D2-136-T-240-pp.20, 21 (FRA-pp.18, 19).

⁷⁵⁷ D2-136-T-240-p.21 (FRA-p.19).

⁷⁵⁸ D2-136-T-240-pp.20, 21 (FRA-pp.18, 19); D2-300-T-315-pp.65-66 (FRA-pp.58-59).

⁷⁵⁹ D2-300-T-314-pp.58-59 (FRA-pp.51-52).

⁷⁶⁰ D2-300-T-314-p.65 (FRA-p.58); T-315-p.35 (FRA-pp.31-32).

⁷⁶¹ D2-300-T-315-pp.33, 35 (FRA-pp.29, 32).

⁷⁶² D2-300-T-314-pp.62-63 (FRA-pp.55-56); EVD-D02-00220/Map annotated by Germain Katanga where is indicated Zitono.

⁷⁶³ D2-300-T-314-pp.63-65 (FRA-pp.56-57); D2-300-T-321-pp.43-44 (FRA-pp.47-48).

⁷⁶⁴ D2-148-T-278-pp.64, 65-66 (FRA-pp.57-58, 59).

⁷⁶⁵ D2-300-T-315-p.54 (FRA-p.48).

⁷⁶⁶ D2-148-T-278-pp.64, 66-67 (FRA-p.58, 59-60).

⁷⁶⁷ D2-148-T-279-p.16 (FRA-p.14); D2-148-T-281-pp.19-20 (FRA-p.16).

⁷⁶⁸ D2-148-T-278-p.68 (FRA-pp.61-62).

participated in a battle against the Ugandans at Sagdi.⁷⁶⁹ Following this battle, D-148 participated in a battle at the centre of Gety, where the Ugandans had a base.⁷⁷⁰

558. The Bira-Ngiti problem arose again later in Nyakunde, intensified by the behaviour of the Ugandans there.⁷⁷¹ The Bira chased the Ngiti out.⁷⁷² The UN Special Report confirms that, throughout 2001 and early 2002, the Ngiti community was targeted and eventually driven out by the Bira.⁷⁷³ Katanga was living in Nyakunde to take exams and, with his sister, sought refuge at the hospital⁷⁷⁴ and returned to Aveba. He did not attend school for the academic year September 2001 - July 2002 due to the disturbances. His family was large and he did everything he could to survive. His uncle had taught him how to hunt.⁷⁷⁵ He shot elephants and okapi but would join the auto-defence if necessary.⁷⁷⁶

559. There is no evidence of attacks by these Walendu Bindi 'defenders'- with the exception of the madcap attack on the Ugandans at Bunia airport, who responded with tanks and helicopters and heavy weapons.⁷⁷⁷ There is no camp in Aveba, no mention of battalions or military structure.

560. The Sun City Agreement was signed in South Africa on 19th April 2002.⁷⁷⁸ It established a framework for the DRC to have a unified, multiparty government with democratic elections and led to the signing by political parties on 17th December 2002 of 'The Global And All-Inclusive Agreement'.⁷⁷⁹ On 30 July 2002, Rwanda and the Democratic Republic of Congo signed the Pretoria Accord concerning the withdrawal of Rwandan soldiers. On 6th September 2002 the Luanda agreement formalised peace between Uganda and the DRC, aimed at Uganda withdrawing its troops.⁷⁸⁰ Despite these agreements both Rwanda and Uganda continued to seek, establish and support local groups in the region.⁷⁸¹

⁷⁶⁹ D2-148-T-278-pp.68-69 (FRA-p.62).

⁷⁷⁰ D2-148-T-278-p.69 (FRA-p.62).

⁷⁷¹ D2-134-T-257-p.32 (FRA-pp.28-29).

⁷⁷² D2-134-T-257-pp.33-34 (FRA-pp.29-30).

⁷⁷³ EVD-OTP-00206/MONUC Special Report/p.DRC-OTP-0129-0267, para. 50.

⁷⁷⁴ D2-300-T-315-pp.17-18 (FRA-pp.16-17).

⁷⁷⁵ D2-300-T-315-pp.24-25, 32-33 (FRA-p.22, 29).

⁷⁷⁶ D2-300-T-315-p.25-l.8-10 (FRA-p.22-l.26-28); D2-300-T-324-p.68-l.9-14 (FRA-p.61-l.5-12).

⁷⁷⁷ D2-300-T-314-pp.49-50 (FRA-pp.42-44).

⁷⁷⁸ EVD-OTP-281/Texte de l'Accord de Sun City.

⁷⁷⁹ EVD-OTP-280/Accord global et inclusif sur la transition en République Démocratique du Congo.

⁷⁸⁰ See EVD-D03-00067/Amendement de l'Accord signé entre la RDC et l'Ouganda à Luanda, Angola, le 6/09/2002, dated 10 February 2003, p.1, referring to it.

⁷⁸¹ EVD-OTP-00206 or EVD-OTP-285/MONUC Special Report/paras4, 6, 7, 16, 28-29; EVD-OTP-00205/MONUC Final Report/p.0291/paras.2-3; EVD-OTP-00222/HRW report, 'Le Fléau d'or - RDC', 2005/pp.0364, 0368-0369, 0379-0381, 0388; EVD-D03-00079/Déclaration du FNI, p.2; EVD-OTP-00240/PUSIC Déclaration Politique, p.3; EVD-D03-00084/FNI letter, pp.1-2; EVD-D02-00072/P-12's letter; D2-236-T-244-p.29-l.20-21, 29-30 (FRA-pp.26-27); P-317-T-229-pp.36-37 (FRA-pp.31-32); P-317-T-230-pp.49-51 (FRA-pp.42-44); D2-228-T-252-pp.14-17 (FRA-pp.15-18); D2-228-T-250-p.13-l.15-18 (FRA-p.12-l.19-22); P-12-T-200-pp.23-24 (FRA-pp.21-22); P-12-T-202-pp 24-27, 29-30, 41-49 (FRA-pp.23-26, 28, 39-48).

561. Jean Pierre Lopondo Molondo was appointed Governor of Ituri by Mbusa Nyamwisi in February 2002. He was chief of staff of the RCD-K/ML army – the APC. In April, about a brigade and a half, 4500 well-trained APC soldiers, mainly of Hema ethnicity, mutinied and joined the UPC, significantly weakening the APC.⁷⁸² At Lopondo's invitation Kandro, and other Ngiti and Lendu, arrived in Bunia.⁷⁸³ The Ugandans and the UPC did not approve. At the beginning of August 2002, Uganda withdrew its support from the RCD-K/ML, partly because of its links with Kinshasa, in favour of the UPC.⁷⁸⁴ On 6th-9th August they together attack the RCD-K/ML APC forces using heavy weapons and tanks.⁷⁸⁵ Lopondo escaped with his life. Many Lendu and Ngiti who had taken refuge at his residence were killed. The APC fled.⁷⁸⁶ Despite its defeat, the APC remained a regular army. It was well trained and armed. The RCD-K/ML moved their party HQ from Bunia to Beni.⁷⁸⁷

562. The subsequent events are well known to the Chamber, Lopondo fled shoeless to Songolo and meets up with Kandro, before continuing on his way to Beni. The soldiers who fled with Lopondo (perhaps one battalion) initially stayed in Songolo and then headed towards Singo; other APC soldiers ended up in Zumbe who then left for Songolo, or other Lendu or Ngiti areas in Ituri.⁷⁸⁸

563. Several positions in and around Bunia that had been occupied by the UPDF or APC forces were now occupied by UPC troops. Bogoro was one of them. Later in August 2002, UPC troops came to relieve the UPDF in Nyakunde. According to the MONUC Special Report, the UPC replaced the UPDF there “apparently to launch attacks on the bordering Ngiti localities”; the UPC “reportedly requested the assistance of the Bira community in attacking the Ngiti”.⁷⁸⁹

564. On 31 August 2002, Songolo was attacked by a group of 500 UPC soldiers together with 50 Bira based in Nyakunde.⁷⁹⁰ D-148, who was [REDACTED] at the time, said there was a lot of destruction, houses were set on fire and people killed.⁷⁹¹ D-161, [REDACTED]

⁷⁸² D2-300-T-315-pp.26-27 (FRA-pp.23-25).

⁷⁸³ D2-300-T-315-p.27-28 (FRA-p.25); D2-148-T-279-pp.51-52 (FRA-pp.45-46).

⁷⁸⁴ EVD-OTP-00222, *Le Fléau d'or*, p. 0392.

⁷⁸⁵ Admission n°3 of the parties taken into account by the Trial Chamber in its Decision on Agreements as to Evidence, ICC-01/04-01/07-2681, 3 February 2011.

⁷⁸⁶ Admission n°3 of the parties taken into account by the Trial Chamber in its Decision on Agreements as to Evidence, ICC-01/04-01/07-2681, 3 February 2011.

⁷⁸⁷ D2-236-T-242-pp.43-1.7-11, 44-1.3-8 (FRA-p.37-1.8-11, p.37-1.27-p.38-1.3).

⁷⁸⁸ D2-300-T-321-p.50 (FRA-p.55); D2-136-T-240-p.24 (FRA-p.21) ; D2-148-T-279-pp.53-54 (FRA-p.47).

⁷⁸⁹ EVD-OTP-00206/MONUC Special Report/para.50.

⁷⁹⁰ EVD-OTP-00206/MONUC Special Report/para. 51. See also EVD-D03-00098/Letter of 15 November 2002 giving details of the Songolo attack of 31 August 2002/p.0194-0350.

⁷⁹¹ D2-148-T-279-pp.7, 51, 54 (FRA-p.6, 45, 47).

testified that Ngiti civilians living in Songolo were killed.⁷⁹² The MONUC Special Report reported 140 deaths, mostly women and children, and that a survey “among the population found that 787 people were missing. Up to now, it has not been possible to establish how many were killed and how many simply ran away. According to a Congolese non-governmental organization, UPC abducted 12 civilians.”⁷⁹³ Interestingly, Katanga thought those figures exaggerated.⁷⁹⁴

565. Kandro and others fled to Avenyuma and then to Singo. It would seem from the evidence of D-148 that it was at this time they adopted the name ‘*Garrison Mobile*’.⁷⁹⁵ Major Faustin Kakule, with the 12th battalion of the APC, arrived at Singo. Together, these forces attacked Nyakunde on 5 September 2002.⁷⁹⁶ D-148 said that the most important commanders were Kandro, Cobra, Faustin.⁷⁹⁷ D-148 claimed that the target of the attack was the newly installed UPC base. The town was substantially a Bira town and any Hema appeared to have left. The civilians killed were mainly Bira. The true number of casualties is unknown, reports are largely unsourced and no forensic evidence has been produced.⁷⁹⁸ D-148 stated that everyone participated in the looting, including “the APC soldiers who were of Nande origin”,⁷⁹⁹ who then went to Beni with their loot.⁸⁰⁰ Much of the hospital equipment appears to have been transported off in that way.⁸⁰¹

566. Nyakunde is a unique event in 2002. It is the first joint APC/combatants operation. It was the product of exceptional circumstances, triggered by the massive attack on the village of Songolo. There is nothing as dangerous as a retreating - army as was the APC. Commander Faustin was reportedly arrested in Beni and detained by the APC, though it is unclear whether his arrest was linked to the atrocities in Nyakunde.⁸⁰² He is currently in FARDC.

567. P-219 claims he saw Katanga at Nyakunde on the day after the attack.⁸⁰³ In his statement, this witness however stated that he went to Nyakunde two days after the attack.⁸⁰⁴

⁷⁹² D2-161-T-269-p.42 (FRA-p.36).

⁷⁹³ EVD-OTP-00206, MONUC Special Report, para.51.

⁷⁹⁴ D2-300-T-322-p.65 (FRA-p.66); EVD-D03-00098, dated 15 November 2002 (Letter, Transmission Rapport circonstancié, No. 002/CLB/2002, Pour la Communauté Lendu de Base: [illegible] Lega Athidho Secrétaire Administratif, A Monsieur Le Président du RCD-Kis/ML à Beni).

⁷⁹⁵ D2-148-T-279-p.13 (FRA-p.11).

⁷⁹⁶ D-148-T-279-pp.7-8, 54-55 (FRA-pp.6-7, 48); D2-136-T-241-pp.20-21 (FRA-pp.18-19); D2-129-T-271-pp.21-24 (FRA-pp.18-21); D2-160-T-272-p.70 (FRA-p.61-62); EVD-OTP-00206/MONUC Special Report/paras 52, 56, 58, 61.

⁷⁹⁷ T-279-p.8-l.18-20 (FRA-p.7-l.23-25).

⁷⁹⁸ D-148-T-279-p.55-l.10-23 (FRA-pp.48-49); P-317-T-229-p.37 (FRA-p.32).

⁷⁹⁹ D2-148-T-280-p.7 (FRA-p.6).

⁸⁰⁰ D2-148-T-279-p.60 (FRA-p.53).

⁸⁰¹ D2-148-T-279-p.60-l.2-8 (FRA-p.53-l.1-6).

⁸⁰² Germain testified that Commander Faustin was questioned by the military command in Beni to explain the situation in Nyakunde and was subsequently arrested. See D02-300-T-315-p.68 (FRA-p.61).

⁸⁰³ D2-148-T-204-pp.57-59 (FRA-pp.58-60).

In any event, he cannot affirm that Katanga participated in the attack. During the entire 45 hours interview, he did not mention that he saw Katanga take anything from Nyakunde. In court, however, he stated that Katanga took a Honda 250cc motorbike. The witness also indicated in court that he did not see Katanga kill or loot.⁸⁰⁵ The Defence argues elsewhere in this brief that this witness is unreliable and should not be relied on for any finding against the accused.

568. P-12 testified that he never spoke with Katanga about the Nyakunde attack of September 2002.⁸⁰⁶ However, the witness then stated that Katanga told him that he was in Cotrojene (phon.) until Kandro died, and that he was too young, but that he did take part in this Nyakunde attack.⁸⁰⁷ Katanga did not give further details.⁸⁰⁸ Witness 12 thus contradicts himself as to whether he spoke to Germain about the Nyakunde attack. This part of his evidence should therefore not be relied on. Elsewhere in this brief, it is argued that this witness is unreliable when it comes to Katanga's alleged confessions.

569. Accordingly, the evidence linking Katanga to Nyakunde is unreliable, inconclusive and largely based on hearsay. It is also contradicted by other evidence. Katanga says he was at Nyabiri.⁸⁰⁹ Christian Mbojima stated that he met him in Bavi-Olongba, only 3 kilometres from Nyabiri, in early August 2002 and that Katanga, though a combatant, did not become a commander until later when he came to live in Aveba.⁸¹⁰ D-148 was at Nyakunde and did not see Katanga.⁸¹¹ Thus, the Prosecution clearly failed to establish that Katanga was present in Nyakunde during or in the aftermath of the battle.

570. Katanga said that Kandro did not come to the assistance of Aveba during the Ugandan attacks and Nyakunde was on Kandro's turf. Katanga explained that "if you run into any problems you would defend yourselves or by yourselves."⁸¹² It was precisely that attitude that the later Beni meetings with the RCD-K/ML, Adirodu and EMOI sought to address.

571. Nono, a commander from Aveba, was killed at Nyakunde.⁸¹³ In an extraordinary episode, Cobra Matata Banaloki went to Aveba and massacred 20 locals, claiming Nono had been bewitched. Katanga was not present as he was still in Nyabiri.⁸¹⁴ The episode illustrates

⁸⁰⁴ P-219-T-207-p.61 (FRA-pp.63-64).

⁸⁰⁵ P-219-T-207-pp.61-62 (FRA-pp.64-65).

⁸⁰⁶ P-12-T-197-p.29 (FRA-p.33).

⁸⁰⁷ P-12-T-197-pp.29-30 (FRA-p.33) [*Discrepancy noted*].

⁸⁰⁸ P-12-T-197-p.30 (FRA-p.33).

⁸⁰⁹ D2-300-T-315-pp.24-25, 44 (FRA-pp.21-22, 39-40).

⁸¹⁰ D2-160-T-274-p.14 (FRA-p.13).

⁸¹¹ D2-148-T-279-pp.8, 11, 58-59 (FRA-p.7, 10, 52).

⁸¹² D2-300-T-321-pp.66-67 (FRA-pp.71-72).

⁸¹³ D2-160-T-272-pp.70-71 (FRA-pp.62-63).

⁸¹⁴ D2-300-T-321-p.62 (FRA-pp.67-68) ; T-325-p.67 (FRA-p.59).

not only superstitious belief but Cobra's erratic nature. That was to be further demonstrated a week or two later with the confrontation leading to Kandro's death. Cobra's and Kandro's groups had been able to co-operate with each other.⁸¹⁵ Cobra was the oldest of the commanders in the collectivity and, in September 2002, was based at Omi hill with approximately 50 trained men under his control.⁸¹⁶ However his behaviour did not endear him to the locals.⁸¹⁷ It would seem Kandro's star rose,⁸¹⁸ particularly due to his association with Lopondo. The APC connection would appear to be a strong link. Whatever the reasons (some say an argument over pillage, others resentment by Cobra of Kandro) the upshot was that Kandro was shot dead in Olongba market in mid September, almost certainly by Cobra's bodyguard.⁸¹⁹

572. As late as September 2002, the combatants plainly had no real structure and only a loose and competitive relationship. With the death of Kandro, some were at each other's throats. Everyone was hunting Cobra, who had fled to the bush, particularly members of the *Garrison* and Ndekote, Kandro's younger brother, who proclaimed himself leader of the group.⁸²⁰ It took several months for Cobra to strengthen his alliances sufficiently to confront and defeat the *Garrison* group, who were chased out of Avenyuma,⁸²¹ and set up camp in Kagaba. Katanga places their arrival there as January 2003;⁸²² D-148 said it was two or three months after Kandro's death,⁸²³ which would place it in late November to December 2002. Kagaba was to be the main point of attack on Bogoro. At no time do these combatants have a monolithic structure. Even after the *Garrison* moved to Kagaba –just a month or two before Bogoro– there is a falling out between its then leaders, Ndekote, and Yuda.⁸²⁴ Yuda wins, and Ndekote and his followers go to Songolo.⁸²⁵ Katanga was never part of the *Garrison*.⁸²⁶

573. Cobra returned and set up camp at Oudo Mbafele's camp in Olongba.⁸²⁷ Katanga testified that there was also a position in Medhu where Mbafele was in charge.⁸²⁸ In Gety –

⁸¹⁵ D2-300-T-315-pp.52-55 (FRA-pp.46-49).

⁸¹⁶ D2-300-T-315-pp.55-56 (FRA-pp.49-50); EVD-D02-00220, undated (Map annotated by Germain Katanga (DRC-D2-300) on 29 September 2011 with the additions of villages in Walendu-Bindi).

⁸¹⁷ D2-300-T-315-pp.54-55 (FRA-pp.48-49).

⁸¹⁸ D2-300-T-315-p.52 (FRA-pp.46-47).

⁸¹⁹ D-148-T-279-p.60-l.1.6 (FRA-p.53); D-129-T-271-pp.52-53 (FRA-p.47); P-219-T-205-p.7-l.12-17 (FRA-p.7-l.1-7); D-160-T-272-p.71 (FRA-p.63); D-160-T-273-p.82 (FRA-p.75).

⁸²⁰ D2-300-T-315-pp.60-61 (D2-300-T-315-FRA-p.54); D2-148-T-279-pp.11, 13 (FRA-pp.9, 11-12); D2-148-T-280-p.11 (FRA-p.9).

⁸²¹ D2-148-T-279-pp.13-14 (FRA-p.12); D2-300-T-315-p.61 (FRA-pp.54-55).

⁸²² D2-300-T-315-p.61-62 (FRA-p.55).

⁸²³ D2-148-T-280-p.11 (FRA-pp.9-10).

⁸²⁴ D2-148-T-279-p.14 (FRA-p.12).

⁸²⁵ D2-148-T-279-p.14 (FRA-p.12); D2-300-T-315-p.61 (D2-300-T-315-FRA-p.54-55).

⁸²⁶ D2-148-T-280-pp.12-13 (FRA-pp.10-11).

⁸²⁷ D2-300-T-315-p.61 (FRA-p.55); T-320-pp.69-70 (FRA-pp.70-71); D2-001-T-277-p.56 (FRA-p.56).

⁸²⁸ D2-300-T-320-p.69 (FRA-pp.70-71).

also known as Gety-Etat - Captain Mutombo de Muto had a company of approximately 150 men there from the time the Ugandans left. There was a position at Lakpa by February 2003 commanded by Lobo Tchamangere.⁸²⁹

574. These camps were largely autonomous and “[n]o one had authority over anyone else on his turf”.⁸³⁰ There was no hierarchy of combatants or commanders. Katanga, said everyone would give themselves titles such as ‘commander of operations’, ‘S-4’, or ‘battalion commander.’⁸³¹ A ‘battalion commander’ may have just 12 or 15 people under his command.⁸³² The existence of names of rank or function are not truly indicative of structure. This was essentially a rag-tag collection, not Saint-Cyr.

575. Internal rivalries and competition prevailed.

“We had problems among ourselves and, although it is said that we were all combatants and that we were all helping our communities, you may want to know that there were internal problems between us which may not have been understood by those looking in from outside.”⁸³³

“[...] each commander had his own stronghold and his followers obeyed his orders, and there was this atmosphere of mistrust between the commanders. They did not wish to be under the leadership of the others.”⁸³⁴

Katanga said he had no involvement in these internal conflicts. He attended Kandro’s funeral in Avenyuma⁸³⁵ and left Nyabiri with Kasaki about a week later, to return to Aveba in October.

576. In Aveba the BCA camp was established some time in 2002 and certainly there by September.⁸³⁶ BCA stood for *Bureau de Combatants d’Aveba* but later *Bureau de Coordination d’Aveba*, and was one kilometre from Katanga’s father’s house.⁸³⁷ The camp was occupied by local combatants and an APC platoon of 36 men. Alpha Bebi was the platoon’s commander, followed by Kambale.⁸³⁸ Towards November, December 2002, Alpha Bebi left and set up a camp at Bukiringi, later, in May 2003, called the Tiger Battalion.⁸³⁹ Between September and November 2002, the number of combatants at the Camp BCA and elsewhere in Aveba town grew to approximately 500 combatants⁸⁴⁰ and included many war-

⁸²⁹ D2-300-T-316-p.14 (FRA-p.12) ; D2-001-T-277-pp.56-57 (FRA-pp.50-51).

⁸³⁰ D2-300-T-324-p.89 (FRA-pp.80-81).

⁸³¹ D2-300-T-317-pp.26-27 (FRA-pp.23-24).

⁸³² D2-300-T-317-p.27 (FRA-p.24).

⁸³³ D2-300-T-321-pp.67-68 (FRA-pp.72-73). See also D2-350-T-253-p.41 (FRA-pp.43-44); D2-129-T-271-pp.32-33, 64 (FRA-pp.29, 75); D2-228-T-250-pp.12-13 (FRA-pp.11-12).

⁸³⁴ D2-129-T-271-pp.32-33 (FRA-p.29).

⁸³⁵ D2-148-T-279-p.12-l.2-4 (FRA-p.10-l.20-21).

⁸³⁶ D2-300-T-315-pp 62-63 (FRA-pp.55-56).

⁸³⁷ D2-300-T-316-p.24 (FRA-pp.21-22); EVD-D02-00225/Photograph of space where was the BCA

⁸³⁸ D2-300-T-315-p.63 (FRA-pp.56-57).

⁸³⁹ D2-001-T-277-p.57 (FRA-p.51).

⁸⁴⁰ D2-300-T-322-pp.35-40 (FRA-pp.35-40).

displaced persons. At the end of November 2002, the BCA was approximately the size of two football fields and bigger at the time of demobilisation.⁸⁴¹ By November, Mbadu had taken over command of the BCA while remaining, according to Katanga, with the APC. He had full authority over the 500 combatants at the BCA.⁸⁴² Above him, however, there was Kasaki who also resided at the camp.⁸⁴³ Commander Mbale had command of the APC platoon.⁸⁴⁴

577. Garimbaya set up camp at the end of the airport piste known as *Aero*.⁸⁴⁵ It stands about a kilometre from the BCA, on a parallel ridge. In February 2003, Garimbaya had about 50 men under him, Ngiti, Nande, Lugbara, Bira and Alur.⁸⁴⁶

578. At Atele 2/Atelemba, Katanga had about 60 men. Half came from the BCA, others from other places.⁸⁴⁷ Katanga stated:

“We were simply a group of young people. We simply managed to group people into sections [...] for example, people will group themselves in their section to share the food.”⁸⁴⁸

He said he was not yet their commander, there was no structure, he did not have a deputy.

579. Soon after his return to Aveba in October 2002, Katanga was designated by the Sages, because of his education and spoke Swahili, to visit Major Hilaire at Marabo to discuss a mission to Beni to seek help.⁸⁴⁹ He went with 50 combatants.⁸⁵⁰ They met and discussed and sought his instructions as to how best to reach Beni without being attacked, and to inform the general staff that people would come to Beni to meet the RCD-K/ML.⁸⁵¹ The following day Hilaire used them against the UPC at Chai.⁸⁵² During the ensuing fighting, Katanga was shot in the leg and was in hospital for two weeks at Aveba.⁸⁵³ He put down his misfortune to not having received Kasaki’s blessing for the attack.⁸⁵⁴ Katanga testified that he had not come across any civilians at the battlefield at Chai.⁸⁵⁵

⁸⁴¹ D2-300-T-316-pp.24-25 (FRA-p.22).

⁸⁴² D2-300-T-324-p.80 (FRA-pp.73-74); D2-129-T-271-pp.26-27 (FRA-p.23).

⁸⁴³ D2-300-T-317-pp.27-28 (FRA-pp.24-25).

⁸⁴⁴ D2-300-T-317-FRA-p.31.

⁸⁴⁵ D2-134-T-259-pp.56-57 (FRA-pp.50-51); P-28-T-217-pp.6-7 (FRA-pp.5-6).

⁸⁴⁶ D2-300-T-322-pp.2-3 (FRA-pp.2-3).

⁸⁴⁷ D2-300-T-324-pp.78-79 (FRA-pp.71-72).

⁸⁴⁸ D2-300-T-324-p.78 (FRA-p.72).

⁸⁴⁹ D2-300-T-315-pp.62-l.13, 67-69 (FRA-p.55-l.26, pp.60-62); T-316-pp.14-15 (FRA-pp.12-12); EVD-D02-00220/Map annotated by Germain Katanga on 29 September 2011 with the additions of villages in Walendu-Bindi.

⁸⁵⁰ D2-300-T-316-p.15 (FRA-p.13).

⁸⁵¹ D2-300-T-316-pp.15-16 (FRA-pp.13-14).

⁸⁵² D2-300-T-316-pp.16-17 (FRA-pp.14-15); D2-300-T-321-pp.50-51 (FRA-pp.55-56).

⁸⁵³ D2-300-T-316-pp.17-19, 22 (FRA-pp.15-16, 20).

⁸⁵⁴ D2-300-T-324-p.82-l.18-23 (FRA-p.75-l.18-22).

⁸⁵⁵ D2-300-T-325-p.15 (FRA-pp.13-14).

580. Katanga was married to Denise on 18 November 2002. They lived in his father's house until after the fall of Bunia on 12 May 2003, when they moved to the BCA.⁸⁵⁶

Arrival of Chef Manu and Others from Zumbe in Aveba, around November 2002

581. Chef Manu travelled to Beni with three persons: Martin Banga, Adolphe, who was Manu's secretary, and Bahati Talika.⁸⁵⁷ No other delegation from Zumbe visited Aveba prior to 24 February 2003⁸⁵⁸ - the only contrary witness was P-250.⁸⁵⁹ Chef Manu stated that they went to Beni at the invitation of APC officials.⁸⁶⁰ They spent about a week in Aveba. While there, they addressed a document to the Congolese Government referring to the suffering of the local people.⁸⁶¹ The document EVD-D03-00098 is dated 15th November 2002 and bears a stamp of 'FREC' (*Force de Résistance Contre l'Extermination des Congolais*). Katanga did not know the details of this document and his name does not appear on it.⁸⁶²

582. Towards the end of November 2002 the decision was taken to go to Beni. The idea came from the sages; more than 60 sages and combatants went to Beni.⁸⁶³ "We needed at least to be able to get information from our authorities with the RCD-K/ML."⁸⁶⁴ Katanga was selected to lead "the delegation of combatants from Aveba, and [...] Munganga Leba for his part was leading the notables".⁸⁶⁵ Until then, Katanga said he had no particular position other than as Kasaki's bodyguard though, given Kasaki's role, such a function must have had a certain standing. For the purpose of being Aveba's representative in Beni, he was designated commander of Aveba to present himself as such in Beni.⁸⁶⁶ As commander of Aveba, Katanga said he had no authority over the local commanders in other areas - "[n]o one had authority over anyone else on his turf. I was a chief in my area and others were chiefs in their areas."⁸⁶⁷ They left in November 2002 on foot.

583. The delegation spent about two weeks in Beni. According to Katanga the day after their arrival they went to meet Mbusa Nyamwisi. Katanga had not met him before. Mbusa said that 'We're waiting for somebody and when he arrives [...] we will begin our meetings'.⁸⁶⁸ That person was Dr. Adirodu Mawazo Baudouin, a Nigiti with a medical practice in Bunia, who

⁸⁵⁶ D2-300-T-316-pp.22-24 (FRA-p.20-21); D2-129-T-271-pp.15, 20, 26 (FRA-pp.13, 17-18, 23).

⁸⁵⁷ D2-88-T-301-pp.25, 36, 43 (FRA-pp.22, 32, 38) ; D2-300-T-322-pp.22-24 (FRA-pp.22-24).

⁸⁵⁸ D2-300-T-318-pp.17-18 (FRA-pp.15-16); T-322-pp.27 (FRA-pp.27-28).

⁸⁵⁹ D2-300-T-322-p.27 (FRA-pp.27-28).

⁸⁶⁰ D3-88-T-301-p.35-37 (FRA-p.31-33).

⁸⁶¹ D3-88-T-301-p.46-l.13-16 (FRA-p.41-l.10-13); D3-88-T-301-p.49-l.2-6; l.15-17 (FRA-pp.43-44).

⁸⁶² D2-300-T-316-p.64 (FRA-pp.56-57); EVD-D03-00098/Letter dated 15 November 2002.

⁸⁶³ D2-300-T-316-p.66 (FRA-p.58).

⁸⁶⁴ D2-300-T-316-p.66 (FRA-p.58).

⁸⁶⁵ D2-300-T-316-p.66-l.17-18 (FRA-p.58-l.17-18).

⁸⁶⁶ D2-300-T-324-p.73-74, 76 (FRA-pp.66-66, 70).

⁸⁶⁷ D2-300-T-324-p.89 (FRA-pp.80-81).

⁸⁶⁸ D2-300-T-316-p.70 (FRA-p.61).

arrived from Kinshasa three days later.⁸⁶⁹ Adirodu was described by Ndjabu as ‘advisor to the presidency’ for Mbusa Nyamwisi.⁸⁷⁰ He is currently the national representative of the RCD-K/ML.⁸⁷¹

584. Three days later a meeting was called by Mbusa.⁸⁷² There were about a dozen present, half from Walendu Bindi. When Adirodu arrived, Katanga did not know him. ‘He entered the room and said he was the head of the delegation’. Those gathered were surprised: ‘[...] those of us who had come from the village, it is then that we learnt about the FRPI, and he said that he was the head of the FRPI delegation [...] we did not even know what the FRPI stood for [...] we were wondering why FRPI? [*Front de Résistance Patriotique en Ituri*].⁸⁷³ Why not FRPC? [*Congo*] His answer was simply ‘no’, this is the position that has been adopted and there was nothing we could do about it and things remained that way”.⁸⁷⁴

Creation of the FRPI

585. The ‘position that had been adopted’ – the creation of the FRPI – had occurred following the RCD-K/ML defeat in August.⁸⁷⁵ Floribert Ndjabu, a young, intelligent and ambitious Lendu from Kpandromo in the north, fled Bunia for Beni, disguised as a child, provided his account.⁸⁷⁶ Mbusa and Kinshasa ‘wanted at all costs to recover control of Ituri’ and there was meeting, lasting a couple of days, at the Hotel Casino in Beni for those who had fled to make ‘some small contribution’ to the discussion how to get back. At that meeting Ndjabu was elected ‘coordinator of all those activities’ and Sambidhu his deputy. No mention of the FRPI was made but a couple of days later Dr Adirodu attended the meeting. He challenged Ndjabu’s role as coordinator. Adirodu said he had been sent by Kinshasa, and mentioned the FRPI which he said had been formed in Kinshasa. It was not a political party because ‘Dr Adirodu had prohibited anyone from being able to interfere in political matters and he was the only one accredited to do so’ [...], ‘what he wanted to do was to form a sort of armed group perhaps’. [...] ‘I believe the group included several ethnic groups’. For a short time, Ndjabu was the FRPI coordinator, and as ‘co-ordinator’ took part in one EMOI meeting.⁸⁷⁷ The FRPI did not have a President.⁸⁷⁸

⁸⁶⁹ D2-300-T-316-p.70. (FRA-pp.61-62).

⁸⁷⁰ D2-236-T-247-pp.41-42 (FRA-pp.39-40).

⁸⁷¹ D2-300-T-316-p.54 (FRA-p.47), D2-236-T-242-p.47 (FRA-p.40).

⁸⁷² For the general account of the meeting, see D2-300-T-316-p.70-73 (FRA-p.62-63).

⁸⁷³ D2-300-T-316-pp.53, 70-73 (FRA-pp.47, 62-63).

⁸⁷⁴ D2-300-T-316-p.69-72 (FRA-pp.61-63).

⁸⁷⁵ D2-300-T-316-pp.65, 71 (FRA-p.57, 62).

⁸⁷⁶ For his account of the meeting see D2-236-T-242-pp.41-47, 51 (FRA-pp.35-40, 43-44); D2-236-T-247-pp.41-42 (FRA-pp.39-40).

⁸⁷⁷ D2-236-T-242-p.45, 51, 56, 58-59 (FRA-pp.38-39, 43-44, 47-48, 49-50); D3-236-T-247-p.26-28, 30-l.8-11 (FRA-pp.24-27, 28-l.14-16).

586. Ndjabu's account illustrates the very loose structuring of the FRPI. Ndjabu's association with the FRPI was short lived – perhaps because of a clash of personality and ambitions with Dr Adirodu. Sambidhu, who was in fact Adirodu's *protégé* and younger brother, remained with the FRPI as coordinator in Beni.⁸⁷⁹

587. Ndjabu's account is supported by Pierre Célestin Iribi Mbodina, 'Pichou'.⁸⁸⁰ Pichou, an intelligence officer, also attended the Casino Hotel meeting. Adirodu is his cousin and Ndjabu a very old friend from the same Catholic Seminary they attended. Pichou speaks of the clash between Adirodu and Ndjabu over who should be coordinator. He was unsure, but thought the FRPI might have been created by Adirodu back in 2001, when Adirodu was a delegate to a conference on Ituri in Kinshasa. In any event, it was clearly an Adirodu vehicle with him as driver. Pichou's name appears on the '*FRPI Manifeste*' – EVD-D02-00063 – dated January 2003, but neither he,⁸⁸¹ nor Sharif,⁸⁸² whose name also appears, say they signed that document. The document was drafted and circulated afterwards and was solely of Adirodu's making.⁸⁸³

588. Pichou stated :

At the time that the FRPI was founded, there was no military structure. The FRPI was simply a structure, a forum, that brought together people who wanted to defend their interests and who did not have a military structure. There was no army Chief of Staff, no colonels, there were only political officers at the time the organisation was founded.⁸⁸⁴

As I said at the beginning, the FRPI was only a political structure in which you had the coordinator, his deputy, and the advisors. The organisation evolved over time.⁸⁸⁵

589. He said that the FRPI did not receive a military structure until the time of the Ituri pacification commission,

because in the meantime the FNI was created, Arua, Kpandroma, and then there was Bunia and the CPI. That is where there was an attempt to organise the soldiers which took place at the Musafiri hotel. The FNI brought together the Lendu commanders, those from Mongbwalu, Gety, Aveba, and others. That is where they met to try to organise a military structure of the FRPI, and this was under the auspices of the Kinshasa government because Kisempia arrived.⁸⁸⁶

⁸⁷⁸ D2-236-T-242-p.51 (FRA-pp.43-44); D2-228-T-249-p.53 (FRA-p.47); D2-228-T-253-p.9 (FRA-p.10); D2-300-T-317-pp.24-25 (FRA-p.22); D2-300-T-316-p.60-l.2-3 (FRA-p.53-l.2).

⁸⁷⁹ D2-236-T-242-p.50 (FRA-p.43).

⁸⁸⁰ Pichou's account of founding and structure of the FRPI see D2-228-T-249-pp.50-62 (FRA-pp.45-57).

⁸⁸¹ D2-228-T-249-pp.56-59 (FRA-pp.50-54).

⁸⁸² D2-350-T-253-pp.38-40 (FRA-pp.41-42).

⁸⁸³ D2-228-T-249-pp.55-59 (FRA-pp.49-54).

⁸⁸⁴ D2-228-T-249-p.59 (FRA-p.54).

⁸⁸⁵ D2-228-T-249-pp.59-60 (FRA-p.54).

⁸⁸⁶ D2-228-T-249-p.60 (FRA-p.55).

590. He explained how it was that Kisempia provided the structure of Commander in Chief, Deputy Commander, S1 – to S5 *etc.* in April/May 2003. Prior to then, he said, it was ‘the APC which had been organising all military activities’.⁸⁸⁷

591. Katanga’s evidence on the founding and structure of the FRPI is based upon what he has learnt from others, he was not present at any of these earlier meetings.⁸⁸⁸ He first heard of it at the Adirodu meeting mentioned above.⁸⁸⁹ By the time Katanga came to Beni, Ndjabu had left the scene. Katanga said that ‘the FRPI was Adirodu’s private matter’⁸⁹⁰, that it was difficult to know what the hierarchy of the FRPI was except for those two people, Adirodu and Sambidhu.⁸⁹¹

592. The whole thing seems to have been something Katanga and others found useful at one level – something called the FRPI existed, it had Dr Adirodu as spokesman, it was a name they could all adopt as their own, Dr Adirodu was RCD-K/ML, he had contact with Kinshasa - so why not? But what was the FRPI? Nobody seems to have had much idea.

A. The FRPI, well, the purpose of the FRPI, we only saw it in the manifesto, but, you see, that transition from the self-defence movement to the FRPI was a simple figment or intellectual concept, because we - it was difficult to understand how the transition had occurred. From combatant to FRPI was something beyond -- in fact, beyond my understanding. I cannot even explain it. So for the name FRPI to come into existence, I think it was simply from Adirodu’s mind that it emerged.⁸⁹²

The Prosecution corrupt this particular statement into ‘strictly academic’ (OTP brief, para. 139). But it was not a ‘strictly academic’ event, and the word was not used. It was important to the people in Walendu Bindi. It was something ‘of Kinshasa’ – a movement with political support – sympathetic to their cause – and something that those delegates sent to Beni from the Collectivity could take back with them to share with those who had sent them. Things were on the move.

593. The Manifesto EVD-D02-00063 is an interesting document. Dated January 2003, it was clearly composed at the end of December/January as it refers to events as late as December 16th 2002. It demonstrates that the FRPI was not a Ngiti organisation – the front cover refers to ‘Aveba-Kpandroma’. It refers to FAP, BOB, FAL, FREL, and FREC (column 2). It states that the FRPI is not a military structure ; ‘*Les Chefs Militaires sont désignés par le conseil des Sages*’; ‘*Le conseil des combattants est hiérarchisé et structuré non pas en fonction des normes militaires classiques*’ (column 5). And refers at the bottom of column 5, which deals

⁸⁸⁷ D2-228-T-249-p.60-62 (FRA-pp.54-57).

⁸⁸⁸ D2-300-T-317-pp.4-5 (FRA-p.4.)

⁸⁸⁹ D2-300-T-316-p.53-l.24, p.69-72 (FRA-p.47-l.16, pp.61-63).

⁸⁹⁰ D2-300-T-316-p.72-l.10 (FRA-p.63-l.10).

⁸⁹¹ D2-300-T-316-p.72 (FRA-p.63.)

⁸⁹² D2-300-T-316-pp.72-73 (FRA-p.63); D2-300-T-317-p.25 (FRA-pp.22-23).

with structure, to the need to create ‘*des postes de coordination stratégique ou antenne de représentation.*’ ‘*Les porte-paroles ou coordonnateurs de différents échelons allant du niveau local au niveau national coiffent ces coordinations ou antennes* » (column 6). It speaks of it not being a political party, nor even a military political party – but reserves the possibility of becoming a political party in the future (column 8). It refers to use of traditional weapons – fleches, machetes. It also plainly exaggerates the position, claiming 25,000 combatants have been killed (column 7) and 22,800 combatants (column 6). The stamp on it is for ‘FRPI Armée Pipa’ – a reference to the 1960 rebellions. There is no mention of a President or any structure. This is in January 2003 and it is this organisation that the Prosecution claims Katanga was then President!

594. Katanga said:

The FRPI, after we took on this name, was used like an umbrella structure just simply so that we could be identified. The objective was not - - we didn’t have any clearly defined objective for the FRPI, because the very details of the FRPI came to us along with the little booklet.⁸⁹³

It didn’t even have a determined organisational chart. We just had the FRPI with as chiefs the spokesperson and the coordinator in Beni, that was it.⁸⁹⁴

595. Germain Katanga says various meetings were held while in Beni, including the issue of supplies. The only way to get these supplies was via Aveba.⁸⁹⁵ The combatants had a meeting with Kasereka, the APC Chief of Staff, during which they discussed how operations and the combatants and the APC could come together and to help the APC recapture the positions it had lost. Katanga testified that, when he came to Beni for the first time, the mission to reconquer Bogoro and Bunia had already been defined and they were simply told that they would help the APC to go into Bunia.⁸⁹⁶ They also met with Uringi-Padolo who was one of the senior leaders of the RCD-K/ML and close to Mbusa.⁸⁹⁷ Katanga also attended a meeting at the headquarters of the *Etat-Major Opérationnel Intégré* (EMOI).⁸⁹⁸

596. After two weeks Katanga left Beni for Aveba by plane, arriving at the beginning of the second week of December.⁸⁹⁹ He was on the same plane, as Chef Manu.⁹⁰⁰ Chef Manu stated that he was in the cockpit and directed the pilot where to go. The first flight, the plane was unable to land as the airstrip was too small and there were people walking about on it.⁹⁰¹ The

⁸⁹³ D2-300-T-317-p.25-l.18-21 (FRA-p.22-l.26-p.23-l.1).

⁸⁹⁴ D2-300-T-317-p.25-l.4-6 (FRA-p.22-l.14-15).

⁸⁹⁵ D2-300-T-316-p.75 (FRA-p.65).

⁸⁹⁶ D2-300-T-325-p.18 (FRA-p.16).

⁸⁹⁷ D2-300-T-317-pp.5-6 (FRA-p.5).

⁸⁹⁸ D2-300-T-317-pp.5-7 (FRA-p.5) ; D2-300-T-316-pp.73-74 (FRA-pp.64-65).

⁸⁹⁹ D2-300-T-317-p.22 (FRA-p.20).

⁹⁰⁰ D2-300-T-322-p.25 (FRA-p.25).

⁹⁰¹ D3-88-T-301-p.67-l.7-20 (FRA-p.59-l.17-p.60-l.1).

airstrip had to be extended and strengthened and Yuda supervised the work.⁹⁰² They returned on the same plane the next day.⁹⁰³ Chef Manu testified that he could see from the plane that Lagura and Zumbé were in flames; he said it was the last attack inflicted on Zumbé.⁹⁰⁴ Chef Manu said that he asked Katanga for ammunition and Katanga, despite the protestations of others, took pity on him and gave him 12 small packages of 100 SMGs or AK-47s bullets.⁹⁰⁵

597. Katanga testified that this plane carried approximately 100 weapons and 15 sachets in a box of 1,500 rounds of ammunition per box.⁹⁰⁶ Chef Manu testified that many young men, including Oudo and Dark, were waiting at Aveba for the plane to land and to share the ammunition and other supplies.⁹⁰⁷

The Role of Coordinator

598. Returning to Beni, Katanga did not have a defined status in the FRPI which, as was discussed above, had a very loose structure with Adirodu as spokesman and his brother the coordinator in Beni.⁹⁰⁸ It is obvious, the defence submits, that Adirodu was manipulating the FRPI for his own political aims and ambitions and Mbusa's too. What is clear is that Adirodu, whose project the FRPI was, was not a man to share office – he wanted the running of the FRPI all to himself.⁹⁰⁹

599. Katanga was certainly not 'President' as the FRPI did not have one at that stage. He says he performed the role of coordinator.⁹¹⁰ The Prosecution scoffs at this suggestion (their para. 592) but is it not in fact a perfectly reasonable statement to make? After all, there was an APC presence and it is highly probable the APC command were keen to retain control of them as far as they could, not to mention later presence of APC officers. There would have to be some coordination, between the combatants and those in Beni, and someone to coordinate. Ndjabu also described himself as having been 'coordinator'.⁹¹¹ Katanga said it was necessary to have someone who could liaise between the two groups and to make the combatants in Aveba understand that they were allies of the APC⁹¹² and that messages from Beni would be well

⁹⁰² D2-300-T-317-pp.47-48 (FRA-p.42).

⁹⁰³ D3-88-T-301-p.66-l.15-16 (FRA-p.58-l.28-p.59-l.1).

⁹⁰⁴ D3-88-T-300-p.24-l.20-to-p.25-l.14 (FRA-p.22-l.6-27), D3-88-T-301-p.68-l.1-8 (FRA-p.60-l.11-18), D3-88-T-302-p.6-l.3-7, p.8-l.22-to-p.9-l.13 (FRA-p.5-l.23-28, p.8-l.16-p.9-l.4), D3-88-T-307-p.41-l.10-25 (FRA-p.35-l.12-26).

⁹⁰⁵ D2-88-T-301-pp.68-71 (FRA-pp.61-63).

⁹⁰⁶ D2-300-T-322-p.25, 26-27 (FRA-pp.25-26, 26-28). Manu confirms that there was ammunition and guns on board of the plane.

⁹⁰⁷ D2-88-T-304-p.70-l.1-13 (FRA-p.62-l.20-p.63-l.3).

⁹⁰⁸ D2-228-T-249-pp.51, 60-61 (FRA-pp.46, 54-55); D2-228-T-253-p.9 (FRA-p.10).

⁹⁰⁹ D2-236-T-242-pp.46-47, 50 (FRA-pp.39, 43); D2-236-T-247-pp.41-42 (FRA-pp.39-40).

⁹¹⁰ D2-300-T-317-p.22-23, 27 (FRA-pp.20-21, 24); D2-300-T-319-pp.17, 21 (FRA-pp.18-19, 23).

⁹¹¹ D2-236-T-242-p.45 (FRA-p.39).

⁹¹² D2-300-T-324-FRA-pp.67-68.

received.⁹¹³ Katanga would try to settle disputes between the APC and local combatants.⁹¹⁴ Katanga placed his position as being between Mbadu and Kasaki.⁹¹⁵ His status changed from ‘commander of Aveba’ to ‘coordinator’ at Aveba.⁹¹⁶ (The Prosecutor says Katanga has ‘perverted’ the BCA acronym but it is difficult to see how the name change helps when it started off life as ‘Bureau de combatants’). And the role of coordinator existed – as with Ndjabu, Sambidhu, and references in the *Manifeste* later to ‘la création des postes de coordination stratégique ou antenne de représentation.’ This latter metaphor says it all.

600. His role was also to mediate between the combatants and the population.⁹¹⁷ His role as coordinator did not give him any military authority over the combatants. His role was to enable people to get on together.⁹¹⁸ He would sometimes intervene when there were internal problems between combatants.⁹¹⁹ Sometimes, Katanga succeeded in resolving such problems.⁹²⁰ Because he was young, he was not always listened and would ask Kasaki to assist.⁹²¹ This role of coordinator was parallel or additional to his command of some of the combatants at Aveba, and the issue of his overall authority will be addressed later. Katanga said he was called many things by people at that time but he held no ‘rank’, displayed no rank and never introduced himself with a rank or function.⁹²² The only change came at Tche, when Kakado intervened in events in March 2003, as will be developed below.

Further trips of Katanga to Beni and Battles of the APC and the combatants

601. In the approximately ten weeks, between Katanga’s return to Beni and the attack on Bogoro, Katanga went back to Beni four times.⁹²³ He was away relatively often. The close of 2002 witnessed an extensive campaign against the RCD-K/ML by other groups, notably RCD-Goma, Lumbala’s RCD-N, the UPC and Jean Pierre Bemba’s MLC, with its operation *Effacer le Tableau* which reached Mambasa.⁹²⁴ A policy of mutual cooperation meant that an APC commander could ask the combatants to help with an operation.⁹²⁵ This, confirmed by HRW, led to joint action between the RCD-K/ML and Lendu militia to counter the substantial

⁹¹³ D2-300-T-324-FRA-p.69.

⁹¹⁴ D2-300-T-325-pp.3-4 (FRA-p.3); D2-228-T-250-pp.12-13 (FRA-pp.11-12).

⁹¹⁵ D2-300-T-315-p.36 (FRA-pp.32-33); D2-300-T-316-pp.35-36 (FRA-pp.30-31); D2-300-T-317-pp.27-28 (FRA-p.24).

⁹¹⁶ D2-300-T-317-p.22-23 (FRA-pp.20-21).

⁹¹⁷ D2-300-T-317-p.27 (FRA-p.24).

⁹¹⁸ D2-300-T-324-pp.74-77 (FRA-pp.68-71).

⁹¹⁹ D2-300-T-324-FRA-pp.68-69.

⁹²⁰ D2-300-T-324-FRA-p.69.

⁹²¹ D2-300-T-324-FRA-p.70.

⁹²² D2-300-T-317-p.22-l.13-24, p. 27 (FRA-pp.20-l.4-15, 23-24); D2-300-T-319-p.16-17, 21 (FRA-pp.18-19, 23); D2-300-T-323-p.38 (FRA-pp.36-37); D2-300-T-325-p.54 (FRA-pp.47-48).

⁹²³ D2-300-T-317-p.8 (FRA-p.7).

⁹²⁴ D2-300-T-316-p.19 (FRA-p.17); D2-300-T-317-pp.9-11 (FRA-pp.8-10); EVD-D02-00122/Map of Ituri.

⁹²⁵ D2-300-T-317-p.13 (FRA-pp.11-12).

advances on Beni,⁹²⁶ such as at Kanyabayonga in early December 2002.⁹²⁷ The coalition against the APC was stopped at Erineti, on 24 December 2002, by an alliance of the APC, the Mai-Mai, and the combatants from Aveba. The combatants intervened at Ofai, Otomaber, Edou, Mont Hoyo and all the way to Komanda to help their APC allies.⁹²⁸ Katanga participated in this battle; he was in Ofai with the combatants.⁹²⁹ The hierarchical and operational structure came directly from the APC, led by EMOI.⁹³⁰ Katanga returned to Aveba from this military activity at the beginning of January 2003.⁹³¹

EMOI

602. Bogoro was a strongly defended, entrenched position held by several hundred well trained and well armed soldiers. It fell in but a few hours. Did it fall to a rag-tail army that had never been in a proper battle? Or did it fall because there was a keen military mind or minds that deployed the men well and used heavy arms to overcome the camp? And was this the work of a 24 year old erstwhile student and Okapi hunter, or the work of professionals?

603. The Prosecution acknowledges (at para. 585) that expelling the UPC from Ituri was in the interests of the APC and EMOI, and that discussions between them and Katanga ‘could’ have taken place on the subject of support and supply, and they ‘could’ have encouraged the Ngiti and Lendu to attack Bogoro. “However, the Prosecution, contrary to the testimonies of the Accused, D02-350 and D02-228, maintains that the credible evidence in the record of the case does not establish that the APC or EMOI had effective control over the Ngiti and Lendu combatants, or that they planned, ordered or even directed the attack on Bogoro.”

604. The Defence submits that the evidence demonstrates that not only ‘could’ they have ‘encouraged’ the attack on Bogoro – they plainly did so, and did plan, order and direct the attack. The Prosecution are fundamentally wrong in their approach in saying that ‘the evidence of the case does not establish that the APC or EMOI had effective control’. It is not for the defence to establish anything. The defence having raised the matter, it is now for the Prosecution to disprove it. The Prosecution must prove beyond a reasonable doubt that the RCD-K/ML and EMOI did not have effective control.

⁹²⁶ EVD-OTP-00222/*Le Fléau d'or*/p.0392.

⁹²⁷ D2-300-T-317-p.14 (FRA-pp.12-13).

⁹²⁸ D2-300-T-316-pp.19-21, 21-22 (FRA-pp.17-19, 19); D2-300-T-317-pp.13, 19 (FRA-pp.12, 17.)

⁹²⁹ D2-300-T-317-pp.13-14 (FRA-pp.12-13); EVD-D02-00119/Map of Kasenyi-Opienge-Beni-Bogoro-Kanyabalonga.

⁹³⁰ D2-300-T-317-p.22 (FRA-p.19).

⁹³¹ D2-300-T-317-p.49 (FRA-p.43).

EMOI: composition, function and meetings in Beni

605. EMOI stands for *État-major opérationnel intégré*.⁹³² It was a military structure based in Beni, set up by the Kinshasa government.⁹³³ Ndjabu testified that the task of the EMOI was to regain control of the territory of Ituri, and also to structure the various armed groups so as to integrate them into the FAC.⁹³⁴

606. EMOI was born out of the rapprochement between the RCD-K/ML and the Kabila ‘former’ Government in Kinshasa, whereby the latter was allowed to operate in the former’s territory to oppose the advance of hostile forces.⁹³⁵ At the time both parties were, despite agreements, facing attack from a coalition of Bemba’s MLC, the RCD-N of Robert Lubala, the RCD-Goma and the UPC.⁹³⁶ The overwhelming objective was for Kinshasa to regain control of its eastern territories.⁹³⁷ EMOI was composed of Staff Officers from the *Maison Militaire* in Kinshasa.⁹³⁸ The *Maison Militaire* is part of the President’s administrative structure.⁹³⁹ In February 2003, before Bogoro, EMOI was led by Colonel Aguru, Commander-in-Chief with Lieutenant-colonel Kibelebele as his deputy. The Chief of Staff was Ekuba, who had command of the general staff, including Colonel Duku, an S-2 in charge of intelligence.⁹⁴⁰ Various witnesses attested to its composition, objects and function, among them P-12⁹⁴¹ and P-219⁹⁴² as well as a number of defence witnesses.⁹⁴³ Katanga spoke of the officers he met and the good relations he struck up with them.⁹⁴⁴ In a previous interview with the Prosecution, P-12 stated that ‘EMOI, [...] Kabila sent soldiers there, soldiers to train Mbusa’s troops, which were known as EMOI.’⁹⁴⁵ P-219 confirmed that EMOI, based in Beni, was created by officers who came from Kinshasa. He named the leader as Colonel Ekuba. They were, he said, officers from the FAC and cooperating with the APC of Mbusa Nyamwisi.⁹⁴⁶

⁹³² D2-228-T-249-p.65 (FRA-p.60).

⁹³³ D2-228-T-249-p.65 (FRA-p.60).

⁹³⁴ D2-236-T-242-pp.51-52, 54-55 (FRA-pp.44, 46).

⁹³⁵ D2-228-T-249-p.65 (FRA-p.60); D2-236-T-243-p.21 (FRA-p.18); D2-236-T-244-p.42 (FRA-p.37).

⁹³⁶ D2-236-T-243-pp.21-22 (FRA-pp.18-19).

⁹³⁷ D2-236-T-242-pp.51-52, 54-55 (FRA-pp.44, 46); D2-300-T-317-p.7 (FRA-p.6); D2-350-T-253-p.37 (FRA-p.40).

⁹³⁸ D2-300-T-317-p.6 (FRA-p.6); D2-228-T-249-p.69 (FRA-pp.63-64) [*Divergence constatée*]; D2-236-T-242-p.55 (FRA-p.47).

⁹³⁹ D2-236-T-242-p.55 (FRA-p.47).

⁹⁴⁰ D2-228-T-249-p.67 (FRA-p.62); D2-236-T-242-pp.53-54 (FRA-p.46); D2-300-T-317-pp.6-7 (FRA-pp.6-7); D2-350-T-253-p.36 (FRA-p.39).

⁹⁴¹ P-12-T-201-p.46 (FRA-p.49-50).

⁹⁴² P-219-T-205-p.42 (FRA-p.42); P-219-T-208-pp.49-51 (FRA-pp.44-45); P-219-T-209-pp.52-53 (FRA-pp.51-52).

⁹⁴³ D2-228, D2-300, D2-236, D3-88, D2-350, D2-001.

⁹⁴⁴ D2-300-T-317-p.7 (FRA-p.6).

⁹⁴⁵ P-12-T-201-p.46 (FRA-p.49).

⁹⁴⁶ P-219-T-209-pp.52-53 (FRA-pp.51-52).

607. Pichou was an intelligence officer, operating from Beni and witnessed the events.⁹⁴⁷ His father had been a Member of Parliament for Bunia. In 1998/1999 he became a member of the National Intelligence Agency,⁹⁴⁸ until he left to become an M.P. in the interim administration in 2004.⁹⁴⁹ Pichou said that in addition to halting the advance of the RCD-Goma, MLC, *etc.*, EMOI's mission was to organise and plan military operations in the region, and to manage and provide all the logistical resources from Kinshasa necessary for the soldiers to accomplish their missions.⁹⁵⁰ Pichou gave the following details: the arms came from Kinshasa on board aircraft either based in Kinshasa or in Beni. There were also aircraft that belonged to local companies. There were large aircraft from Kinshasa that transported military and were involved in military logistics. Smaller companies carried out the deliveries from Beni to some of the airstrips throughout Ituri – such as Aveba, Mongbwalu, and Kpandroma. Pichou took part in such missions.⁹⁵¹ People would also come to Beni to establish contact with EMOI for the purpose of getting arms. With regard to the distribution of weapons, there was a pre-established schedule in Beni that set out this out who was to receive them and where.⁹⁵²

608. F. Ndjabu said that one of EMOI's objectives was to train other groups and integrate them into the army, which is why there was the Mangangu training centre, supervised by EMOI.⁹⁵³ They had a weapons depot or an armoury specifically for EMOI that was located at 'OZACAF'.⁹⁵⁴ The general practice regarding how these weapons were brought from Kinshasa to Beni was by a cargo plane from an air transport company, Air Uhuru.⁹⁵⁵

609. Pichou said that the UPC was the force against which EMOI was fighting.⁹⁵⁶ At that time, the UPC was co-operating with the MLC, and they advanced up to Kommanda and Iringeti.⁹⁵⁷ The EMOI force tried to prevent the UPC and its collaborators from getting to Beni.⁹⁵⁸ This is supported by Katanga's account of the fighting he engaged in at Christmas. P-12 confirmed that the Ngiti group had gone to fight alongside EMOI at Beni.⁹⁵⁹

610. P-219, whom the defence submits cannot be relied up to incriminate the accused, remains someone who doubtless heard of things which the defence do not contest. Among

⁹⁴⁷ D2-228-T-249-p.70 (FRA-p.64).

⁹⁴⁸ D2-228-T-249-p.38 (FRA-p.34).

⁹⁴⁹ D2-228-T-250-pp.14-15 (FRA-p.13).

⁹⁵⁰ D2-228-T-249-pp.66-67 (FRA-pp.60-61).

⁹⁵¹ D2-228-T-249-pp.69-70 (FRA-pp.64-65).

⁹⁵² D2-228-T-249-pp.70-71 (FRA-p.65).

⁹⁵³ D2-236-T-244-pp.42-44 (FRA-pp.37-38).

⁹⁵⁴ D2-236-T-242-pp.56-57 (FRA-pp.48-49).

⁹⁵⁵ D2-236-T-242-p.57 (FRA-p.49).

⁹⁵⁶ D2-228-T-249-pp.66-67 (FRA-p.61).

⁹⁵⁷ D2-228-T-249-p.66 (FRA-p.60).

⁹⁵⁸ D2-228-T-249-p.66 (FRA-p.60).

⁹⁵⁹ P-12-T-201-p.46 (FRA-pp.49-50).

them, the fact of EMOI in the context of delivery of weapons from Beni.⁹⁶⁰ P-219 confirmed his statement according to which upon the arrival of weapons, there was a briefing from the integrated headquarters of operations, EMOI, based in Beni, addressed to the different groups, giving instructions as to how the arms were to be divided.⁹⁶¹

611. Arms supplies featured clearly in Ndjabu's testimony. Around September-October 2002, F. Ndjabu attended a meeting in EMOI headquarters in the premises of the NRA airport of Beni, when he had just been elected 'co-ordinator' in Beni, at the request of Colonel Aguru.⁹⁶² Aguru asked him to take some weapons and ammunition, that had come from Kinshasa, to Mongbwalu and Rethy⁹⁶³ for the commanders in Kpandroma, to re-conquer the Mahagi and Aru territories.⁹⁶⁴ The shipment weighed 2 tonnes.⁹⁶⁵ With the commissioner for the interior of the Mbusa's government, they went by plane (Air Across) to Mongbwalu, and from there to Rethy, where they gave the remaining arms to the commander of the APC.⁹⁶⁶ Ndjabu returned to Beni at the beginning of November, with Moi, to obtain further supplies for Moi.⁹⁶⁷

612. Floribert Ndjabu confirmed that EMOI carried out large-scale operations not only to the north but also, around September 2002, on the road from Beni to Bunia and which involved *inter alia*, Komanda, Irumu, up to Chai. The aim was to neutralise the UPC and regain control.⁹⁶⁸ Ndjabu believed that EMOI participated in these operations by supplying munitions, strategic planning of military operations, defining targets, and, also physically, in the military operations themselves.⁹⁶⁹

613. Pichou confirmed that he attended meetings held in the EMOI facilities near the Airport in Beni, where the planning of the Bogoro attack was organised by the integrated operational general staff.⁹⁷⁰ He stated that there were several organisation and planning meetings, about intelligence, military strategy, formal or less formal, but he did not attend all of them.⁹⁷¹ From EMOI, Auguru, Ekuba, Duku, Kibelebele, would be there⁹⁷² and Ndjabu and Sharif also

⁹⁶⁰ P-219-T-205-p.42 (FRA-p.42).

⁹⁶¹ P-219-T-208-pp.49-51 (FRA-pp.44-45).

⁹⁶² D2-236-T-242-p.45, 51, 56, 58-59 ((FRA-pp.38-39, 43-44, 47-48, 49-50).

⁹⁶³ D2-236-T-242-pp.56, 58 (FRA-pp.48, 49) ; D3-236-T-247-p.26-28, 30-l.8-11 (FRA-pp.24-27, 28-l.14-16).

⁹⁶⁴ D2-236-T-242-p.57 (FRA-p.49) [*Dicrepancy noted*].

⁹⁶⁵ D2-236-T-242-pp.57-59 (FRA-p.49).

⁹⁶⁶ D2-236-T-242-p.59 (FRA-p.50).

⁹⁶⁷ D2-236-T-242-pp.60-61 (FRA-pp.51-52).

⁹⁶⁸ D2-236-T-244-p.44 (FRA-pp.38-39); D2-236-T-247-p.78 (FRA-pp.70-71) [*Dicrepancy noted*].

⁹⁶⁹ D2-236-T-247-pp.77-78 (FRA-pp.69-71).

⁹⁷⁰ D2-228-T-250-p.10 (FRA-p.9); D2-228-T-252-pp.49-50 (FRA-pp.54-55) [*Divergence constatée*].

⁹⁷¹ D2-228-T-252-pp.50-52 (FRA-pp.54-58).

⁹⁷² D2-228-T-252-pp.51-52 (FRA-pp.56-57).

attended sometimes.⁹⁷³ At some meetings, the general staff discussed issues with the representatives of the combatants from all the areas.⁹⁷⁴ Among the representatives of combatants from Mongbwalu, Kpandroma, Aveba, and Kagaba at such planning meetings, he saw Mateso Ninga, Ndrati (phon), Kiza (deceased), Godas Sukpa, Yuda who arrived later, and Germain Katanga. He saw Ngudjolo in Beni only either at the end of 2003 or early 2004, but after the attacks at Bogoro and Bunia.⁹⁷⁵

614. At one crucial meeting Pichou said a map of Ituri was used,⁹⁷⁶ showing Aveba, Bogoro and Ituri in general, and advice and explanations were given: emphasising the need to hold onto territory gained. “If we need to attack, we can’t do it in the way that it was tried previously - because you capture an area that you can’t control and very quickly you’re driven out because, quite simply, you aren’t organised and you can’t maintain your control.”⁹⁷⁷ Bogoro was located on the map and discussed to see how Bogoro could be reconquered.⁹⁷⁸ There was a pressing need to reach Bunia - the centre for replenishing UPC supplies for Bunia was Bogoro, supplied by Uganda. Therefore APC men were sent from Beni to Aveba to prepare the combatants to attack Bogoro.⁹⁷⁹ Pichou indicated that the map was shown to them in front of the house occupied by Colonel Aguru and his general staff.

615. Sharif said that he attended a meeting convened by Mbusa between the 20th and the 30th of December 2002 in Beni, with the APC commanders and Aguru, where Mbusa told them they had to recover Bunia and that he would provide all assistance.⁹⁸⁰ While the target addressed was Bunia, Bogoro was on the road to Bunia.⁹⁸¹ According to Sharif, Mbusa had promised to give 200 weapons.⁹⁸² He attended several EMOI meetings.⁹⁸³ From time to time, Aguru came from Kinshasa and gave new strategic and military instructions. Aguru promised them that if they were to recover those areas, the head of state would give them some work: the people who wanted to go into the army, or to continue their studies, could do so.⁹⁸⁴ Sharif

⁹⁷³ D2-228-T-252-p.52 (FRA-p.57).

⁹⁷⁴ D2-228-T-252-p.52 (FRA-p.57).

⁹⁷⁵ D2-228-T-252-pp.52-53 (FRA-pp.57-58); D2-228-T-253-p.6 (FRA-p.7).

⁹⁷⁶ D2-228-T-252-p.54 (FRA-pp.59-60).

⁹⁷⁷ D2-228-T-250-p.10 (FRA-p.9); D2-228-T-252-p.50-l.10-16 (FRA-p.55-l.8-15).

⁹⁷⁸ D2-228-T-252-p.54 (FRA-p.60).

⁹⁷⁹ D2-228-T-249-p.73 (FRA-pp.67-68); D2-228-T-250-p.5 (FRA-p.4); D2-228-T-252-pp.14-15, 25-26, 53-54 (FRA-pp.14-15, 27-28, 59-60).

⁹⁸⁰ D2-350-T-253-p.34-37 (FRA-pp.37-40) ; D2-350-T-254-p.16 (FRA-p.14) [*Divergence constatée*].

⁹⁸¹ D2-350-T-253-p.43 (FRA-p.46); D2-350-T-254-pp.7-8 (FRA-pp.6-7).

⁹⁸² D2-350-T-253-p.41 (FRA-p.44).

⁹⁸³ D2-350-T-253-p.37 (FRA-p.40).

⁹⁸⁴ D2-350-T-253-p.37 (FRA-p.40); D2-350-T-254-pp.19-21 (FRA-pp.17-18) [*Divergence constatée*], 23.

said that Aguru was responsible for all operations with a view to recovering Bunia.⁹⁸⁵ Sharif said that he attended two meeting with Aguru when he came back from Kinshasa.⁹⁸⁶

616. Sharif confirmed the occurrence of a meeting where a map of Ituri was shown; this was during his first meeting with Colonel Aguru:

During the first meeting that we had, Colonel Aguru brought a map of Ituri [...] he indicated what strategy should be espoused to recover Bunia, and he also talked about Bogoro and he indicated the positions that the Ugandans and the APC occupied. It was about Nyakunde, Mongbwalu, the strategic areas that were occupied by the enemy, and it was important, therefore, to recover all these positions. And it was in this way that we could recover Bunia [...].

When Aguru showed us the map he indicated all the positions that were occupied by the enemy, the UPDF and the UPC and Kpandroma was indicated and Bogoro, and these are the areas that had to be recovered before going to Bunia. So among these areas, therefore, he cited Bogoro. It wasn't about Bogoro specifically, but Bogoro featured among those areas that were occupied by the UPC.⁹⁸⁷

617. Katanga stated that during his first visit to Beni, he had a meeting with Colonel Aguru. This was the first time he came into contact with EMOI, *ie* in November 2002.⁹⁸⁸ He came back around four times until Bogoro and continued to see the same people, apart from Mbusa.⁹⁸⁹ Stressing that Bogoro was, in military terms, an important strategic location, Katanga explained that the UPC got its weapons from Ugandan and then Rwanda and that also Bogoro was the only practicable route left to take to get at Bunia.⁹⁹⁰ Katanga's meeting with Aguru was confirmed by Chef Manu.⁹⁹¹

618. F. Ndjabu said that he did not attend a meeting with EMOI where Bogoro was specifically discussed but stressed that given that the EMOI main mission was the reconquest of Ituri, Bogoro was part of it. His view was that EMOI did play a role in the attack of 24 February 2003.⁹⁹² P-219 did not claim to have attended a meeting with EMOI but he confirmed his statement where he spoke of EMOI and its supply of arms and uniforms to the FRPI.⁹⁹³ [REDACTED].

619. Ndjabu testified that during an unofficial meeting with President Kabila, around 10-11th February 2003, the possibility of setting up a mechanism to stop the UPC was discussed and

⁹⁸⁵ D2-350-T-254-p.23 (FRA-pp.19-20).

⁹⁸⁶ D2-350-T-254-pp.19-20 (FRA-pp.16-17) [*Divergence constatée*].

⁹⁸⁷ D2-350-T-254-p.22-l.4-23 (FRA-p.19-l.8-25).

⁹⁸⁸ D2-300-T-317-pp.5-7 (FRA-pp.5-6).

⁹⁸⁹ D2-300-T-317-p.8 (FRA-p.7).

⁹⁹⁰ D2-300-T-317-pp.8-9 (FRA-pp.7-8).

⁹⁹¹ D3-88-T-301-p.61 (FRA-p.54), p.65-l.3-9 (FRA-p.57-l.24-p.58-l.2).

⁹⁹² D2-236-T-147-pp.79-80 (FRA-pp.71-72); D2-236-T-244-pp.46-47 (FRA-pp.41-42).

⁹⁹³ P-219-T-208-pp.44-45 (FRA-pp.39-40).

Kabila said they had to act quickly and go back, so that Ituri could be recovered from the hands of the UPC.⁹⁹⁴ Things were clearly moving quickly.

EMOI - Effective control

620. Pichou testified that concomitantly with the EMOI structure, led by Colonel Aguru,⁹⁹⁵ there were also structures where there were representatives of the various forces.⁹⁹⁶ The FRPI was represented with its Beni based coordination team; commanders came from all over the place, Mongbwalu, Aveba, *etc.*, to entertain purely military ties with the EMOI authorities. The political structure of the FRPI did not control what the commandants discussed with the EMOI.⁹⁹⁷ Pichou thought that Aguru and Kibelebele received their orders from the general staff of the FAC, but he stressed that General Kisempia, chief of the *Maison Militaire* of the Chief of State at the time, made a declaration saying that he reported to the Head of State directly and that his assignment came only from the latter. Therefore, while the military organisation was in the realm of the general staff, this was a particularly sensitive issue where the Presidency of the Republic played an important role, in taking the decisions.⁹⁹⁸

621. Pichou testified that EMOI was at the same time both a decision-making body and a coordinating body.⁹⁹⁹ The coordinating body's instructions were binding, given its composition: the established general staff structure coordinated the activities of the components of the EMOI, in particular through assessment meetings within the EMOI facilities.¹⁰⁰⁰ EMOI also took decisions, for instance, to send such weapons to such-and-such a place, and provided them. Given that EMOI operated on the territory of the RCD-K/ML, there had to be cooperation between the RCD-K/ML and the Kinshasa government that it reported to directly.¹⁰⁰¹ Pichou said that, in principle, the decisions of the EMOI were binding and obeyed.¹⁰⁰² He noted that there were assessment missions, after which a report was made. There were also guidelines before a mission could be carried out.¹⁰⁰³

622. Colonel Aguru, the Commander in Chief, could give orders to General Kasereka of the APC.¹⁰⁰⁴ When asked if Aguru was a hierarchical superior of the commanders from Mongbwalu, Aveba, and Kagaba that came to discuss military matters, Pichou replied that

⁹⁹⁴ D2-236-T-243-pp.19-20 (FRA-pp.16-18).

⁹⁹⁵ D2-228-T-249-p.67 (FRA-p.62).

⁹⁹⁶ D2-228-T-249-p.67 (FRA-p.62).

⁹⁹⁷ D2-228-T-249-p.68 (FRA-p.62) [*Divergence constatée*].

⁹⁹⁸ D2-228-T-249-p.69 (FRA-pp.63-64) [*Divergence constatée*].

⁹⁹⁹ D2-228-T-252-p.47 (FRA-p.52).

¹⁰⁰⁰ D2-228-T-252-p.47 (FRA-p.52).

¹⁰⁰¹ D2-228-T-252-p.47 (FRA-p.52).

¹⁰⁰² D2-228-T-252-pp.47-48 (FRA-p.52).

¹⁰⁰³ D2-228-T-252-p.50-l.23-25 (FRA-p.55-l.25-28).

¹⁰⁰⁴ D2-228-T-252-p.48 (FRA-pp.52-53).

given that the FRPI combatants were not experienced military men, Aguru, and the others, had built up relationships with them, adapted to the reality of anarchy and the lack of a single commander that prevailed. For instance, Mateso Nynga would obey what Aguru said. Katanga also had such a relationship with Aguru. The issue of purely military management was somewhat effected by this cooperation.¹⁰⁰⁵

623. Similarly, Ndjabu confirmed that EMOI had control over military operations in Ituri since their principal mission was to reconquer Ituri.¹⁰⁰⁶ Aguru had told him that EMOI was directly answerable to the *Maison militaire* – the general staff of the Head of State. Before the logistics were made available for the operation in Ituri, Aguru had to address his requests to Kinshasa. He specified that the *Maison militaire* is an organ within the Presidency of the Republic, in the same way as the *maison civile*, and responsible for certain aspects related to the army.¹⁰⁰⁷ Aguru told him that it was the *Maison militaire* who had sent them.¹⁰⁰⁸

624. Katanga also testified that EMOI controlled all the material and logistics for all the operations, be it ammunitions, medication, weapons and instructions.¹⁰⁰⁹

EMOI/APC troops deployed in Ituri

625. Pichou testified that in January or February 2003, before the Bogoro attack, he went from Beni to Aveba by plane,¹⁰¹⁰ on mission for EMOI, with men from the APC and RCD-K/ML, as well as weapons and ammunition intended for Aveba and Olongba and others forces that controlled those regions.¹⁰¹¹ He took with him ten people from Beni, including Blaise Koka, Lieutenant-Colonel Bipe, Mutombo (*Le Mouton*), operator Kasereka (Mike-4), and Roger.¹⁰¹² On Aveba landing strip they met several Ngiti commanders, such as Cobra Matata, Muhito, Sipa.¹⁰¹³

626. Pichou specified that these men from Beni were assigned to reorganise the fighting forces in Aveba, Kagaba, and the FRPI forces, because at the time, Komanda, which is on the Beni road when coming from Bunia, was the objective of various forces, such as MLC and UPC.¹⁰¹⁴ Pichou said that this group of experts was sent to overcome the problems caused by

¹⁰⁰⁵ D2-228-T-252-pp.48-49 (FRA-pp.53-54).

¹⁰⁰⁶ D2-236-T-242-pp.54-55 (FRA-pp.46-47).

¹⁰⁰⁷ D2-236-T-242-p.55 (FRA-p.47).

¹⁰⁰⁸ D2-236-T-242-p.55 (FRA-p.47).

¹⁰⁰⁹ D2-300-T-317-pp.7-8 (FRA-pp.6-7).

¹⁰¹⁰ D2-228-T-249-p.72 (FRA-p.66).

¹⁰¹¹ D2-228-T-249-p.72 (FRA-p.67).

¹⁰¹² D2-228-T-249-pp.72-73 (FRA-p.67); D2-228-T-250-p.3 (FRA-pp.2-3).

¹⁰¹³ D2-228-T-252-p.64 (FRA-p.71).

¹⁰¹⁴ D2-228-T-249-p.73 (FRA-p.67); D2-228-T-250-pp.3-4 (FRA-pp.3-4.); EVD-D02-00118/Excerpt (Beni-Aru) from the General Map Democratic Republic of Congo.

the lack of experience of the fighters who controlled Komanda.¹⁰¹⁵ He added that they also had another mission that consisted in preparing the attack of Bogoro.¹⁰¹⁶ They had arrived with equipment and others followed them.¹⁰¹⁷ Pichou did not stay and left them at Aveba whilst he returned to Beni.¹⁰¹⁸ The group spent time in Aveba and later went to Kagaba to prepare the attack of Bogoro.¹⁰¹⁹

627. Regarding the APC/EMOI troops deployed on the field, Sharif said that Commanders Mutombo, Kasereka, Demuto and Koka were sent by Mbusa to Aveba, Kagaba, Geti and others places to train the fighters and conduct the operations;¹⁰²⁰ the following operational commanders were also in the field, fighting on all fronts in Ituri: Moi at Kpandroma, Papi Yani at Mongwalu, Faustin, Hilaire and others at Gety, and Side.¹⁰²¹

628. The strategy, of which Bogoro was but part, was in the minds of those at Kinshasa and Beni. Most of the background would be unknown to the ordinary member of the FAC, APC or militia. According to Katanga, the general plan of attack for the Bogoro operation, had been prepared on paper by EMOI in Beni, and was brought to Aveba by Adirodu who entrusted it to Blaise Koka while stressing the urgency of carrying it out. Obviously the details of the operation had to be worked out *in situ* – that is in Kagaba - figuring out the number of fighters, the kind of weapons, the quantity of ammunition, the number of health personnel, preparing the weapons and the ceremonies.¹⁰²²

629. Katanga said Blaise Koka was the commander of operations, and his immediate subordinate was Mutombo.¹⁰²³ He had to act quickly to attack Bogoro pursuant to the orders of Adirodu, but he could not do so immediately as he had to master the situation on the ground with the help of Mutombo. Blaise Koka left Aveba on the 20th of February with Mutombo and the majority of the APC soldiers who were there and went to Kagaba.¹⁰²⁴ Katanga added that from Aveba, only Garimbaya's team left, on the 21st of February, transporting ammunition.¹⁰²⁵ There was no meeting of commanders to plan the attack at Aveba, given the insecurity, nor at Medhu.

¹⁰¹⁵ D2-228-T-249-p.73 (FRA-p.67); D2-228-T-250-p.5 (FRA-pp.4-5).

¹⁰¹⁶ D2-228-T-249-p.73 (FRA-p.68); D2-228-T-250-p.5 (FRA-p.4).

¹⁰¹⁷ D2-228-T-249-p.73 (FRA-p.68).

¹⁰¹⁸ D2-228-T-249-p.73 (FRA-p.68).

¹⁰¹⁹ D2-228-T-250-p.7 (FRA-p.7).

¹⁰²⁰ D2-350-T-253-pp.41-42 (FRA-pp.44-45) [*Divergence constatée*].

¹⁰²¹ D2-350-T-254-p.26 (FRA-pp.22-23) [*Divergence constatée*].

¹⁰²² D2-300-T-318-pp.3, 5, p.22-l.13-17 (FRA-pp.3, 5, p.20-l.3-8).

¹⁰²³ D2-300-T-318-p.5-l.7, p.22-l.13-17 (FRA-p.4-l.22, p.20-l.3-8).

¹⁰²⁴ D2-300-T-317-p.67 (FRA-p.59); D2-300-T-318-pp.5, 16-17, 22-l.13-17 (FRA-p.20-l.3-8).

¹⁰²⁵ D2-300-T-318-pp.4-5 (FRA-p.3-5).

630. D-148 confirmed that the people assembled in Kagaba before the departure for Bogoro.¹⁰²⁶ According to him, in Kagaba, Yuda and his deputy Androzo Zaba Dark planned the details of the attack with the APC soldiers present – the APC was there to provide reinforcements, because they had experience in the area of heavy weaponry.¹⁰²⁷ Yuda made a speech to encourage the combatants, saying that there was no security at Bogoro and so he wanted people to bring in reinforcements to drive away the UPC which was the source of insecurity to the civilian population.¹⁰²⁸ Pascal Alezo Sipa, G2 in charge of intelligence, took part in the planning but did not go to the battlefield.¹⁰²⁹

Documentary evidence

631. Several documents mention the EMOI, and confirms their involvement in the planning of the reconquest of Ituri, and in particular Bogoro, confirming the credibility of the testimonies mentioned above.

632. EVD-D02-00147/DRC-D02-0001-0932 is a [REDACTED] memo, [REDACTED]. These directives concern the military situation in North Kivu and Ituri towards the end of 2002, after the fall of Lopondo. It speaks about measures to be taken to stop the UPC and its allies, to assist the APC in reconquering lost territory and to regain control over the resources and populations of Ituri. The Defence notes that this conforms to the aim of the EMOI indicated, *inter alia*, by Sharif and Katanga. The document describes in details the deployment of the troops and their missions, showing a very structured organisation. Katanga gave the meaning of the military abbreviations used.¹⁰³⁰

633. EVD-D02-00202/DRC-D02-0001-0938 is also a [REDACTED] memo, [REDACTED]. It stresses the necessity to take urgent measures in Ituri, such as the reinforcement of APC troops in number and in heavy weapons, and to follow the *Directives Opérationnelles* (Dir Ops), to counter the pressure exercised by the UPC, supported by the MLC and UPDF, given that the fall of Beni would grant them the control of this area. It lists some soldiers who will be sent on the field.

634. EVD-D02-00148/DRC-D02-0001-0937 is a letter from [REDACTED]. It requests proposals of deployment of military unit in the territory under control of the RCD/ML, which should be stronger than the APC one already present. The Defence submits that that the vocabulary used confirms the testimony of Katanga regarding the existence and aim of

¹⁰²⁶ D2-148-T-279-p.20-l.16-18 (FRA-p.18-l.2).

¹⁰²⁷ D2-148-T-279-p.18-19, p.36-l.13-25, p.37-l.14-15 (FRA-p.16 ; p.32-l.5-16, p.33-l.4-5).

¹⁰²⁸ D2-148-T-281-p.21 (FRA-p.18).

¹⁰²⁹ D2-148-T-280-p.23-l.2-16 (FRA-p.19-l.27-28 to p.20-l.12).

¹⁰³⁰ D2-300-T-320-p.10-13 (FRA-pp.11-14).

Maison Militaire. Indeed, the deployment of more efficient troops is necessary to reconquer Ituri.

635. EVD-D02-00203/DRC-D02-0001-0940 is a memo from [REDACTED], which seems a reply to the letter EVD-D02-00148 (given the similar references [REDACTED]) by suggesting several unites to deploy in the territory under control of the RCD/ML.

636. EVD-D02-00149/DRC-D02-0001-0941 is a [REDACTED] letter dated [REDACTED]. It describes the different political and military alliances there. It notes that Uganda does not intend to leave the territory and instead supports all the movements to keep its influence, that Uganda and Rwanda provide logistical support to the UPC, MLC, RCD-Nat, and Jerome's forces, in order to put their men in the territory, that the presence of a government team (FAC) at Beni is an obstacle for Uganda and its allies, *etc.* The Defence submits that this document confirms the existence of the EMOI, its military and strategy aim, and shows the close link between EMOI and the RCD-K/ML. The authenticity of this document can be inferred from the technical (EMOI) and local (forces negatives) vocabulary used, [REDACTED].¹⁰³¹

637. [REDACTED] he obtained all these letters in June 2011 from [REDACTED].¹⁰³² The Defence stresses that it actively sought information from the DRC government as to the activities of EMOI without success, as confirmed by Jean Logo.¹⁰³³ The Defence contends that the source and nature of the documents obtained by [REDACTED] provide sufficient indicia of reliability.

638. EVD-D03-00136 is a letter obtained by the Defence for Ngudjolo, signed by Samba Kaputo, *Directeur de Cabinet Adjoint* of the *Cabinet* of the President of the Republic, addressed to the CEMIA, dated 23 November 2002 at Kinshasa. In conformity with the last security meeting held on 15 September 2002 in the President's Office regarding the operations of Nyakunde/Ituri, Mr Kaputo orders the CEMIA to reinforce the FAC commanders and staff in the field in order to continue the operations on the sites targeted and planned (Mongwalu, Mandro, Bogoro and Komanda), in particular by sending a team of officers to supervise and continue the joint FAC-APC operations in the region of Beni and Ituri, reinforced in material and financial means that the Chief of State will put at his disposal.¹⁰³⁴ Mr Kaputo stresses that all the confidential reports should be addressed directly to the Cabinet of the Chief of State. The authenticity of this document is confirmed by the similar terms and issue which appear in

¹⁰³¹ D2-300-T-320-pp.13-15 (FRA-pp.15-16).

¹⁰³² [REDACTED].

¹⁰³³ D2-258-T-287-p.74 (FRA-p.65).

¹⁰³⁴ Emphasis added.

the documents mentioned above, as well by its stamps 'Presidence' and 'Confidentiel', the handwritten signature.

639. The Defence submits that all these documents support the defence case that Kinshasa, through the *Etat-major interarmées*, the *Maison militaire*, the Intelligence service, the EMOI, organised the deployment of APC troops in Ituri to fight the UPC and its allies and planned and directed the reconquest of Ituri, and in particular the campaign at Bogoro.¹⁰³⁵

Communications

640. From flutes, to horns, to shouting from hilltop to hilltop, to modern radio systems, the chamber has heard a lot of evidence concerning communication. The central dispute is that the prosecution claim that there was a network allowing Walendu Bindi, and particularly Aveba, to be in contact with Zombe and the defence submits that there was not.

641. There were no regular cell phone networks in Aveba or anywhere else in the region.¹⁰³⁶ Aveba had a *phonie blanche*, used by the missionaries and installed in the health centre.¹⁰³⁷ It seems to have had a range of about 10 kilometres.¹⁰³⁸ Relay connections were needed for distances beyond this.¹⁰³⁹ The *phonie blanche* was not used by the APC or by other combatants in Aveba.¹⁰⁴⁰

642. Walkie-talkies began to appear in Aveba in December 2002 after the trip to Beni. Katanga said they had about six, called 'Icom'. They were short range devices with a range of 5 kilometres. Katanga had one.¹⁰⁴¹

643. Katanga also had a 'Thuraya' satellite phone, given him by Mbusa so that he could be in contact.¹⁰⁴² Katanga also communicated with Aguru who, like Duku, considered Katanga as his 'little brother' because they were all from Ituri.¹⁰⁴³ Each time that an operation was planned, in order to be sure that the combatants would reinforce the APC, it would either be EMOI or the general staff of the APC that would call, including Mbusa,¹⁰⁴⁴ and Katanga

¹⁰³⁵ See also EVD-OTP-00253, EVD-OTP-00233 and EVD-OTP-00234, letters from F. Ndjabu Ngabu which stress the importance of the role of the EMOI in Ituri, and in particular its control over the FRPI.

¹⁰³⁶ D2-300-T-317-pp.41-42 (FRA-p.37).

¹⁰³⁷ D2-300-T-317-p.43 (D2-300-T-317-FRA-p.38); T-318-p.19 (FRA-p.17).

¹⁰³⁸ D2-300-T-317-p.43 (FRA-p.38).

¹⁰³⁹ D2-300-T-317-p.43 (FRA-p.38).

¹⁰⁴⁰ D2-300-T-317-p.43 (FRA-p.38).

¹⁰⁴¹ D2-300-T-317-pp.37-38, 41 (FRA-pp.33-34, 36-37); T-325-pp.21-22 (FRA-p.19).

¹⁰⁴² D2-300-T-317-p.57 (FRA-p.50).

¹⁰⁴³ D2-300-T-317-FRA-p.50.

¹⁰⁴⁴ D2-300-T-325-p.22 (FRA-p.19).

could inform them of the availability of the combatants.¹⁰⁴⁵ After Mike 4 arrived in January 2003, the Thuraya was primarily used by him to be in direct communication with Mbusa.¹⁰⁴⁶

644. Mike-4¹⁰⁴⁷ brought a multifrequency radio communication device when he arrived in January 2003. It had a long range and was intended for contact with the APC at Beni.¹⁰⁴⁸ The problem appears to have been powering it. In January/February 2003, there were two generators in Aveba. Katanga's father had one which had broken down, and the health centre had one which worked,¹⁰⁴⁹ which is why the multifrequency radio was first installed in the health centre rather than the BCA, until March 2003, when moved to the BCA camp.¹⁰⁵⁰ There were frequent problems with the battery as the multifrequency radio needed more power than the *phonie blanche*.¹⁰⁵¹ Katanga said it had a problem on the day Bogoro was attacked. There was another multifrequency radio in Kagaba which the combatants brought from Avenyuma.¹⁰⁵² From January, Aveba could communicate with Kagaba.

645. It is the defence case that there was no radio or other contact with Bedu-Ezekere, Zumbe.¹⁰⁵³ Katanga said he did not know whether Zumbe had any phonies.¹⁰⁵⁴ Chef Manu testified that there was some contact between Zumbe and Kagaba because the young men from Zumbe left from time to time to get ammunition.¹⁰⁵⁵ He also stated that the young men had obtained walkie-talkies from Nyakunde which they called Cobra.¹⁰⁵⁶

General presentation of Bogoro

646. Before the war, there were around 6320 inhabitants in the *groupement* of Babiase, whose chef-lieu is Bogoro. It had a multi-ethnic population and the Hema were the most numerous.¹⁰⁵⁷ By February 2003 the Lendu and Ngiti appear mostly to have fled,¹⁰⁵⁸ though V-02 said that in December 2002 there were still some Lendu and Ngiti in Bogoro.¹⁰⁵⁹ The size of the remaining population on February 24th is hard to quantify. The town was barely functioning in any normal sense. The schools had been closed since early 2001,¹⁰⁶⁰ the events

¹⁰⁴⁵ D2-300-T-325-p.22 (FRA-p.19).

¹⁰⁴⁶ D2-300-T-317-p.41, 45 (D2-300-T-317-FRA-pp.36, 40).

¹⁰⁴⁷ See EVD-D02-00236, Mike 4's diploma.

¹⁰⁴⁸ D2-300-T-317-p.42 (FRA-p.37).

¹⁰⁴⁹ D2-300-T-317-p.44 (FRA-p.39).

¹⁰⁵⁰ D2-300-T-317-p.44 (FRA-p.39).

¹⁰⁵¹ D2-300-T-317-pp.43-44 (FRA-pp.38-39).

¹⁰⁵² D2-300-T-317-pp.44-45 (FRA-pp.39-40).

¹⁰⁵³ D2-300-T-317-p.45 (FRA-p.40); T-318-pp.18-19 (FRA-pp.16-17).

¹⁰⁵⁴ D2-300-T-318-p.19 (FRA-p.17).

¹⁰⁵⁵ D3-88-T-304-p.38-l.15-18 (FRA-p.34-l.13-16); See also D2-228-T-249-p.70 (FRA-pp.64-65).

¹⁰⁵⁶ D3-88-T-304-pp.72-73 (FRA-pp.64-65).

¹⁰⁵⁷ EVD-OTP-00202/Statement of P-166/para.14.

¹⁰⁵⁸ P-166-T-226-p.53-l.17-to-p.55-l.12 (FRA-p.49-l.6-to-p.50-l.19).

¹⁰⁵⁹ V-02-T-232-p.10-l.22-to-p.11-l.6 (FRA-p. 9-l.4-13).

¹⁰⁶⁰ P-166-T-226-p.37-l.1-10 (FRA-p.33-l.15-22).

had caused many to move away and rumours or notice of an impending attack reduced the remaining 'hard core'. D-176 said seven families left Bogoro, but the rest remained and there were at least 800 civilians left, a figure considerably less than the 3000 suggested by the prosecution.¹⁰⁶¹

647. Bogoro is strategically placed, as was plain to see on the site visit, sitting as it does astride the road from Lake Albert to Bunia, in a declivity on the side of the Rift Valley. The UPDF built the first military camp in Bogoro, locating it in and around the Bogoro Institute. P-166 said that just after the 2001 attack, the UPDF reinforced their troops in Bogoro and settled at the Bogoro Institute. In August 2002, around the time of the fall of Lopondo, the UPDF withdrew its forces and the UPC moved in. The UPC controlled the locality in early 2003¹⁰⁶² and its presence there prevented the Lendu from using the road to reach Bunia.¹⁰⁶³ Bogoro became a major UPC military base for attacking the neighbouring Lendu and Ngiti villages.¹⁰⁶⁴ For the Ngiti and Lendu, Bogoro was inaccessible.¹⁰⁶⁵

648. Kinshasa and the RCD-K/ML wanted to take back Ituri,¹⁰⁶⁶ and Bunia was its capital and only major town. With the proposed withdrawal of the UPDF, the only obstacle was the UPC. To regain Bunia, to weaken the position of the UPC, and to ensure Uganda kept its promises, control of Bunia's eastern side and the Kasenyi road were strategic necessities. The Bunia to Komanda route was a difficult alternative route. The UPC and its camp at Bogoro Institute was a legitimate military target.¹⁰⁶⁷ The UPDF built *manyatta* and surrounded the camp with defensive trenches, and communication trenches were dug inside the perimeter.¹⁰⁶⁸ The UPC soldiers adopted these facilities.¹⁰⁶⁹

¹⁰⁶¹ D2-176-T-256-p.54 (FRA-p.46).

¹⁰⁶² P-268-T-108-p.49 (FRA-p.48).

¹⁰⁶³ EVD-OTP-00206/MONUC Special Report/para.64. See EVD-D02-00099 and EVD-D03-00074, P-166' sketch of Bogoro indicating the Bunia and Kasenyi roads; D2-228-T-252-pp.25-26 (FRA-pp.27-28); D2-148-T-279-p.18-l.21-23 (FRA-p.16-l.15-16); D2-148-T-280-p.21-l.2-4 (FRA-p.18-l.10-12); D2-148-T-281-p.35 (FRA-p.30).

¹⁰⁶⁴ D2-129-T-271-pp.27, 51, 76 (FRA-p.46, 68-69); D2-228-T-252-pp.25-26 (FRA-p.28).

¹⁰⁶⁵ D2-300-T-318-p.24-l.14 (FRA-p.21-l.25).

¹⁰⁶⁶ D2-228-T-252-p.27 (FRA-p.29).

¹⁰⁶⁷ D2-176-T-255-p.29-l.17-20 (FRA-p.29-l.20-24); P-323-T-117-p.21-l.4-9, 18 (FRA-p.20-l.11-15).

¹⁰⁶⁸ EVD-OTP-00202/P-166' statement/para.49; P-233-T-83-p.40-l.22-23 (FRA-p.49-l.14-15); P-323-T-117-p.11-l.21-22 (FRA-p.11-l.17-18); P-250-T-94-p.72-l.2-5 (FRA-p.75-l.12-15).

¹⁰⁶⁹ D2-176-T-255-p.28-l.19-21 (FRA-p.28-l.23-24); EVD-OTP-00202/P-166' statement/para.47; P-166-T-226-p.17-l.12-24 (FRA-p.69-l.15-21); P-233-T-83-p.40-l.8-19 (FRA-p.48-l.22-to-p.49-l.11.); P-161-T-109-p.44-l.12-16 (FRA-p.43-l.19-23); P-323-T-117-pp.8-17, 66-68 (FRA-pp.8-16; 64-67); EVD-OTP-00050/Satellite image of Bogoro dated April 2003, where P-323 marked the trenches by a continuous line, the UPC positions by dots, and the entrance of the camp by an arrow; see also EVD-D02-00019/Satellite image of Bogoro where the trenches dug around the camp can be seen according to P-159: P-159-T-123-p.78-l.2-5 (FRA-p.73-l.12-17); P-250-T-93-p.34-l.5-9, p.35-l.25-p.36-l.1 (FRA-p.34-l.24-to-p.35-l.4; p.36-l.21-22); P-250-T-94-p.67-l.7-22, p.72-l.2-5 (FRA-p.75-l.12-15).

649. The UPC force at Bogoro was a trained army, large, equipped with modern weaponry. It was also in a well constructed, defensive position as Katanga said he found when he went on the earlier attack of the 10th of February. The UPC in Bogoro were, despite several attacks, confident of their superiority.¹⁰⁷⁰ Any attempt to dislodge such a group would necessarily be a daunting task. It was capable of calling for support from UPC based in Bunia and Kasenyi and had radio communication facilities to do so.¹⁰⁷¹ Bogoro was a well-defended, strategic position. The UPC would not have committed so many of their assets had it been otherwise.

650. By the time of the attack on 24th February there were a substantial number of defenders, considerably more than the 100 or so suggested by the Prosecution. According to P-323, a member of the 1st platoon of the 1st company at the UPC camp,¹⁰⁷² there was a battalion of 340 UPC soldiers in the Bogoro camp,¹⁰⁷³ all wearing uniforms and equipped with SMGs, G-2s, RPGs, and mortars¹⁰⁷⁴ According to P-268, approximately 300 or 400 UPC soldiers were at the Bogoro Institute at the time of the attack, only two of whom were women.¹⁰⁷⁵ P-233 said that there were between 100 and 200 UPC soldiers stationed at the Institute and approximately another 100 UPC troops camping just nearby at Madam Giyma's.¹⁰⁷⁶ P-166 said there were weapons connected by wires to a battery,¹⁰⁷⁷ and mines at the entrance of the UPC camp.¹⁰⁷⁸ Most of the UPC soldiers were based at the Bogoro Institute; there were also five at the Kavali School and approximately ten at Mount Waka.¹⁰⁷⁹ There was also a surveillance position on the road to Diguna.¹⁰⁸⁰ Patrols went outside the camp, covering the roads towards Bunia, Kasenyi, Mount Waka, and Gety, day and night.¹⁰⁸¹ In the event of an attack the population of Bogoro and even that of neighbouring villages rushed to the military camp for protection.¹⁰⁸²

¹⁰⁷⁰ D2-176-T-255-p.27 (FRA-p.27).

¹⁰⁷¹ P-268-T-108-p.14-l.6-11 (FRA-p.13-l.20-24); P-323-T-117-p5-l.25-to-p.6-l.1 (FRA-p.5-l.23-25).

¹⁰⁷² P-323-T-118-pp.26-27 (FRA-pp.25-26).

¹⁰⁷³ P-323-T-117-p.2-l.20-to-p.3-l.15 (FRA-p.2-l.15-to-p.3-l.11).

¹⁰⁷⁴ P-323-T-117-p. 3-l.16-to-p.4-l.25 (FRA-p.3-l.14-to-p.4-l.21).

¹⁰⁷⁵ P-268-T-108-p.17-l.10-24, p.37-l.21-25, p.47-l.16-18 (FRA-p.16-l.20-to-p.17-l.9 ; p.36-l.20-23 ; p.46-l.12-14).

¹⁰⁷⁶ P-233-T-88-p.16-l.8-14 (FRA-p.19-l.22-25-to-p.20-l.6).

¹⁰⁷⁷ EVD-OTP-00202/P-166' statement/para.57; P-166-T-227-p.9-l.16-25.

¹⁰⁷⁸ P-166-T-226-p.14-l.10-22 (FRA-p.12-l.16-26).

¹⁰⁷⁹ P-268-T-107-p.20-l.6-22, p.25-l.8-17, p.30-l.6-16 (FRA-p.19-l.19-25-to-p.20-l.1-11; p.25-l.14-23; p.30-l.14-22); EVD-OTP-00044/Conf/Sketch of Bogoro annotated in court by P-268 on 24 February 2010, indicating the Location of the Kavali School with a red dot and the mark '1' (T-107-p.22-l.18-to-p.25-l.5 (FRA-p.22-l.15-25-to-p.23-l.1); P-268-T-108-p.37-l.21-to-p.38-l.7 (FRA-p.36-l.20-to-p.37-l.5); D2-176-T-255-p.29-l.24-p.30-l.3 (FRA-p.29-l.27-to-p.30-l.3); D2-176-T-256-p.8-l.18-20 (FRA-p.8-l.1-3).

¹⁰⁸⁰ D2-176-T-255-p.30-l.3-7 (FRA-p.30-l.4-7); D2-176-T-256-p.8-l.18-20 (FRA-p.8-l.1-3).

¹⁰⁸¹ P-323-T-117-p.22-l.4-to-p.23-l.14 (FRA-p.21-l.12-to-p.22-l.21); D2-176-T-255-p.30-l.8 (FRA-p.30-l.8); D2-176-T-256-p.8-l.1-8 (FRA-p.7-l.14-19). V-02, P-166 and P-268 also mentioned UPC patrols: V-02-T-231-p.31-l.16-22 (FRA-p.27-l.24-to-p.28-l.2); V-02-T-232-p.40-l.20-21 (FRA-p.35-l.10-12); EVD-OTP-00202/P-166' statement/para.55; P-268-T-108-p.38-l.8-14 (FRA-p.37-l.6-12).

¹⁰⁸² P-233-T-83-p.41-l.12-17 (FRA-p.50-l.7-13); P-233-T-88-Red-pp7-8 (FRA-pp.9-10).

Previous attack against Bogoro in 2001 and 2002

651. Bogoro was subject of attacks prior to February 2003. Only P-161 mentioned an attack against Bogoro in 2000, but he is not credible, since he also agreed that the first attack was in 2001.¹⁰⁸³ The defence submits that there is no reliable evidence of joint attacks Lendu/Ngiti attacks prior to 24th February. The two attacks of 9th January 2001 and August 2002 can be distinguished from subsequent attacks. The 2001 attack against Bogoro was unique as it involved the Ugandans¹⁰⁸⁴ and the North Lendu.¹⁰⁸⁵ It did not involve the UPC or the Ngiti. The attack came from Katonie following an incident.¹⁰⁸⁶ It appears to have been relatively spontaneous and Aveba is far.

652. The second attack against Bogoro occurred on 14 August 2002.¹⁰⁸⁷ The UPDF were still in place with a few UPC soldiers.¹⁰⁸⁸ The defence submits that this was in fact an attack essentially by the APC.¹⁰⁸⁹ There is no reliable evidence, nor is it alleged, that the August 2002 attack was either a joint Lendu/Ngiti operation, or involved Ngiti.

653. Between August 2002 and the attack of 24th February the general situation changed radically. The RCD-K/ML and the APC army were chased out of Bunia by a UPDF/UPC operation in early August. Uganda reconsidered its support for the UPC. The UPC took an offensive role against the APC from August 2002 onwards, allying itself with the MLC and RCD-Goma – itself Rwandan backed.¹⁰⁹⁰ In the meantime, Uganda had agreed to withdraw from Ituri and Kinshasa, no longer opposed by the RCD-K/ML and its APC, was out to reclaim Ituri. Supporting the Ngiti was an obvious means of helping obtain that objective as they presented a local, knowledgeable force, with no love for the UPC.

Weapons Deliveries, Late 2002, Early 2003, from the RCD-K/ML / APC

654. Heavy weapons, machine guns and ammunition do not grow on trees. Prior to December 2002 the Ngiti's effective arms were bows and arrows and spears. They were able to gather up

¹⁰⁸³ P-161-T-114-p.14-l.10-18 (FRA-p.14-l.11-18); T-112-p.28-l.23-to-p.29-l.1 (FRA-p.28-l.14-16); T-116-p.33-l.16-to-p.34-l.8 (FRA-p.33-l.11-to-p.34-l.4).

¹⁰⁸⁴ D-176-T-256-pp.48-49 (FRA-p.40-42), EVD-OTP-00202/P-166' statement/paras.27-28; P-166-T-225-p.76-77 (FRA-p.68).

¹⁰⁸⁵ P-159-T-120-p.8-l.11-16 (FRA-p.8-l.1-6); P-233-T-87-p.20-l.16-17 (FRA-p.24-l.2-3); EVD-OTP-00202/P-166' statement/para.25; P-166-T-227-p.24-l.14-15 (FRA-p.21-l.28-to-p.22-l.1); D-176-T-256-p.30-l.11-14 (FRA-p.26-l.25-to-p.27-l.2); V-02-T-232-p.26-l.6-7, 12 (FRA-p.22-l.8-9 ; 15-16)

¹⁰⁸⁶ P-233-T-87-p.50-l.9-17 (FRA-p.60-l.1-10); P-233-T-88-p.40-l.19 to p.42-l.14 (FRA-p.50-l.4-to-p.52-l.9); P-323-T-118-p.21-l.16-to-p.22-l.25 (FRA-p.20-l.18-to-p.21-l.24).

¹⁰⁸⁷ P-166-T-225-p.18-l.17-18 (FRA-p.15-l.20-22); EVD-OTP-00202/P-166's statement/para.31.

¹⁰⁸⁸ P-233-T-87-p.15-l.22-to-p.16-l.4, p. 50 (FRA-p.18-l.5-13); T-88-Red-p.6-l.1-4 (FRA-p.7-l.17-20); EVD-OTP-00202/P-166' statement/para.30.

¹⁰⁸⁹ P-161-T-112-p.28-l.13-20 (FRA-p.28-l.2-11); D2-300-T-315-p.41-43 (FRA-pp.36-39); P-233-T-87-p.52-l.7-21 (FRA-p.62-l.5-to-p.63-l.1).

¹⁰⁹⁰ EVD-OTP-00206/MONUC Special Report/paras.28-29; EVD-OTP-00205/MONUC Final Report/p.0291/para.3; EVD-OTP-00222/Le Fléau d'or/pp0376, 0392, 0394; D2-300-T-316-p.19; D2-300-T-317-pp.10-11 (FRA-pp.9-10).

some abandoned weapons in battle, or were sometimes able to buy them off APC soldiers. The fact and source of the supply does not seem to be in dispute. The HRW report confirms that the RCD-K/ML provided weapons to the Lendu militia, and the MONUC Special Report that the APC was sending weapon supplies from Beni to Lendu militia.¹⁰⁹¹ This was all part of a wider plan. Prior to the deliveries, there were few automatic weapons.¹⁰⁹² Prior to the delegation visit to Beni in November/December 2002, no Antonov planes landed at Aveba. After Beni, weapons, ammunition and other supplies were delivered in plenty.¹⁰⁹³ The weapons were not just new AK47's but light and heavy mortars, SMG's and MAGs, light machine guns, and rocket propelled grenades.¹⁰⁹⁴ There was also rations, fuel, medication, military uniforms, boots, etc.¹⁰⁹⁵ They were brought in by Antonov over a few weeks – six or more deliveries according to Katanga.¹⁰⁹⁶ What was the purpose of supplying this material? The only logical reason for the deliveries to Aveba is a proposed attack on Bogoro. Neither Kinshasa nor the RCD-K/ML would distribute such weapons with no good purpose. The defence submits the deliveries were part of a plan to take back Ituri and in particular, to furnish the necessary armament for an attack on Bogoro. The supply is good evidence of the RCD-K/ML and Kinshasa directing the plan and strategy. The plot was to strike at Bogoro from Gety and to get to Bunia.¹⁰⁹⁷ It is the only route from the Gety/Aveba side of Walendu Bindi. The reason that Aveba was picked as the focal point for cooperation with the APC was that there was a landing-strip there, it was outside the principal war-zone and thus relatively peaceful.¹⁰⁹⁸

655. Katanga testified that no weapons were transported from Aveba to Bedu-Ezekere/Zumbe.¹⁰⁹⁹ Katanga was aware of the weapons that had left Aveba for Kagaba, Aveba for Singo, and Aveba for Songolo.¹¹⁰⁰ This is not inconsistent with Chef Manu's testimony stating that young people from Zumbe got their supplies in Kagaba.¹¹⁰¹ D-161 testified that Yuda used to come to Aveba when the plane landed.¹¹⁰²

¹⁰⁹¹ EVD-OTP-00222/*Le Fléau d'or*/pp.0388, 0392; EVD-OTP-00206/MONUC Special Report/paras 9, 30; see also EVD-OTP-00240/PUSIC *Déclaration Politique*; EVD-OTP-00253/F. Ndjabu's Memorandum; D2-176-T-252-p.67-l.5-7 (FRA-p.74-l.5-7), who said that the Lendu combatants received military logistics equipment and support from the RCD-K/ML and the Kinshasa government.

¹⁰⁹² D2-300-T-317-p.50 (FRA-pp.43-44).

¹⁰⁹³ D2-161-T-269-p.29 (FRA-p.25); D2-160-T-272-p.77 (FRA-pp.68-69).

¹⁰⁹⁴ D2-300-T-317-p.50 (FRA-pp.43-44).

¹⁰⁹⁵ D2-300-T-317-p.49 (FRA-pp.43-44).

¹⁰⁹⁶ D2-300-T-317-p.48 (FRA-p.42).

¹⁰⁹⁷ D2-300-T-317-p.57 (FRA-p.49).

¹⁰⁹⁸ D2-300-T-324-FRA-p.79.

¹⁰⁹⁹ D2-300-T-318-p.19 (FRA-p.17).

¹¹⁰⁰ D2-300-T-318-p.19 (FRA-p.17).

¹¹⁰¹ D2-88-T-304-p.38-l.14-19 (FRA-p.34-l.11-16).

¹¹⁰² D2-161-T-269-pp.48-53 (FRA-p.41-45).

656. Katanga stated that all the equipment delivered was primarily for the APC. He testified that “[i]f we benefitted it’s because we were allies.”¹¹⁰³ If 30 cases came, they gave 10 cases to the combatants.¹¹⁰⁴ Ammunition was given when going to the front, as otherwise the APC feared they may turn on them.¹¹⁰⁵ Yuda at Kagaba was on the front line whereas in Aveba the combatants were not.¹¹⁰⁶ The combatants did not get the heavy weaponry as they did not know how to use it.¹¹⁰⁷ Expertise was necessary – and it is probable the authorities deemed it unwise to teach the combatants such things.

Involvement of the APC

657. Katanga testified that many APC were scattered through the collectivity, originally part of Faustin’s 12th Battalion or the remaining part of Lopondo’s men,¹¹⁰⁸ and many had become semi independent by December 2002.¹¹⁰⁹ Reference has already been made above to an APC platoon¹¹¹⁰ under Alpha Bebi and Kambale (aka Mbale)¹¹¹¹ already in Aveba.

658. Kasereka - ‘Mike-4’ - arrived in Aveba in January 2003.¹¹¹² He was an APC lieutenant, aged about 35, and the communications director. He began to identify the APC combatants.¹¹¹³ He was also there to evaluate the situation.¹¹¹⁴ He briefed Blaise Koka and those at Beni about the situation.¹¹¹⁵ In February, 2003, Blaise Koka arrived by plane with other soldiers, while a company of approximately 150 APC soldiers arrived on foot. Some stayed at the BCA while most went directly to Kagaba.¹¹¹⁶ According to Katanga, Blaise Koka reported directly to APC Staff Headquarters under Kasereka¹¹¹⁷ and reported on supply requirements and checked incoming supplies as the planes landed.¹¹¹⁸ Koka went to other zones, including Kagaba and Singo, to meet with APC commanders there, rather than have them come to Aveba.¹¹¹⁹ In addition, other EMOI officers were in Aveba. Some were experts to accompany operations: they were the ones issuing instructions, targeting specific areas, as

¹¹⁰³ D2-300-T-317-p.51 (FRA-pp.44-45).

¹¹⁰⁴ D2-300-T-317-p.51 (FRA-p.45).

¹¹⁰⁵ D2-300-T-317-p.51 (FRA-p.45).

¹¹⁰⁶ D2-300-T-317-p.53 (D2-300-T-317-FRA-p.46).

¹¹⁰⁷ D2-300-T-317-p.52 (FRA-p.46).

¹¹⁰⁸ D2-300-T-317-FRA-pp.46-47.

¹¹⁰⁹ D2-300-T-317-pp.53-54 (FRA-p.47).

¹¹¹⁰ D2-300-T-315-pp.63-64 (FRA-pp.56-57).

¹¹¹¹ D2-300-T-315-p.63 (FRA-p.56).

¹¹¹² D2-300-T-317-p.55 (FRA-p.48).

¹¹¹³ D2-300-T-317-pp.53-54 (FRA-pp.46-47).

¹¹¹⁴ D2-300-T-317-p.54 (FRA-p.47).

¹¹¹⁵ D2-300-T-317-p.56 (FRA-p.49).

¹¹¹⁶ D2-300-T-317-pp.55-56 (FRA-p.48).

¹¹¹⁷ D2-300-T-317-p.56 (FRA-pp.48-49).

¹¹¹⁸ D2-300-T-317-p.56 (FRA-p.49).

¹¹¹⁹ D2-300-T-324-FRA-p.85 (FRA-p.77).

the attacks and operations were conducted.¹¹²⁰ Lieutenant Bip was APC and was in charge of administration and logistics.¹¹²¹ He arrived in Aveba with Koka and other soldiers.¹¹²² Captain Mutombo was in Gety, but was ordered by the APC Chief of Staff to go to Aveba, and arrived there the day after Blaise Koka.¹¹²³

659. Christian Modjima confirmed that there were people coming from Beni to Aveba, including officers like Mandefu, whom he knew from Gety, long before 2002.¹¹²⁴ He also saw Kambale, Mike 4, Dr. Adirodu arrive in Aveba by plane from Beni.¹¹²⁵ However, he did not know what operations they were involved in.¹¹²⁶

660. Katanga was asked if Aveba was the main APC position and said that it was like a logistics base, and the number of APC soldiers varied, depending on operations,¹¹²⁷ and there were a significant number of APC in Singo and Kagaba, where the battlefield was to be found.¹¹²⁸ Koka would go and meet other APC commanders at their respective bases rather than have them come to Aveba.¹¹²⁹

661. If Blaise Koka were to ask Katanga to go to fight, Katanga would first consult Kasaki and only if he consented could he go.¹¹³⁰ He had once not got Kasaki's consent – at Chai - and been wounded. An example of him getting Kasaki's consent was when he went with Koka to Bunia. He explained and discussed it with Kasaki who had been reluctant to endorse anything outside the *collectivité*.¹¹³¹

662. Before Blaise Koka arrived, ammunition was stored at the BCA,¹¹³² but Katanga said after he arrived and was provided a house,¹¹³³ the ammunition was stored there.¹¹³⁴ It would make sense for the APC to be cautious about giving the combatants total control over the supplies.

¹¹²⁰ D2-300-T-317-p.57 (FRA-pp.49-50).

¹¹²¹ D-300-T-317-pp.67-68 (FRA-p.59).

¹¹²² D2-300-T-317-p.68 (FRA-pp.59-60).

¹¹²³ D2-300-T-317-p.68 (FRA-p.60).

¹¹²⁴ D2-160-T-272-p.77 (FRA-p.69).

¹¹²⁵ D2-160-T-272-p.78 (FRA-p.69).

¹¹²⁶ D2-160-T-274-p.31 (FRA-p.28).

¹¹²⁷ D2-300-T-324-p.84 (FRA-p.76-77).

¹¹²⁸ D2-300-T-324-pp.84-85 (FRA-p.76-77).

¹¹²⁹ D2-300-T-324-pp.85-86 (FRA-pp.77-78).

¹¹³⁰ D2-300-T-324-p.82 (FRA-p.75).

¹¹³¹ D2-300-T-324-pp.83-84 (FRA-p.75-76).

¹¹³² D2-300-T-317-pp.51-52, 53 (FRA-pp.45-46).

¹¹³³ D2-300-T-317-p.52 (FRA-p.45).

¹¹³⁴ D2-300-T-317-p.52 (FRA-p.46).

Authority of Katanga on the eve of the main Bogoro attack

663. Few in the collectivity would have sensed any change in their affairs after Katanga returned from Beni in December. The fact the FRPI existed would not have effected much change. Katanga said that news about the existence of the FRPI passed by word of mouth – often by traders.¹¹³⁵ The defence position is that Germain Katanga’s authority grew between the years 2002 and 2004. It is not easy to take a snap-shot of his situation on the eve of the Bogoro attack, as the Prosecution has tried to do. The Prosecution witnesses that speak of him, their five core witnesses, are unreliable on the subject and not to be relied upon. Their evidence may reflect the situation later, post Bogoro. The Ngiti combatants were not an army in any real sense, but a rag-tail bunch with different histories and objectives. Many of the ordinary combatants were village based defenders who only came to be armed after Beni began supplies. Many of their commanders had little love for authority beyond themselves and their often narrow interests.¹¹³⁶ It was in an effort to turn them more into a force that could work with and carry out Beni’s interests that they were armed. If they worked together at all, it was on a temporary and consensual basis. After Bogoro they saw it was in their interests to present themselves as a homogenous and structured force. In that way, they could be seen as a force to be dealt with, to be consulted and taken into account in the peace process and eventually profit from the demobilisation processes or integration in the national army.

664. Katanga had no rank or office in the FRPI. ‘Coordinator’ is a function, which only enabled him to facilitate rapprochement, without necessarily be successful.¹¹³⁷ Hierarchically, Katanga said his position on return from Beni as ‘coordinator’ placed him between Mbadu and Kasaki: “I was between Mbadu and Kasaki, but I couldn’t issue any commands to Mbadu, because my case was somewhat apart.”¹¹³⁸ In the ‘*auto-défense*’, a commander’s control was limited to those who were loyal to him. The combatants would follow the instructions of their local commander only.¹¹³⁹ So, Mbadu’s combatants had more respect for Mbadu than for Katanga because Mbadu founded the BCA with them; they would not listen to anyone else.¹¹⁴⁰ Katanga communicated directly with Kasaki rather than Mbadu. For instance, if the APC needed combatants for an operation, he would ask Kasaki.¹¹⁴¹ If Kasaki

¹¹³⁵ D2-300-T-317-p.25 (FRA-p.22).

¹¹³⁶ P-12-T-198-p.47-l.7-19 (FRA-p.49-l.12-27).

¹¹³⁷ D2-300-T-317-pp.22, 27, 31 (FRA-p.20, 24, 27); D2-300-T-324-p.74-75 (FRA-p.68-69); D2-300-T-325-pp.3-4 (FRA-p.2-4); D2-228-T-250-pp.12-13 (FRA-p.11-12).

¹¹³⁸ D2-300-T-317-pp.28-29 (FRA-pp.25-26). Note that the corrected english transcript replaced ‘camp’ with ‘case’.

¹¹³⁹ D2-300-T-324-p.89 (FRA-p.81); D2-350-T-253-p.41 (FRA-pp.43-44); D2-129-T-271-pp.32-33, 64 (FRA-p.28-29 ; 58) ; D2-228-T-250-pp.12-13 (FRA-pp.11-12).

¹¹⁴⁰ D2-300-T-317-p.29 (FRA-pp.25-26).

¹¹⁴¹ D2-300-T-317-FRA-p.26.

agreed, he would instruct Mbadu to that effect.¹¹⁴² The instructions of Kasaki to Mbadu were effectively direct orders that he would execute, while instructions from Katanga were executed by Mbadu only if he agreed to cooperate.¹¹⁴³ His authority over combatants that were not his particular, loyal group was limited.¹¹⁴⁴ However, from January 2003, Katanga said he did gradually begin to have authority over the BCA combatants because of a conflict between Mbadu and Kasaki. Mbadu wanted to take the weapons away from the APC platoon at BCA, but Kasaki disapproved. Kasaki then appointed Iringa as commander *ad interim* for the BCA.¹¹⁴⁵ At the time of the Bogoro attack of 24 February 2003, Mbadu was still at BCA, but Katanga came from time to time.¹¹⁴⁶

665. Katanga said he had no control over **Garimbaya**, the APC company commander based in the *Aéro* camp, who was independent and answerable only to his APC colleagues at the BCA, the platoon commander Kambale, also known as Mbale.¹¹⁴⁷ Katanga said he had a good relationship with Garimbaya but they were more like brothers.¹¹⁴⁸ Garimbaya was an APC soldier and even Mbale, the platoon commander of the APC forces at camp BCA, was strictly speaking answerable to him.¹¹⁴⁹ P-28 confirmed that Garimbaya and Commander Mbadu were company commanders.¹¹⁵⁰ Garimbaya was higher in rank than Alpha Bebi when he arrived.¹¹⁵¹ Garimbaya had authority over Bebi.¹¹⁵² Prior to the arrival of Blaise Koka, Garimbaya was, however, not the highest ranking APC soldier in Aveba. Apart from some officers who were former soldiers in the army, many APC commanders did not have grades as such but were simply known as company commanders. Some officers of the 12th Battalion had remained in Singo, whilst Garimbaya wanted to remain in Aveba.¹¹⁵³ For instance, there was Captain Mutombo in Gety, and Lieutenant Captain Kassongo in Singo.¹¹⁵⁴ Alain Metu testified that Garimbaya and Katanga were in two different camps.¹¹⁵⁵ It is Katanga's position that, in July/August 2004, Garimbaya joined Katanga's residence company at camp BCA.

¹¹⁴² D2-300-T-317-FRA-p.27.

¹¹⁴³ D2-300-T-317-pp.30-31 (FRA-p.26-27).

¹¹⁴⁴ D2-300-T-317-pp.30-31 (FRA-p.26-28).

¹¹⁴⁵ D2-300-T-317-pp.32-33 (FRA-pp.28-29).

¹¹⁴⁶ D2-300-T-317-pp.33-34 (D2-300-T-317-FRA-p.29-30).

¹¹⁴⁷ D2-300-T-317-p.35 (FRA-p.31); D2-300-T-322-p.2-l.19-21 (FRA-p.2-l.24-27); see also D2-300-T-324-p.81 (FRA-p.74) where Katanga said that Garimbaya was company commander.

¹¹⁴⁸ D2-300-T-317-p.28 (FRA-p.25).

¹¹⁴⁹ D2-300-T-317-p.34-35 (FRA-p.31).

¹¹⁵⁰ P-28-T-217-pp.5-6 (FRA-p.5).

¹¹⁵¹ D2-300-T-324-FRA-p.83.

¹¹⁵² D2-300-T-325-pp.2-3 (FRA-p.2).

¹¹⁵³ D2-300-T-325-p.2 (FRA-p.2).

¹¹⁵⁴ D2-300-T-325-p.2 (FRA-p.2).

¹¹⁵⁵ D2-134-T-259-pp.57, 58 (FRA-p.51).

666. Outside Aveba, Katanga had no command authority. Each commander did more or less what he wanted to do. There was no means to sanction any commander at that stage. Many of them had been APC and they saw themselves as trained soldiers. Katanga was not a soldier. He held no commission. It was relatively easy for them to ‘pull rank’ on Katanga. Katanga was not the commander of all Ngiti combatants at the time that Malivo arrived in Aveba.¹¹⁵⁶

667. Katanga had no command authority over Yuda who had full authority over the *Garrison* at **Kagaba** and was answerable only to the APC.¹¹⁵⁷ Malivo heard that Yuda replaced Kandro as leader of the Garrison.¹¹⁵⁸ He had a multiple frequency radio, had access to the secret codes of the general staff of the APC. He arrived in Aveba from Avenyuma, where he then was based, with a radio phonic, to coordinate the landing of the first plane in December 2002.¹¹⁵⁹ Katanga had no authority over APC Captain Mutombo and its company at **Gety**, who was answerable to the APC only.¹¹⁶⁰ Move, who was in **Nyabiri**, was not under the authority of Katanga.¹¹⁶¹ The Defence accepts that, as P-28 says,¹¹⁶² his group was elevated to being ‘Leopard Battalion’ and came under Katanga’s orders, but that was still in the future and not by the time of Bogoro. As was confirmed by David Adirodu, Move did not arrive in Aveba until after Bogoro. The Defence submits that the battalions were put in place after the CPI negotiations with Kisempia.¹¹⁶³ Katanga had no authority over Cobra, who was at **Bavi-Olongba**.¹¹⁶⁴ Cobra played a part in Kandro’s death. He was his own man, as his later history demonstrates. Katanga said Cobra wanted to kill him. He also says that Cobra did not participate in the Bogoro attack.¹¹⁶⁵

668. Thus, on the eve of the main Bogoro attack, Katanga was ‘Commander of Aveba’ but effectively over his own loyal, Atelemba group, most of them from Aveba. Indeed, at the time of the Bogoro attack, while Katanga had control over his 60 men in Atelemba¹¹⁶⁶ and had started to gain control over the combatants at the BCA,¹¹⁶⁷ he had no control over Garimbaya,¹¹⁶⁸ Yuda,¹¹⁶⁹ Mutombo,¹¹⁷⁰ Move,¹¹⁷¹ Cobra,¹¹⁷² etc. The Aveba commander had

¹¹⁵⁶ D2-129-T-271-pp.65 (FRA-p.60).

¹¹⁵⁷ D2-300-T-317-pp.35-36 (FRA-pp.31-32); D2-350-T-253-p.41-l.2-9 (FRA-p.43-l.25-to-p.44-l.4); D2-228-T-250-pp.12-13 (FRA-p.11-12); P-219-T-206-p.27-l.25 (FRA-p.26-l.28).

¹¹⁵⁸ D2-129-T-271-pp.24, 25, 63 (FRA-p.21-23 ; 57).

¹¹⁵⁹ D2-300-T-317-pp.35-36 (FRA-pp.31-32).

¹¹⁶⁰ D2-300-T-317-p.36 (FRA-p.32).

¹¹⁶¹ D2-300-T-317-p.36 (FRA-p.32); D2-129-T-271-p.83 (FRA-p.75).

¹¹⁶² P-28-T-217-p.6 (FRA-p.6).

¹¹⁶³ D02-P-0236-T-243-p.36-l.1-6 (FRA-p.31-l.17-20).

¹¹⁶⁴ D2-300-T-317-p.37 (FRA-p.32-33); D2-350-T-253-p.41-l.2-9 (FRA-p.43-l.25-totp.44-l.4).

¹¹⁶⁵ D2-300-T-317-p.37 (FRA-p.32-33).

¹¹⁶⁶ D2-300-T-317-pp.27-28, 31-32 (FRA-pp.23-25, 27-29); D2-300-T-324-p.78 (FRA-p.71).

¹¹⁶⁷ D2-300-T-317-pp.32-33 (FRA-p.28-29).

¹¹⁶⁸ D2-300-T-317-p.35 (FRA-p.31); D2-300-T-322-p.2-l.19-21 (FRA-p.2-l.24-27); see also D2-300-T-324-p.81 (FRA-p.74) where Katanga said that Garimbaya was company commander.

no authority over the local commanders in the other areas; there was no hierarchy; each commander had his own stronghold and his followers obeyed his orders; each fighter was autonomous.¹¹⁷³

669. Kasaki, rather than Kakado, appears to have had the most effective authority, not of a military or command nature, but merely;

A. Mr. President, if you disobey Kasaki you will not receive any treatment. He will deprive you of all his gris-gris and you will die without any further assistance.

670. Pichou Mbodina emphasised that Katanga was considered a stranger who came and tried to impose his will in an environment where he did not come from.¹¹⁷⁴ Katanga did not even speak Ndruma. As Pichou explained, after the Bogoro attack, Kakado wanted to put Katanga in charge of the combatants of Walendu Bindi, but he was faced with people who were against him;

you had to be in a position to have your orders respected by Cobra Matata and others and those people found this unacceptable, especially because Germain had just arrived and had just entered into the combatant environment and to give him all these privileges at such an early stage was not acceptable. So in Aveba on the spot, he could do so, but he couldn't claim to that position elsewhere.¹¹⁷⁵

Authority and influence of the Sages

671. African society respects age. The Sages are members of the community in whose judgement others place faith. Members of the community became Sages because of their age, maturity, manner of speaking, ability to convince people with their words, experience, interventions, and moral or material contribution.¹¹⁷⁶ The patriarchal structure of society means that they are mostly men. Katanga testified that the sages were more powerful than the civil administration.¹¹⁷⁷ Only the sages lent authority to the chief in power.¹¹⁷⁸ In general, the Sages had authority over displaced persons as well their own community.¹¹⁷⁹

672. With the war and UPC control of Bunia, the regular administration fell apart. Chief Akobi was still the chief in August 2002 in theory, but in practice was unable to exercise most

¹¹⁶⁹ D2-300-T-317-pp.35-36 (FRA-pp.31-32); D2-350-T-253-p.41-l.2-9 (FRA-p.43-l.25-to-p.44-l.4); D2-228-T-250-pp.12-13 (FRA-p.11-12); P-219-T-206-p.27-l.25 (FRA-p.26-l.28).

¹¹⁷⁰ D2-300-T-317-p.36 (FRA-p.32).

¹¹⁷¹ D2-300-T-317-p.36 (FRA-p.32); D2-129-T-271-p.83 (FRA-p.75).

¹¹⁷² D2-300-T-317-p.37 (FRA-pp.32-33); D2-350-T-253-p.41-l.2-9 (FRA-p.43-l.25-totop.44-l.4).

¹¹⁷³ D2-300-T-324-p.89 (FRA-p.81); D2-350-T-253-p.41 (FRA-pp.43-44); D2-129-T-271-pp.32-33, 64 (FRA-pp.28-29 ; 58) ; D2-228-T-250-pp.12-13 (FRA-p.11-12).

¹¹⁷⁴ D2-228-T-252-p.62 (FRA-pp.68-69).

¹¹⁷⁵ D2-228-T-252-pp.62-63 (FRA-pp.69-70).

¹¹⁷⁶ D2-300-T-325-p.4 (FRA-p.4).

¹¹⁷⁷ D2-300-T-316-p.28 (FRA-p.25).

¹¹⁷⁸ D2-300-T-316-p.28 (FRA-p.25).

¹¹⁷⁹ D2-300-T-325-p.6 (FRA-p.5).

of his powers or functions.¹¹⁸⁰ Chief Akobi was nothing in comparison to Kakado and Kasaki.¹¹⁸¹ Kakado never considered Chef Akobi to be a true chief.¹¹⁸²

673. Amongst the sages in the Walendu-Bindi there was nobody more powerful than Bernard Tsubina Kabayonga Kakado.¹¹⁸³ As P-219 expressed it, he was the most powerful after God. “He is somebody with very mystical powers. He used to invoke spirits in caves.” He was the supreme leader, also known as PDG.¹¹⁸⁴ He was highly respected throughout the community for his prophetic abilities; Kakado told the community when to harvest, when there will be a drought, and whether there is going to be a good harvest.¹¹⁸⁵ He was like a visionary. He never expressed a hatred of Hema, instead saying ‘you are killing your brothers’.¹¹⁸⁶ He predicted there would be war.¹¹⁸⁷ His powers to protect and guide the Ngiti was community-wide.¹¹⁸⁸ He was respected by the fighters; if he said ‘Stop’ to the combatants, nobody could move; if he did not say go, nobody could go.¹¹⁸⁹ P-219 confirmed that Kakado was dreaded or respected more than even the chief of the community,¹¹⁹⁰ that he was the spiritual leader of the Ngiti army; he took the overall decisions when it came to appointing someone or drafting a plan.¹¹⁹¹

674. Katanga respected Kakado.¹¹⁹² P-12 acknowledged that Kakado could say “You must not attack”, that he had that kind of influence.¹¹⁹³ As an illustration, P-12 explained that Katanga’s group did not show up at a meeting in January 2004 with P-12 because Kakado had felt that things would not go well there and that is why they did not come. Similarly, Pichou did not show up for a meeting that he had to attend with P-12 in Kinshasa in May 2004 to represent his group, because Kakado had forecast that the situation would not be good in Kinshasa and that is why he did not go.¹¹⁹⁴

675. Pichou Mbodina, while saying that in the FRPI ‘from an administrative viewpoint, there was [...] nobody holding supreme authority’,¹¹⁹⁵ confirmed that, with regard to the events in

¹¹⁸⁰ D2-300-T-315-p.33-l.9-10 (FRA-p.29-l.27); D2-300-T-325-p.6 (FRA-p.6).

¹¹⁸¹ D2-300-T-315-p.33-l.10 (FRA-p.29-l.27).

¹¹⁸² D2-300-T-325-pp.8-9 (FRA-p.5-6).

¹¹⁸³ D2-300-T-316-pp.30-32 (FRA-p.27-28); EVD-D02-00222/photo of Kakado identified by Katanga.

¹¹⁸⁴ P-219-T-206-p.33-l.13-15 (FRA-p.31-l.28-to-p.32-l.1).

¹¹⁸⁵ D2-300-T-316-p.33 (FRA-p.29).

¹¹⁸⁶ D2-300-T-316-p.35 (FRA-p.29-l.7-9); P-219-T-207-p.22 (FRA-p.23).

¹¹⁸⁷ D2-300-T-316-p.33 (FRA-p.29).

¹¹⁸⁸ D2-300-T-325-p.30 (FRA-p.27).

¹¹⁸⁹ D2-300-T-316-pp.32-35 (FRA-pp.28-30); D2-300-T-322-pp.15-16 (FRA-pp.16-17).

¹¹⁹⁰ P-219-T-207-p.22-l.13-16 (FRA-p.23-l.4-8).

¹¹⁹¹ P-219-T-205-p.8-l.6-10 (FRA-p.7-l.21-25).

¹¹⁹² D2-300-T-316-pp.32-35 (FRA-pp.28-30); D2-300-T-322-pp.15-16 (FRA-pp.16-17).

¹¹⁹³ P-12-T-199-pp.4-5 (FRA-p.4-5).

¹¹⁹⁴ P-12-T-199-p.4 (FRA-pp.4-5).

¹¹⁹⁵ P-28-T-250-p.57 (FRA-p.53).

Ituri and Lendu combatants during the war, if the ‘notables’ such as Kakado for the south or Mbokba/Mbumba for the north said that “this should happen” or “this is what should be done”,

no one else could say anything in front of them, because people believed in certain practices according to which what they were saying had to be accepted as such”; “these were the people who decided about the time and method of what had to be done”. “If these two people had said “no” to the attack against Bogoro, even if Kinshasa had decided to go ahead with it, nothing would have happened”; they were “highly respected by the population and [had] full authority over the population. They impose[d] it.”¹¹⁹⁶

676. Kakado had several envoys or *féticheurs* assigned to various sectors.¹¹⁹⁷ In Aveba and Nyabiri, it was Kasaki.¹¹⁹⁸ Kasaki Bandru was second only to Kakado. He was a *féticheur* and ‘chargé de front.’ Kakado would delegate Kasaki to act in his place. He transmitted Kakado’s message and accompanied the combatants to the front, he was the leader of the combatants and the one who told them what to do. He made the fetish.¹¹⁹⁹ The other sages carried out Kasaki’s instructions.¹²⁰⁰ Katanga respected Kasaki and could not go over Kasaki.¹²⁰¹ Katanga had been Kasaki’s bodyguard and with him at Nyabiri until October 2002. Plainly a relationship developed between them and Kasaki trusted him; Katanga served him and escorted him.¹²⁰² Kasaki died in 2009 and Kakado in 2011.¹²⁰³

677. Both Kakado and Kasaki were not soldiers but they were all powerful.¹²⁰⁴ Much of their power rested in people’s belief in *fétiche* – the mystical power residing in objects (known as *gris-gris*) or in particular actions, and which protected a person from harm and, particularly in wartime, from death. If you disobeyed Kasaki, you would not receive any treatment; he would deprive you of all his *gris-gris* and you would die without any further assistance.¹²⁰⁵ It was more or less the rule before going out to battle, to go to see the *féticheur* to get the *fétiches*.¹²⁰⁶ Tests were carried out; when the test was positive, the person could go to battle, but in the contrary case would be forbidden to go to battle.¹²⁰⁷ The *féticheur* defined conditions to use the *fétiches*.¹²⁰⁸ The instructions from the sages were in relation to the duty to protect all

¹¹⁹⁶ D2-228-T-250-p.56-57 (FRA-pp.52-53); D2-228-T-252-pp.58-59 (FRA-pp.64-65).

¹¹⁹⁷ D2-300-T-324-pp.87-88 (FRA-p.78-79).

¹¹⁹⁸ D2-300-T-324-pp.87-88 (FRA-p.78-79) ; D2-300-T-315-p.33 (FRA-p.29).

¹¹⁹⁹ D2-300-T-315-pp.33-36 (FRA-pp.30-32); D2-300-T-316-p.35 (FRA-pp.30-31); D2-300-T-324-p.88 (FRA-p.79); P-219-T-206-p.32-l.15-25 (FRA-p.31-l.4-14).

¹²⁰⁰ D2-300-T-324-pp.88-89 (FRA-pp.80-81).

¹²⁰¹ D2-300-T-322-p.33 (FRA-pp.33-34).

¹²⁰² D2-300-T-315-p.51 (FRA-p.45); D2-300-T-324-p.69-72 (FRA-pp.62-66).

¹²⁰³ D2-300-T-325-pp.29-30 (FRA-p.26-27).

¹²⁰⁴ D2-300-T-322-pp.15-16 (FRA-p.16-17).

¹²⁰⁵ D2-300-T-324-p.89-l.6-8 (FRA-p.80-l.25-26).

¹²⁰⁶ D2-300-T-315-p.36 (FRA-p.32); D2-300-T-325-pp.28-29 (FRA-p.25-26) ; D2-148-T-279-p.32 (FRA-p.28); D-148-T-281-p.20 (FRA-p.17); P-280-T-157-pp.7-l.12-20, 17 (FRA-p.7-l.12-19; 17).

¹²⁰⁷ D2-148-T-279-p.32 (FRA-p.28).

¹²⁰⁸ D2-148-T-279-p.32 (FRA-p.28); P-280-T-157-p.8 (FRA-p.8).

categories of civilians (*ie.* including the ones they would encounter during the battle) and their property.¹²⁰⁹ They had to behave respectfully and were asked not to bother the population,¹²¹⁰ not to steal¹²¹¹ or pillage,¹²¹² not to kill,¹²¹³ not to rape,¹²¹⁴ like the ten commandments of Moses.¹²¹⁵ These were standing and permanent instructions;¹²¹⁶ they were always the same, whatever the battle,¹²¹⁷ and applied also after the battle¹²¹⁸ – even if it may happen that some persons violate these conditions, driven by the hunger to get money.¹²¹⁹

678. It was undoubtedly a powerful and observed belief system. The combatants believed that they would not survive without the intervention of those sages; they believed in the protective effect of the *gris-gris*.¹²²⁰ If you engaged in anything contrary to the instructions, you risked being cursed by the sages and being injured or even killed; if the group did not comply with the conditions, it would suffer a terrible defeat and several people would be killed.¹²²¹ Katanga used and believed in the power of fetishes¹²²² and believed his being wounded at Chai was due to the fact that he had not submitted himself to the appropriate process with Kasaki. He said that his existence today was living proof of the effectiveness of *gris gris*.¹²²³ If things went wrong it was not the fetishes that was blamed but some irregularity in the community - witchcraft – hence Cobra's killing at Aveba after Nyakunde.

Katanga's decision to remain in Aveba

Kasaki's order

679. Katanga said that after the abortive attack on Bogoro of 10th February, the 'first thing' that concerned Kakado and Kasaki was that "it was very difficult for us to go back and

¹²⁰⁹ D2-300-T-316-p.43 (FRA-pp.37-38).

¹²¹⁰ D2-300-T-316-pp.45-46 (FRA-pp.39-41).

¹²¹¹ D2-148-T-279-pp.29, 41 (FRA-pp.25-26, 36-37); D2-148-T-281-p.20 (FRA-p.17); D2-300-T-318-p.4 (FRA-pp.3-4).

¹²¹² P-280-T-157-pp.8, 17-18 (FRA-p.8 ; 17-18).

¹²¹³ D2-300-T-316-pp.45-46 (FRA-pp.40-41); D2-300-T-318-p.4 (FRA-pp.3-4).

¹²¹⁴ D2-300-T-316-pp.45-46 (FRA-pp.40-41); D2-300-T-318-p.4 (FRA-pp.3-4); D-148-T-279-pp.29, 41(FRA-pp.25-26, 36-37); D2-148-T-281-p.20 (FRA-p.17); P-28-T-218-p.65-l.18-p.67-l.6, p.70-l.18-p.71-l.4 (FRA-p.57-l.8-p.58-l.16, p.61-l.18-28); P-279-T-149-p.14-l.2-14 (FRA-p.14-l.13-to-p.15-l.1); P-280-T-157-pp7-8, 17-19 (FRA-pp.7-8, 17-18).

¹²¹⁵ D2-300-T-318-p.4 (FRA-pp.3-4).

¹²¹⁶ D2-300-T-316-p.44 (FRA-p.39).

¹²¹⁷ D2-148-T-281-p.21 (FRA-p.17).

¹²¹⁸ D2-148-T-280-pp.37-38 (FRA-pp.32-33).

¹²¹⁹ D2-148-T-280-pp.37-38 (FRA-pp.32-33).

¹²²⁰ D2-300-T-315-p.36 (FRA-pp.32-33); D2-300-T-322-pp.33-34 (FRA-pp.33-35); D2-300-T-325-pp.28-29 (FRA-pp.25-26); D2-148-T-279-p.29, 41 (FRA-p.28 ; 36-37); D2-228-T-252-p.58-l.10-11 (FRA-p.64-l.23-26); P-280-T-157-p.8 (FRA-pp.7-8).

¹²²¹ D2-300-T-316-p.44 (FRA-p.39); D2-300-T-324-p.89-l.6-8 (FRA-p.80-l.25-26); D2-148-T-279-pp.29, 32, 41 (FRA-pp.25-26, 28, 36-37); D2-148-T-280-p.67-68 (FRA-pp.58-59).

¹²²² D2-300-T-315-p.36 (FRA-pp.32-33); D2-300-T-325-p.28 (FRA-pp.25-26); D2-148-T-279-p.28-l.23 (FRA-p.25-l.16).

¹²²³ D2-300-T-315-p.37-l.3-4 (FRA-p.33-l.9-10).

fight in Bogoro given that the bodies of our brothers had not been buried.”¹²²⁴ It was inevitable that some process would be invoked to address the situation, particularly given that the bodies of the dead were abandoned, which was taboo.

As we had abandoned them there, we hadn’t given them a home. Home means a grave in our collectivity, so that means that the enemy forces recovered their soul, their spirits. And they could have lots of experience and that could be dangerous, because they knew our secrets.¹²²⁵

680. Kasaki asked for two weeks to recover their souls with traditional ceremonies. The defence submits that this process, while addressing the problem of the unrecovered souls is another form of fetishes as it seeks to provide protection in the future.

He said that there was a traditional or mystical way recovering the soul of our brothers who had been left in enemy territory, [...] so that there would be no bad luck. [...] Kasaki said that if the ceremony hadn’t been done, then we would not go to Kagaba for those of us who were in Aveba.¹²²⁶

681. The prescription concerned those in Aveba under Katanga, in respect of whom Kasaki appears to have been administering in particular. It was those combatants that appear most influenced by Kasaki. Katanga said this did not prevent a few local combatants going off for the 24th attack in any event, but that had attendant fetishes dangers. Garimbaya or Mbale, though Ngiti by origin, appear to be subject more to military hierarchy as trained APC.¹²²⁷ Nor were those who went excluded from receiving fetische – Regarding specifically the Bogoro attack of the 24th February 2003, the combatants received fetishes,¹²²⁸ such as D-148’s group, and the ‘usual’ conditions imposed.¹²²⁹

Kisoro’s threat

682. Kisoro is significant for two reasons. Firstly, he is a clear example of the fragmented, individual nature of the various groups of combatants. Secondly, he provided a further reason for Katanga to remain in Aveba rather than go to Bogoro. He had to protect the population there from possible attack - a population that included his own family.¹²³⁰ Kisoro appears to have been something of a mad dog. ‘When Kakado wanted to assert his authority, he turned against the old man, and one of Kakado’s sons was killed by Kisoro.’¹²³¹ A few months after Bogoro, Kisoro was killed by Oudo Mbafefe in Bavi.¹²³²

¹²²⁴ D2-300-T-318-p-6 (FRA-p.5).

¹²²⁵ D2-300-T-318-p.6 (FRA-pp.5-6).

¹²²⁶ D2-300-T-318-p.6-7 (FRA-p.5-6); D2-300-T-322-p.33 (FRA-p.34).

¹²²⁷ D2-300-T-322-pp.35-36, 40-42 (FRA-pp.36-37 ; 40-42).

¹²²⁸ P-280-T-157-pp.7, 17 (FRA-p.7,17).

¹²²⁹ D-148-T-281-pp.20, 22 (FRA-p.16-17, 18).

¹²³⁰ D2-300-T-317-p.67, 70 (FRA-p.59, 61-62); D2-300-T-318-pp.7, 14-15 (FRA-pp.6, 13-14); D2-129-T-271-p.32-33, 83 (FRA-p.28-29, 75); D2-228-T-250-pp.11-12 (FRA-pp.10-11); D2-228-T-251-pp.68-70 (FRA-pp.74-75); D2-228-T-252-p.61 (FRA-p.68).

¹²³¹ D2-300-T-317-pp.68-70 (FRA-pp.60-62).

¹²³² D2-300-T-317-p.69 (FRA-p.61).

683. Kisoro was a former APC soldier from Kaswara about 3-5 kilometres from Aveba. He set up camp in Bulandjabo. He would move about with about a hundred men. He scorned both the APC and the other combatants to the extent that if they wandered into his area he might kill them.¹²³³ Kisoro was a problem,¹²³⁴ particularly for Aveba.¹²³⁵ Pichou confirmed that Kisoro carried out frequent attack against Aveba at that time.¹²³⁶ D-148 participated in an earlier battle in Aveba where they had to chase Kisoro out.¹²³⁷ David Adirodu fought against Kisoro another time and was wounded.¹²³⁸ Jeannot Malivo Kagaba confirmed that Kisoro did not obey Germain's orders; they had to flee Aveba twice to avoid an attack by Kisoro. Malivo underlined that there was an atmosphere of mistrust between the commanders.¹²³⁹ P-219 confirmed that Kisoro was not under the authority of Katanga.¹²⁴⁰

684. Katanga's account of events, supported by other witnesses, is that when Adirodu's plane had been off-loaded in Aveba on the 15th of February 2003, Kisoro appeared and threatened to shoot the plane down. He had Adirodu disembark and sit on the ground. They agreed to provide Kisoro with some ammunition but tricked him by giving him the wrong calibre to ensure he could not use it against them. When Kisoro got back to Kaswara and found out, he was somewhat displeased.¹²⁴¹ The next day, the 16th February, Kisoro returned to take the remaining ammunition by force.¹²⁴² P-219 confirmed he had heard all this and that Kisoro attacked Aveba in February and they fought for four days.¹²⁴³ Over the next week or so there was a continuing threat from Kisoro and the occasional fire fight – on one day Bahati de Zumbé was wounded.¹²⁴⁴ The population was in a state of insecurity.¹²⁴⁵

685. That Katanga remained in Aveba, his village, where he was commander, and where his family were living, is wholly understandable in those circumstances. Aside from the attempt on 10th February, Katanga first went to Bogoro on 8th March.

¹²³³ D2-300-T-317-p.65, 68, 71 (FRA-pp.57, 60, 63); D2-300-T-323-p.12 (FRA-pp.11-12); D2-129-T-271-p.32 (FRA-pp.28-29); D2-148-T-279-p.16-l.1-2 (FRA-p.14-l.3-4); D2-001-T-277-p.14-l.16-17 (FRA-p.13-l.3-4); D2-148-T-281-p.19-20 (FRA-p.16); EVD-OTP-00277/Map with Bulanzabo.

¹²³⁴ D2-300-T-317-pp.68-72 (FRA-pp.60-63); D2-300-T-323-p.10-l.9-22 (FRA-p.9-l.27-to-p.10-l.13); D2-001-T-277-pp.13-14 (FRA-pp.12-13); D2-148-T-279-p.16-l.8 (FRA-p.14-l.10); P-219-T-206-p.28-l.1-3 (FRA-p.26-l.28-to-p.29-l.1).

¹²³⁵ D2-148-T-281-p.20-l.2-6 (FRA-p.16); D2-148-T-279-p.16-l.10 (FRA-p.14-l.11-12); D2-001-T-277-p.13-14 (FRA-pp.12-13);

¹²³⁶ D2-228-T-250-p.11-12 (FRA-pp.10-11); D2-228-T-251-p.69 (FRA-p.75); D2-228-T-252-p.61 (FRA-p.68).

¹²³⁷ D2-148-T-279-p.16 (FRA-p.14).

¹²³⁸ D2-001-T-277-pp.13-14 (FRA-p.12-13).

¹²³⁹ D2-129-T-271-pp.32-33, 83 (FRA-pp.28-29; 75).

¹²⁴⁰ P-219-T-205-p.39-l.7 (FRA-p.38-l.23-24); P-219-T-206-p.27-l.18-19 (FRA-p.26-l.20-21).

¹²⁴¹ D2-300-T-317-pp.65-66 (FRA-pp.57-59); D2-300-T-323-pp.9-10 (FRA-pp.9-10).

¹²⁴² D2-300-T-317-p.67 (FRA-p.59); EVD-D02-00220/Map of Ituri indicating the village of Kaswara.

¹²⁴³ P-219-T-208-pp.46-48, 51-52, 55 (FRA-p.41-43, 45-46, 49).

¹²⁴⁴ D2-300-T-317-p.70 (FRA-pp.61-62).

¹²⁴⁵ D2-300-T-317-pp.67, 70 (FRA-p.59, 61-62); D2-300-T-318-p.7 (FRA-p.6); D2-129-T-271-pp.32-33 (FRA-p.28-29); D2-228-T-250-p.12 (FRA-pp.16-17).

686. Katanga did not leave Aveba or if he did, not for long. Even at the Tchev meeting on the 3rd March 2003, called by Kakado, Katanga says he would have made a rapid return to Aveba had his belief, that Kisoro would be in Tchev also, been proved incorrect.¹²⁴⁶ The Kisoro problem appears only to have been resolved by Oudo killing him a few months later.¹²⁴⁷

Attacks against Bogoro Late 2002-Early 2003.

687. Bogoro was attacked shortly before the final attack. Katanga participated in the attack of 10th February.¹²⁴⁸ Katanga remembers the date because of those who were lost that day.¹²⁴⁹ It was a disaster and resulted in several local Ngiti being killed.¹²⁵⁰ The Prosecutor argues that few witnesses spoke of this attack.¹²⁵¹ This is incorrect as demonstrated below.

688. **D-148** mentioned five attacks against Bogoro in the months preceding the main attack of 24 February, one while the Garnison was still based in Songolo and four when the Garnison had set up its camp in Kagaba¹²⁵² which he accepted was two or three months after Kandro's death.¹²⁵³ He detailed those attacks.¹²⁵⁴ **D-148** participated in the fourth and fifth attacks.¹²⁵⁵

689. **P-166** specified that after August 2002, it was the Lendus Sud from Walendu-Bindi who came to attack Bogoro. He said that between the attack of August 2002 and the one of February 2003, there were between three and four attacks from the Lendus against Bogoro, but these were fights only between soldiers. There were few deceased, between one and three persons. It was the same on each side. He did not remember the dates of these three or four attacks because there were no deceased among the population.¹²⁵⁶ He said that a UPC soldier told him that during the second of those attacks, Lendu-Bindi soldiers had been killed.¹²⁵⁷ "However, as concerns the true battles that took place in the centre of Bogoro, I would say that there are four. There were four battles of this nature against the UPC fighters", where the Lendu-Bindi were defeated.¹²⁵⁸

¹²⁴⁶ D2-300-T-323-p.11-12, 14 (FRA-p.10-12, 13); D2-300-T-317-p.70-l.17-20 (FRA-p.62-l.9-11).

¹²⁴⁷ D2-300-T-317-p.69 (FRA-p.61).

¹²⁴⁸ D2-300-T-316-p.22-l.7-18 (FRA-p.19-l.21-to-p.20-l.2); D2-300-T-317-pp.59-60 (FRA-pp.52-53); D2-300-T-318-pp.2, 32-l.13 (FRA-p.2, 28-l.8); D2-300-T-324-p.39 (FRA-pp.36-37).

¹²⁴⁹ D2-300-T-322-p.30 (FRA-pp.30-31).

¹²⁵⁰ D2-300-T-317-pp.60-61 (FRA-pp.52-53); D2-300-T-318-p.2, 5-l.11-14 (FRA-p.2, 4-l.25-27).

¹²⁵¹ See Section 7.4.2.3.

¹²⁵² D2-148-T-279-p.33 (FRA-p.29).

¹²⁵³ D2-148-T-279-p.14-15 (FRA-pp.12-13).

¹²⁵⁴ D2-148-T-279-pp.17, 34-36 (FRA-p.15, 30-32); D2-148-T-280-pp.60-62 (FRA-p.53-55).

¹²⁵⁵ D2-148-T-280-pp.61-62 (FRA-p.54).

¹²⁵⁶ D2-148-T-280-pp.61-62 (FRA-pp.54-55).

¹²⁵⁷ P-166-T-226-p.9-l.11-to-p.10-l.3 (FRA-p.8-l.2-19).

¹²⁵⁸ P-166-T-226-p.5-l.3-18 (FRA p.4-l.12-25), p.4-l.12-16 (FRA p.3-l.23-to-p.4-l.1), P-166-T-227-p.10-l.24-to-p.11-l.1 (FRA-p.9-l.23-27).

690. While **P-159** was not present at Bogoro for the final attack he spoke of earlier attacks:¹²⁵⁹

And each time that the enemy arrived, the young people of Bogoro defended their village. I remember that during an attack from Ngiti [...] It was around 6.00 a.m. or 7.00 a.m. we observed the enemy. We saw where they were and we fled into the camp. We gave the signal and our men came out. They fought against the Lendus and they pushed them back. They even succeeded in killing two of their commanders. [...].¹²⁶⁰

I do not know whether those bodies were buried. They were killed and left on the spot. I do not know whether they were carried away. So the two commanders were killed and those commanders were wearing their stripes, and those who killed them took those stripes or epaulettes and brought them to the camp to show them there and to show their weapons. So I do not know what happened to the bodies.¹²⁶¹

691. **D-176** confirmed that an attack took place, he believes, on 10 February, during which the UPC defeated the assailants,¹²⁶² who were Ngiti.¹²⁶³ One attacker hanged himself because he was afraid of being captured.¹²⁶⁴ According to D-176, ten attackers were killed and on his side they suffered one loss.¹²⁶⁵ This attack came from one direction only, Gety.¹²⁶⁶

692. **P-168** heard of an unsuccessful attack on Bogoro one or two weeks prior to the February 2003 attack, beaten off by the UPC, but does not know anything about it.¹²⁶⁷ He heard that it was “a very brutal attack.”¹²⁶⁸ **P-219** was asked whether there was an attack on Bogoro two weeks before the attack that chased out the UPC, given that in his statement he said that the main attack of Monday “was the second attack, because the first attack had failed. The FRPI had been repulsed. After that, there was a resupply, and then the second attack was organised.” He replied that he did not know, then that he did not agree, then that he could not talk about this.¹²⁶⁹

693. None of these attacks were a joint attack – they are solely Ngiti. Katanga gave a detailed account of this earlier attack. He said that Blaise Koka launched the operation to assess the capacity of the enemy and to determine what weapons they had and what were their defences. The intelligence on Bogoro was deficient. It was a reconnaissance in strength and if the opportunity had presented itself, they were ready to take Bogoro.¹²⁷⁰ On the way, they only

¹²⁵⁹ P-159-T-118-p.74-l.2 (FRA-p.71-l.10); P-159-T-122-p.16-19 (FRA-pp.16-18).

¹²⁶⁰ P-159-T-120-pp.70-71 (FRA-p.70).

¹²⁶¹ P-159-T-122-pp.18-19 (FRA-pp.16-18).

¹²⁶² D2-176-T-255-p.25-l.20-21 (FRA-p.25-l.21-22); T-256-p.56-l.8-12 (FRA-p.47-l.19-23).

¹²⁶³ D2-176-T-257-p.15-l.9-10, pp.19-20 (FRA-p.13-l.20, p.17).

¹²⁶⁴ D2-176-T-255-p.25 (FRA-p.25); T-256-p.56-l.8-12 (FRA-p.47-l.19-23).

¹²⁶⁵ D2-176-T-255-p.25-l.24-25 (FRA-p.25-l.25-27); T-256-p.56-l.8-12 (FRA-p.47-l.19-23).

¹²⁶⁶ D2-176-T-256-p.56-l.24-to-p.57-l.5 (FRA-p.48-l.6-11) (public session); p.24-l.9-to-p.25-l.3 (FRA-pp.21-22).

¹²⁶⁷ P-268-T-108-p.40 (FRA-p.38-39).

¹²⁶⁸ P-268-T-108-p.40 (FRA-p.39).

¹²⁶⁹ P-219-T-208-p.57-l.24-to-p.60-l.7 (FRA-p.51-l.11-p.53-l.12).

¹²⁷⁰ D2-300-T-317-p.59 (FRA-pp.51-52); D2-300-T-322-pp.6-10 (FRA-pp.6-11).

saw animals, and no human being.¹²⁷¹ They did not observe a civilian presence.¹²⁷² The operation was disastrous.¹²⁷³ The support weapons did not function – but if they had worked, they may have won, and if they had won, they would have consolidated their position immediately.¹²⁷⁴ A section of 10 persons from Aveba were caught by machine-gun fire.¹²⁷⁵ Katanga said they had never lost as many local men and had had to flee without recovering their dead. Others were wounded and ended up dying in health centres.¹²⁷⁶

694. It was claimed by several witnesses that they received prior notice of the 24th February attack. Katanga denies knowledge of this. Witness 219 claims Katanga transmitted such a message himself on the Sunday – but that evidence, and 219, is in the defence submission, not credible and not corroborated. Many witnesses spoke on the subject, some said they were given notice, in all manner of ways from letters,¹²⁷⁷ to market gossip, to rumours, and others that there had been radio intercepts.¹²⁷⁸ Others said they were unaware of any notice.¹²⁷⁹ The defence dispute the existence of a radio network between Aveba / Walendu Bindi and Zombe and submit the evidence on this subject is too contradictory to be safely relied upon to prove such a radio link. If there had been such a link why were the Lendu late? The evidence on the subject also reflects the UPC's confidence that they would successfully repulse any attack, a reflection of how well defended they considered their position to be.

695. Katanga remained at Aveba on the 24th February.¹²⁸⁰ The defence made its position in that respect clear from an early stage of the trial. The Prosecution rely on their five key witnesses to prove he was present in Bogoro. The Prosecution do not argue that his absence would have affected the plan. His presence is not a determining issue in the case. The defence submits that there is no reliable evidence that he was present. The Bogoro attack did not require his presence – it was not *a sine qua non* of the attack, anymore than the attack at Bunia. It may be that, had he been at Bogoro, the excesses that were committed would have been avoided or restrained. The principal commander was Yuda, but Yuda was wounded and

¹²⁷¹ D2-300-T-318-p.24-l.13-22 (FRA-pp.21-22).

¹²⁷² D2-300-T-318-p.2 (FRA-p.2).

¹²⁷³ D2-300-T-317-p.60-l.5 (FRA-p.52-l.15); D2-300-T-318-p.5-l.11-14 (FRA-p.5-l.25-27).

¹²⁷⁴ D2-300-T-318-p.5-l.11-14 (FRA-p.5-l.25-27); D2-300-T-322-pp.7-10 (FRA-pp.7-11).

¹²⁷⁵ D2-300-T-317-pp.60-61 (FRA-pp.52-53).

¹²⁷⁶ D2-300-T-317-p.60 (FRA-p.52); D2-300-T-318-p.2 (FRA-p.2).

¹²⁷⁷ P-161-T-109-p.32 (FRA-pp.31-32); P-161-T-113-p.27-29 (FRA-pp.27-29); P-161-T-114-p.40-41, 43-44 (FRA-p.41-42, 44).

¹²⁷⁸ P-161-T-111-pp.22-23 (FRA-pp.21-22), P-233-T-88-pp.16-17 (FRA-pp.20-21), P-166-T-227-p.42 (FRA-pp.37-38).

¹²⁷⁹ P-159-T-123-pp.54-56 (FRA-pp.51-52), P-268-T-108-pp.39-40 (FRA-p.38); P-249-T-136-p.71 (FRA-pp.74-75).

¹²⁸⁰ D2-300-T-317-p.67 (FRA-p.59).

the command of his men devolved to Dark. The defence submits it is likely that was the problem – Dark failed to exercise authority.

696. Katanga would have gone to Bogoro had there not been a number of factors that came together to prevent his going. Those matters have been reviewed above. The fact that Aveba ‘brothers’ had been killed and their bodies abandoned made it ‘difficult’. Kasaki’s processes to recover souls took time. Kisoro’s continuing threat to the community that Katanga’s primary role was to protect and the need to secure the supplies and ammunition.¹²⁸¹ Pichou raised another, domestic issue but that has not featured in Katanga’s evidence.¹²⁸² In any event, even if none of those problems had existed, he would still have had to seek the consent of Kasaki – and fetish systems being how they are, there could be no guarantee he would have been passed ‘fit’ to go.

EMOI plan of attack and preparation for the attack at Kagaba

697. Katanga said that following their defeat at Bogoro on the 10th of February 2003, the Ngiti combatants returned the same day, and himself on the 11th.¹²⁸³ On the 15th, Adirodu landed in the Antonov with additional supply of 200 guns, ammunition and rations. Adirodu said though the operation had failed they had to return soon, before the UPC had the opportunity to reorganise. He stressed the urgency of the situation to Blaise Koka¹²⁸⁴ and handed over a plan of attack: “The plan of attack came from Beni. [...] by the EMOI.”¹²⁸⁵ The “programme for the attack on Bogoro” “arrived on a sheet of paper”, from the EMOI in Beni.¹²⁸⁶

698. Over the next week, despite the problem of Kisoro, preparations for a further attack on Bogoro continued. ‘When you talk about the detail of the attack, it was in the hands of Blaise Koka.’ It was, said Katanga, very difficult for Blaise Koka, as a military man, to wait for Kasaki’s ceremonies to conclude.¹²⁸⁷ The defence submits it was wholly unnecessary for him to do so. It would have been “as though you were adding something to his programme, which didn’t make sense”.¹²⁸⁸ There were adequate numbers of combatants available and the heavy weapons were in the hands of the APC, not the locals.¹²⁸⁹ Nor was the main body of men at that time at Aveba but on the front line at Kagaba and elsewhere. Also, it might make sense

¹²⁸¹ D2-300-T-318-pp.14-16 (FRA-pp.13-15). See also D2-228-T-250-pp.11-12 (FRA-pp.10-11); D2-228-T-252-p.61 (FRA-p.68); D2-228-T-251-pp.68-70 (FRA-pp.74-77).

¹²⁸² D2-228-T-251-p.70-l.15-23 (FRA-p.77-l.1-9); D2-228-T-252-p.61 (FRA-p.68).

¹²⁸³ D2-300-T-317-p.62 (FRA-p.54).

¹²⁸⁴ D2-300-T-317-pp.62-63 (FRA-pp.54-55).

¹²⁸⁵ D2-300-T-320-p.17 (FRA-p.19).

¹²⁸⁶ D2-300-T-318-pp.3-5 (FRA-pp.3-4).

¹²⁸⁷ D2-300-T-318-pp.5, 6-l.9-12 (FRA-pp.4, 5-l.16-20).

¹²⁸⁸ D2-300-T-318-p.6-l.9-12 (FRA-p.5-l.16-20).

¹²⁸⁹ D2-300-T-318-p.21 (FRA-p.19).

not to take locals who had suffered a significant blow to morale. Katanga said only a few local combatants went – free spirits.¹²⁹⁰

699. Garimbaya left with more than 50 of his own men.¹²⁹¹

A. People began to leave Aveba from the 20th, the 21st onwards..... Blaise Koka left Aveba on the 20th of February, ...and Garimbaya followed with the troops on the 21st.

The group that left Aveba was only Garimbaya's team and joined Blaise Koka in order to transport ammunition, because a part of the ammunition was to be transported on the head.¹²⁹²

As for civilians - Bogoro is far from Aveba – the same distance as The Hague is from Amsterdam. As Germain pointed out:

That would have been too far away, too far away. To have in mind to leave Aveba for Bogoro to loot, well, one may go that far to loot just a door. How would you transport the door back from Bogoro to Aveba -- or to Bogoro ?

700. Katanga was fully aware of the plan to attack Bogoro and from the 21st knew it might happen at any time. He was not confident it would be a success having experienced the UPC firepower and believing they would certainly have got reinforcements.¹²⁹³

B- Bogoro attack of 24 February 2003

701. The attack against Bogoro was launched very early in the morning,¹²⁹⁴ around 5 am.¹²⁹⁵

In Aveba, they were surprised by the strength of the explosions.¹²⁹⁶ Malivo said:

we were at home, and at about 5.00 a.m. we heard heavy mortar fire. And at 6.00, 6.00 a.m., when we went outside we could still hear the gun-fire and we wanted to find out what was happening.¹²⁹⁷

702. Katanga left home for the Health Centre:

A. I heard those explosions from my home, from my father's home, so I quickly took a motorbike and went to the health centre [...] I went to the health centre to cross-check and find out whether Mike-4 had any information on the situation in Kagaba. When I got to the health centre, I found Mike-4 communicating with one Aldo on the multifrequency phonie. He told me that he had just received the message from Kagaba, from Aldo, who was known as Alpha Lima, and that the message was that Bogoro had come under attack in the early hours of the morning. That was the message. Some two or three hours thereafter, we no longer heard any loud sounds of explosions. The detonations had reduced. And one hour after [...] that was around 10.00 a.m. or 10.30, Yuda appeared or arrived in Aveba wounded.¹²⁹⁸

A. Shortly after he arrived -- or, rather, I left shortly after Yuda was already there because it was necessary to try and prepare something for him, and at the health centre, Mike-4 and Aldo had set up a system, a running communication system, whereby Aldo would send walkie-

¹²⁹⁰ D2-300-T-318-p.23 (FRA-p.20).

¹²⁹¹ D2-300-T-318-pp.4-5 (FRA-p.4).

¹²⁹² D2-300-T-318-p.4-5 (FRA-p.4-5).

¹²⁹³ D2-300-T-318-pp.4-5, 16, 23-l.8-18, 32-l.13-21 (FRA-pp.4-5, 14-16, 20-21, 28-l.7-14).

¹²⁹⁴ D2-148-T-279-p.20-l.18 (FRA-p.18-l.5); D2-300-T-318-pp.19-20 (FRA-pp.17-18).

¹²⁹⁵ D2-176-T-255-p.34-l.13, p.35-l.6 (FRA-p.34-l.15, p.35-l.7); P-132-T-138-p.74 (FRA-p.78).

¹²⁹⁶ D2-300-T-318-p.16-l.18-21, p.19 (FRA-p.15-l.3-5, p.17-l.23, p.18-l.4-5).

¹²⁹⁷ D2-129-T-271-p.28 (FRA-p.25-l.3-5).

¹²⁹⁸ D2-300-T-318-pp.19-20 (FRA-p.17-18).

talkie messages that he was exchanging with people in Bogoro. He would send those messages directly to Mike-4. In that way, they were able to monitor what was happening at the battlefield.¹²⁹⁹

703. Pichou Mbodina understood, from those who were there, that Germain Katanga did not take part in the Bogoro attack for the reasons of local insecurity.¹³⁰⁰ He also mentioned some domestic problem.¹³⁰¹ D-148 did not see Katanga during the Bogoro attack.¹³⁰² David Adirodu Achele heard that Katanga was in Aveba the day of the Bogoro attack.¹³⁰³

704. Malivo went to the health centre hospital at about 6 to 7 a.m to use the white phonie but there was nobody in Kagaba to respond.¹³⁰⁴ There was a nurse and the hospital administrator. Eventually, about 9-10 a.m he learnt through someone at a village on a hill above Kagaba, Madre, that Bogoro had fallen.¹³⁰⁵ A few minutes later the same operator informed them to expect casualties, including Yuda. He saw Germain twice. The first time was a few hours after Malivo himself arrived there and he came to get information, he was on his motorbike and was dressed in civilian clothes. The second time - "because when Yuda came in wounded, he too rushed there to see what had happened to Yuda".¹³⁰⁶ Yuda arrived on a motorbike, at about 10-10.30 am, wounded to his left hand and chest.¹³⁰⁷ It would follow that he must have left Bogoro at least no later than 9 a.m or earlier, particularly given the state of roads at that time. He stayed one week or so.¹³⁰⁸ Other people were seriously wounded and one was transferred to Beni for treatment.¹³⁰⁹ Aveba was an important asset with its Beni link and piste.

705. Katanga remained in Aveba. There was a consolidation of forces in Bogoro in expectation of the counter-attack everyone believed would take place and still pockets of resistance.¹³¹⁰ He made one visit to Kagaba two days after the attack to see Garimbaya, to learn what had happened and what made the operation a success.¹³¹¹ "The attackers of the 24th of February were more numerous, more organized and better armed than those of the 10th of February. They used weapons that had never been used before, had a lot of

¹²⁹⁹ D2-300-T-318-p.21 (FRA-p.18-19).

¹³⁰⁰ D2-228-T-250-pp.11-12 (FRA-p.11-l.3-10); D2-228-T-252-p.61-l.12-13 (FRA-p.68-l.21-22); D2-228-T-251-pp.68-70 (FRA-p.74-76).

¹³⁰¹ D2-228-T-251-p.70-l.15-23 (FRA-p.77-l.1-9).; D2-228-T-252-p.61 (FRA-p.68).

¹³⁰² D2-148-T-279-pp.18-l.16-17, 26-l.19-20 (FRA-p.16-l.10-11, p.23-l.20-21).

¹³⁰³ D2-001-T-277-p.15 (FRA-p.14).

¹³⁰⁴ D2-129-T-271-pp.28-30 (FRA-p.25-26).

¹³⁰⁵ D2-129-T-271-p.29 (FRA-p.26).

¹³⁰⁶ D2-P-0129-T-271-p.31 (FRA-p.27-28).

¹³⁰⁷ D2-300-T-318-p.20 (FRA-p.18-l.10-11); D2-148-T-280-p.25-l.18-20 (FRA-p.22-l.4-5); D2-001-T-277-p.15 (FRA-p.14); D2-129-T-271-p.31 (FRA-p.27).

¹³⁰⁸ D2-300-T-318-p.20 (FRA-p.18).

¹³⁰⁹ D2-129-T-271-p.31 (FRA-p.28).

¹³¹⁰ D2-300-T-318-p.37 (FRA-p.32).

¹³¹¹ D2-300-T-318-P.32-33 (FRA-p.28); D2-300-T-323-pp.13-18 (FRA-p.14-16).

ammunition, superior weaponry, and that is why the UPC lost the battle.”¹³¹² He heard no mention of the civilian casualties.

706. The defence case is that the commanders who participated in the attack from Aveba were Blaise Koka and Mutombo and their APC soldiers, Garimbaya and his 50 men,¹³¹³ and some local combatants who went independently despite the fear of adverse consequences.¹³¹⁴ A few FAC officers, in uniform, went as well.¹³¹⁵ They gathered at Kagaba before the attack. The main force was the Kagaba *Garrison*, under Yuda and his deputy Dark,¹³¹⁶ as well as forces from the neighbouring area.¹³¹⁷ Some combatants from Gety went to Kagaba for the attack.¹³¹⁸ From Medhu the combatants attacked under the command of Commander Oudo, his deputy Adibale, Anguluma and Awilo.¹³¹⁹ Also at Bogoro it is believed the following were present: Bahati, also called Lobo Tchamangere, commander at Golgota camp in Lakpa,¹³²⁰ Alpha Bebi, commander at camp Bukiringi,¹³²¹ Muhito Akobi Emile.¹³²² According to David Adirodu, Move was in Beni;¹³²³ D-148 did not see him during the attack.¹³²⁴ Katanga does not know whether Move, who was in Nyabiri, participated.¹³²⁵

707. Katanga said that Dark later criticised him for not being present. This was when Katanga tried to pass through Bogoro en route for Bunia in March. Dark ‘threatened me [...] because [...] he wondered why I had to take that road to go to Bunia going through Bogoro when I hadn’t been involved in the fighting against the UPC [...]’ That stand off was only resolved by Blaise Koka saying to Dark ‘well, he wasn’t there. I was there. I’m going through. He’s accompanying me.’¹³²⁶ Dark criticised Cobra for the same reason. Katanga says Cobra was not present because he was wounded in his left foot at the time and “was not going to the front but was simply an expert in terrorising people on the roads.”¹³²⁷ Katanga says that Kisoro did not participate.

¹³¹² D-176-T-256-pp.57-58 (FRA-p.48-49).

¹³¹³ D2-300-T-318-pp.5, 21-23 (FRA-p.3, 19-20).

¹³¹⁴ D2-300-T-318-p.23-l.4-7 (FRA-p.20, 18-21).

¹³¹⁵ D2-300-T-318-p.26-l.6-10 (FRA-p.23-l.4-7).

¹³¹⁶ D2-300-T-318-p.25-l.8-13 (FRA-p.22-l.13-17); D2-228-T-250-p.10-l.19-25 (FRA-p.9-l.26-28, p.10-l.1-2); D2-148-T-279-p.36-l.13-15, p.37-l.20-24 (FRA-p.33-l.10-14) [*Divergence constatée*]; D2-001-T-277-p.15 (FRA-p.14; D2-129-T-271-p.29 (FRA-p.26)).

¹³¹⁷ D2-228-T-250-p.10-l.23-24 (FRA-p.10-l.3).

¹³¹⁸ D2-300-T-318-p.25-l.7-8 (FRA-p.22-l.12-13).

¹³¹⁹ D2-148-T-279-p.18-l.12-14, 37-38 (FRA-p.16-l.7-9, p.33-l.9-19).

¹³²⁰ D2-001-T-277-p.15 (FRA-p.14-l.2); D2-148-T-280-p.22-l.5-10 (FRA-p.20-l.20-21).

¹³²¹ D2-148-T-280-p.22-l.14-16 (FRA-p.19-l.17-19).

¹³²² D2-148-T-280-p.22-l.18-24 (FRA-p.19-l.25-26).

¹³²³ D2-001-T-277-p.15 (FRA-p.14-l.7-8).

¹³²⁴ D2-148-T-280-p.23-l.19 (FRA-p.20-l.13-14).

¹³²⁵ D2-300-T-318-p.25-l.15 (FRA-p.22-l.18-19).

¹³²⁶ D2-300-T-318-p.41 (FRA-p.36-l.10-13).

¹³²⁷ D2-300-T-318-p.25-l.15-25 (FRA-p.22-l.23-27).

708. The presence of UPDF actively engaged in the fighting on the side of the attackers is, the defence submits, highly unlikely. There is no reliable evidence of it. Katanga said, in effect, that the Ugandans were such troublemakers that you could not rule it out, but he had not heard of it.¹³²⁸ Pichou is unaware of UPDF participation in the battle itself.¹³²⁹ P-233 said that he had heard that the UPC had asked for reinforcements to come from Kasenyi and Bunia; they were blocked and unable to reach Bogoro.¹³³⁰ D-176 learnt only once he arrived in Bunia why no UPC reinforcements had been sent to Bogoro. He asked for the reason and the brigade answered him that they were ‘suspected’ of having set up an alliance with the PUSIC and Chef Kahwa Panga Mandro.¹³³¹ The defence submits that the ‘blocking’ was the probable extent of UPDF involvement.

Direction of the attack

709. All descriptions of battles, especially as intense as this one must have been, are fragmented and partial. The defence accepts and submits that the attack was primarily two pronged, from Kagaba and Medhu and that Lendu joined in when they appreciated what was happening. It was not encircled as it has been suggested by some witnesses. That would have put those on opposite sides of the circle in the line of fire. D-148 said that Bogoro was not encircled; ‘when you plan a war, you cannot cut off all the routes, you have to leave some way of retreating because those who carry weapons must be able to get away; so there were breaches through which one could leave’.¹³³² D-148 said the attackers did not attack from the Kasenyi road but blocked it.¹³³³

710. D-176 [REDACTED]¹³³⁴ and described the attack.¹³³⁵ D 176, led in his evidence, agreed that there were Lendu from Zumbe.¹³³⁶ He said that the positions and patrols were not all present on the day of the attack.¹³³⁷ It started at 5 - 5.30 a.m. and went back and forth until around 10 –10.30 when he realised the soldiers’ *manyattas* had caught alight and the attackers were in their midst.¹³³⁸ The UPC Commander Germain said they should flee and the civilians were told and started to emerge from the building.¹³³⁹ Some witnesses said many Hema

¹³²⁸ D2-318-p.26-l.12-p.27-l.11 (FRA-p.23-l.8-22, p.24-l.3-5).

¹³²⁹ P-219-T-250-p.13 (FRA-p.12-l.13-22).

¹³³⁰ P-233-T-88-p.29 (FRA-p.36-l.14-19).

¹³³¹ D2-176-T-255-pp.38-39 (FRA-p.38-l.20-28).

¹³³² D2-148-T-280-p.24-25 (FRA-p.21-l.11-13).

¹³³³ D2-148-T-280-p.24 (FRA-p.21-l.4-5).

¹³³⁴ D2-176-T-256-p.21-l.11-13 (FRA-p.18-l.24-27).

¹³³⁵ D2-176-T-256-pp.24-25 (FRA-pp.21-22).

¹³³⁶ D2-176-T-256-p.9 (FRA-p.5-l.4-8, p.27-l.4-5).

¹³³⁷ D2-176-T-256-p.8 (FRA-p.7-8).

¹³³⁸ D2-176-T-255-pp.35-36 (FRA-p.50).

¹³³⁹ D-176-T-255-p.36 (FRA-p.36).

civilians were involved in the defence of Bogoro.¹³⁴⁰ Between 70¹³⁴¹ and 120¹³⁴² UPC soldiers were killed during the attack.

711. Issues concerning specific charge (killing, rape, pillage, *etc.*) are addressed under the relevant charge. As to civilian deaths Katanga said that he was not informed about it – that a soldier will not boast of things that are shameful.¹³⁴³

C- Context following the 24th February attack against Bogoro

Occupation of Bogoro by the Garnison

712. Witness 250 testified that Katanga spent the night after the Bogoro attack at the residence of Mathieu Ngudjolo in Zombe and stayed there for three to four days.¹³⁴⁴ It is submitted that this witness was not credible

713. After the victory, Commanders Oudo and Adibale left as they had lost a lot of men.¹³⁴⁵ The soldiers from Zombe went back home.¹³⁴⁶ Commander Dark stayed to command, with the mobile *Garnison*.¹³⁴⁷ They remained up until the first brigade of the FARDC arrived.¹³⁴⁸ The occupation of Bogoro did not stabilise the security situation. It was known that the UPC occupied Kasenyi, Tchomia and other areas and could return at any time.¹³⁴⁹

714. Katanga says he first passed through Bogoro on the 8th of March 2003 en route to Bunia and was confronted by Dark for not having been at the attack.¹³⁵⁰

President?

715. Katanga returned from Beni with no formal position in the FRPI,¹³⁵¹ as discussed above. His role of coordinator was just that – a function rather than an office. He said that different people called him different things – but that he held no rank or office or title, other than Commander at Aveba, and the coordinator. He did not use or have the title of President.¹³⁵²

¹³⁴⁰ See V2-B, Direct participation in hostilities, *infra*.

¹³⁴¹ D2-176-T-255-p.40-l.12-13 (FRA-p.40-l.8-9).

¹³⁴² P-323-T-117-p.48 (FRA-p.47).

¹³⁴³ D2-300-T-318-p.35-l.18-23 (FRA-p.3-l.3-13).

¹³⁴⁴ P-250-T-98-pp.55-56 (FRA-p.57-l.3-13); P-250-T-99-pp.35-36 (FRA-pp.35-36).

¹³⁴⁵ D2-148-T-279-p.38 (FRA-p.33-l.19-20).

¹³⁴⁶ P-219-T-206-p.11-l.1 (FRA-p.10-l.23-24).

¹³⁴⁷ D2-148-T-279-p.38 (FRA-p.33-l.22); P-219-T-206-p.11 (FRA-p.10).

¹³⁴⁸ D2-148-T-279-p.40 (FRA-p.35-l.19-20).

¹³⁴⁹ D2-300-T-318-p.37-l.14-23 (FRA-p.32-l.14-23).

¹³⁵⁰ D2-300-T-318-p.41-l.14-20 (FRA-p.36-l.4-13).

¹³⁵¹ D2-300-T-317-p.22-l.13-24 (FRA-p.20-l.11-14).

¹³⁵² D2-300-T-317-p.22-l.20-24, p.27 (FRA-p.22-l.19-20); D2-300-T-319-pp.16, 17, 21 (FRA-p.18-23); D2-300-T-323-p.38 (FRA-p.33); D2-300-T-325-p.54 (FRA-p.47).

“I never introduced myself as ‘President’ or even ‘Colonel,’ never. [...] at that stage your Honour, I did not know what my title was. Everyone referred to me the way they wanted, but personally, I knew that I was the co-ordinator.”¹³⁵³

716. The documentary evidence, mainly letters, is addressed below, in section VI.

717. The prosecution claim Katanga was, at the time of Bogoro, President of the FRPI – but on the known history of the FRPI the defence submits that is not so, and there is certainly no reliable evidence of it being so. An understandable confusion arises in the case between that use of designation and being ‘President of FRPI’. On the 3rd March, Kakado lent Katanga his authority over the Walendu Bindi combatants for the first time. It was only on the 8th February 2004, with the declaration of the independence of the FRPI, that Katanga made the title ‘President of the FRPI’ official.¹³⁵⁴ In respect of the FRPI, Katanga clearly and formally nominated himself as President in 2004.¹³⁵⁵ P-12 and [REDACTED] [P-160] both said they had not heard Katanga ever refer to himself before then as President of the FRPI.¹³⁵⁶ Before then he had began to use the name President in the context of the FRPI after May to some extent – as on the invitations.¹³⁵⁷ This was after the attempt at a joint FNI/FRPI structure failed,¹³⁵⁸ as discussed below. By the mid 2003, for Adirodu and Mbusa, the FRPI was of no interest. It had fulfilled its function in getting the locals to support the APC. Katanga could have made himself King of it if he had wanted.

718. On 3rd March, at Tchei, combatants and non combatants, including church pastors and chiefs of localities, arrived for a meeting called by Kakado.¹³⁵⁹ “I had told you [...] we met with Kisoro in the presence of the old man Kakado in Tchei”. Kasaki, Katanga, Cobra, Kisoro and many others attended.’ Katanga said this was a significant moment and that two out of three people in the Collectivité will recall it – it had a kind of magical date – 3 3 3. Kakado stated that ‘today is the day of changes which I have been waiting for’.

Your Honour, I had told you that we met with Kisoro on 3 March 2003 in Tchei and we, on the 3rd we met with Kisoro in the presence of the old man Kakado in Tchei. Cobra was present. Old man Kasaki told those of us who had been invited to Tchei that the time had come when he preferred that the combatants should not kill each other because of titles. Cobra did not want anyone else to be referred to as ‘Colonel’ and so the old man said ‘Okay, Cobra, you will stay Colonel. Katanga will become the president of the combatants’ and he appointed someone else major and others captain, and so on and so forth. That is what happened. And

¹³⁵³ D2-300-T-319-p.17 (FRA-p.19).

¹³⁵⁴ D2-300-T-319-p.21 (FRA-p.18) and EVD-D02-00046/*Déclaration politique d’indépendance de la présidence du FRPI*, signed by Katanga.

¹³⁵⁵ D2-300-T-319-p.21 (FRA-p.18) and EVD-D02-00046/*Déclaration politique d’indépendance de la présidence du FRPI*, signed by Katanga.

¹³⁵⁶ P-12-T-198-p.37-l.5-19 (FRA-p.38-39).

¹³⁵⁷ D2-300-T-319-p.21 (FRA-p.23).

¹³⁵⁸ D2-300-T-318-pp.54 (FRA-p.47); D2-300-T-319-pp.7-8, 12 (FRA-p.5-9, 13).

¹³⁵⁹ D2-300-T-320-p.61-l.11-22 (FRA-p.63); D2-300-T-318-p.31-l.24-25 (FRA-p.27-l.20-21); D2-300-T-323-p.14 (FRA-p.13).

then we came to Bunia. Since this person was an old wise man, he used that title ‘president’ and two or three other wise men heard it and that is what happened.¹³⁶⁰

719. Kakado, known as PDG, ‘President director-general’ appointed Katanga not to a rank but to a position ‘President of the Combatants’.¹³⁶¹ Bearing in mind the deadly rivalry of the previous September between Kandro and Cobra,¹³⁶² this was surely Kakado’s way of placating Cobra while recognising the stabilising effect of Germain Katanga. His exhortation to stop killing one another was surely a reference to the Kisoro problem and to the previous history with Kandro.

Subsequent attacks against the UPC

Mandro, 4th March 2003

720. On the 4th March Mandro was attacked. It was a strategic position, the training centre of the UPC and an important and large base.¹³⁶³ The Prosecution relies on this attack to establish a widespread or systematic attack against the civilian population¹³⁶⁴ and cite the UN Secretary General’s report (EVD-OTP-00285). The testimonies referred to are not referenced. There is no indication as to identity or exact nature of this testimony, nor technique of interview, nor the identity and qualifications of the MONUC staff, nor the extent any civilian loss was accidental. No weight can be attached to it. Katanga says he did not participate in the Mandro attack;¹³⁶⁵ and heard about it on the radio.¹³⁶⁶ D-148 himself fought at Mandro and testified that he did not see Katanga at Mandro.¹³⁶⁷

721. Witness 250 testified that the FNI and FRPI soldiers attacked Mandro together.¹³⁶⁸ According to his testimony, Ngudjolo and Katanga both participated in Mandro.¹³⁶⁹ He does not place Yuda at Mandro.¹³⁷⁰ He further states that the attack took place on the third day after the Bogoro attack [27 February 2003],¹³⁷¹ when Mandro was attacked a week later. The witness also testified that the Mandro fight lasted three or four days,¹³⁷² when it only lasted a day. His testimony about the planning of Mandro is contradictory. At one point, he testified

¹³⁶⁰ D2-300-T-319-p.17 (FRA-p.18-19).

¹³⁶¹ D2-300-T-319-p.17-18, 20-21 (FRA-p.23-l.10-19).

¹³⁶² D2-300-T-319-pp.16-17 (FRA-p.18).

¹³⁶³ D2-300-T-322-p.66-l.8-15 (FRA-p.68); see EVD-D02-00226/Map annotated by Katanga indicating Bogoro-Zumbe-Mandro-Bunia.

¹³⁶⁴ PFB, para 36.

¹³⁶⁵ D2-300-T-318-p.39-l.22-23 (FRA p.34-l.17-18).

¹³⁶⁶ D2-300-T-318-p.40-l.1-3 (FRA p.34-l.22-25).

¹³⁶⁷ D2-148-T-279-p.25 (FRA-p.22).

¹³⁶⁸ P-250-T-99-pp.36-37, 38 (FRA-p.37-38); P-250-T-98-p.57 (FRA-p.55).

¹³⁶⁹ P-250-T-103-p.65 (FRA-p.61) (The president of the FRPI was present at Mandro, together with his guards).

¹³⁷⁰ P-250-T-103-pp.63-65 (FRA-p.60-62).

¹³⁷¹ P-250-T-99-pp.37-38 (FRA-p.38).

¹³⁷² P-250-T-99-p.36 (FRA-p.36).

that the FNI and FRPI did not fight together in a planned attack after Bogoro.¹³⁷³ At another point, he stated that the FRPI planned Mandro and some elements of the FNI at Bogoro participated in it as an opportunistic attack. At yet another moment, he testified that the FNI planned it and carried it out with the FRPI.¹³⁷⁴ Elsewhere in this brief, it is argued that Witness 250 is inherently unreliable.

722. With respect to Mandro P-12 and [REDACTED] P-160 both testified that Katanga had told them that he led the operations at Mandro. They had decided to attack Mandro to show they were not party to the agreement between the Hema and the Lendu.¹³⁷⁵ This conversation allegedly took place at a dinner in the house [REDACTED]. That conversation is extensively reviewed elsewhere.

723. In addition, Pichou and Malivo heard that Katanga participated in Mandro. This is at least a useful indication of their truthfulness, though not in this instance their reliability! Certainly it demonstrates that they did not come before the court to provide solely exculpatory evidence. Neither of them was there. Nor have their sources been identified.¹³⁷⁶ Malivo could not recall the circumstances he had heard about it.¹³⁷⁷ The testimony of Malivo on this aspect was vague. In re-examination, the witness conceded when asked if Katanga participated in Mandro, that he did not know if he was there.¹³⁷⁸

Bunia, 6th March 2003

724. On 6th March the UPC unwisely attacked the UPDF in Bunia and Lendu forces lent support to the UPDF based at Dele. The UPDF were accused of looting the town.¹³⁷⁹ The first investigations into these events by MONUC appear only to have taken place as from June 2003.¹³⁸⁰ There has not been any significant investigation into these events by the Prosecutor, as demonstrated by the record.

725. Two days after the taking of Bunia, 8th March 2003, Germain Katanga met Mathieu Ngudjolo for the first time.¹³⁸¹ He travelled there [CORR: replace by “to Dele”] with Blaise Koka but as Koka was viewed as *persona non grata* by the UPDF, being APC, the visit was

¹³⁷³ P-250-T-94-pp.82-84 (FRA-p.86).

¹³⁷⁴ P-250-T-98-pp.58-59 (FRA-pp.58-59); P-250-T-99-pp.23-24 (FRA-pp.22-24); P-250-T-94-pp.83-84 (FRA-pp.86-87); P-250-T-103-pp.61-62 (FRA-pp.58-60).

¹³⁷⁵ P-12-T-197-p.25 (FRA-pp.27-28); P-160-T-210-pp.72-73, 77-78 (FRA-pp.63, 67-68).

¹³⁷⁶ D2-228-T-250-p.11 (FRA-p.10); T-252-pp.23-24, 61 (FRA-pp.25-26, 68); D2-129-T-272-pp.7, 11-14 (FRA-pp.9-12).

¹³⁷⁷ D2-129-T-272-p.41 (FRA-p.36).

¹³⁷⁸ D2-129-T-272-p.41 (FRA-p.36).

¹³⁷⁹ EVD-OTP-00206 Secretary General Special Report/para.74.

¹³⁸⁰ EVD-OTP-00206.

¹³⁸¹ D2-300-T-318-p.42-l.14-15 (FRA-p.36-l.26-27).

short lived and Katanga returned to Aweba.¹³⁸² Katanga was not present in Bunia when it fell; nor was he involved in the attack. D-148 was present at the Bunia battle but says Germain Katanga was not.¹³⁸³

Peace initiatives following the fall of Bunia

726. On the 18th March, MONUC facilitated the signing of a ceasefire agreement. Under this agreement supervisory jurisdiction over the ceasefire is given to MONUC.¹³⁸⁴

727. Germain Katanga arrived in Bunia for the second time on the 21st March.¹³⁸⁵ On the following morning he met UPDF General Kali Kayihura at Bunia airport, together with the leaders of other groups. At the proposal of General Kali Kayihura, he was taken to sign the ceasefire agreement, signed by the major protagonists on the 18th.¹³⁸⁶ It is on this date that Mr Katanga heard of the FNI for the first time.¹³⁸⁷

728. In the days which followed, Kinshasa sent the PIR police. Around the end of March or beginning of April, General Kisempia arrived with a FAC battalion. He set the objective of forming a brigade out of the combatants of Ituri. On the 2nd April 2003, the Final Act of the inter-Congolese dialogue was signed at Sun City.¹³⁸⁸ From the 4th to the 14th April 2003, there was the CPI Conference (Commission de Pacification en Ituri)¹³⁸⁹ with most of the major stakeholders. On the 7th of April 2003, Joseph Kabila is sworn in as President for the transitional period. On about 14th April Germain Katanga visited Bunia for the third time.¹³⁹⁰ One of the outcomes of this major political conference is the establishment of a Special Interim Assembly.¹³⁹¹

Obstacles to the peace process

729. During the course of the CPI, on 3rd or 4th of April 2003, there was an attack on Drodoro, a significant distance north east of Bunia and the allegation was that it had been attacked by

¹³⁸² D2-300-T-318-pp.40-42 (FRA-pp.35-36).

¹³⁸³ D2-148-T-279-p.25 (FRA-p.22); see also P-219-T-209-p.24 (FRA-p.23).

¹³⁸⁴ EVD-D03-00044/*Accord de Cessation des hostilités en Ituri*, 18 March 2003, Article III (3).

¹³⁸⁵ D2-300-T-318-p.48 (FRA-p.42).

¹³⁸⁶ EVD-D03-00044/*Accord de Cessation des hostilités en Ituri*, 18 March 2003, p. 4.

¹³⁸⁷ D2-300-T-318-p.50 (FRA-p.43).

¹³⁸⁸ EVD-OTP-281, Texte de l'accord de Sun City, signé le 19 Avril en Afrique du Sud- Accord politique pour la gestion consensuelle de la transition.

¹³⁸⁹ See video DRC00127065, reviewed in EVD-OTP-00128/P-30's statement, paras 228 *et seq.*

¹³⁹⁰ D2-300-T-318-p.53 (FRA-p.46).

¹³⁹¹ See EVD-OTP-00243/*Rapport sur la situation Générale en Ituri Présenté Par L'Organe Exécutif Intérimaire à l'Assemblée Spéciale Intérimaire de l'Ituri lors de sa 5^{ème} session, Préambule*, November 2003, at p. 0219.

Lendu.¹³⁹² In the period following the CPI, between April and November 2003, problems of instability and insecurity continued to plague Ituri.¹³⁹³

FRPI/FNI joint Etat Major

730. The history and position of the FNI was referred to extensively in the evidence.¹³⁹⁴

731. Katanga first heard of the FNI on the 22 March.¹³⁹⁵ P-12, who was intimately concerned with the FIPI discussions and the events in Bunia in March, when the UPC was driven out and the Lendu and Ngiti came together, testified that:

the FRPI did not know the FNI. The FRPI had come into contact with the FNI only during the Ituri Pacification Commission meetings. At that moment in time the political groups that had been created in Kampala had to return in order to sign the Cessation of Hostilities Agreement and, at that moment in time, they understood that there was a party in existence, the FNI. This must have been around the end of March because the commission had started its work on 18 March 2003, and around that period, we could say that they met. I remember that General Kale Kayihura Bande, well, he was far more concerned with military matters. He brought the military leaders together so that they could reach an agreement, and each military leader was to speak on the radio. At that moment in time Colonel Ngudjolo spoke. He introduced himself and he said, "I am the commander of the FRPI." He did not say that he had come on behalf of the FNI. He said that he represented the FRPI.¹³⁹⁶

732. In April, with the influence of General Kisempia, the FNI-FRPI attempted to merge and establish a joint organisation.¹³⁹⁷ Until then the FNI had been a wholly political movement with no armed wing.¹³⁹⁸ There was a meeting at the MUSAFIRI hotel. Germain Katanga was present but Mathieu Ngudjolo was not.¹³⁹⁹ The coordination of the two groups was established and an *Etat-Major* formed, at least in theory. The FRPI was given a semblance of a structure, hitherto lacking, as the military wing of the FNI. *Maître* Kiza was appointed *Chef d'Etat-Major*. Germain Katanga was appointed *Adjoint Chef d'Etat-Major*.¹⁴⁰⁰

733. On the 6th May 2003, the **UPDF officially withdrew** from Bunia. Chaos descended. According to Thomas Lubanga, in a Press conference in the later half of May 2003, the 'destructeurs' were Lendu and disguised police coming from Kinshasa.¹⁴⁰¹ According to P-30, while Lendu were killing Hema, the UPC went after everyone, including the Hema.¹⁴⁰²

¹³⁹² P-30-T-183-p.32-l.19-25 (FRA-p.30-l.12-19).

¹³⁹³ See EVD-OTP-00243/*Rapport sur la situation Générale en Ituri/Préambule*/p. 0219.

¹³⁹⁴ See, for instance, D2-236-T-244WT-p.7-l.15-25 (FRA-p.6-l.25-to-p.7-l.6); D2-228-T-249-pp.59-60, 62-64 (FRA-pp.54-55 ; 57-59); D2-350-T-253-p.40 (FRA-p.43); P-12-T-194-pp 47, 48, 57-58 (FRA-p.48, 49, 58-60).

¹³⁹⁵ D2-300-T-316-p.53-l.1-7 (FRA-p.46-l.21-28); see also P-12-T-198-p.30-l.5-10, 19-20 (FRA-p.31-l.5-12, 19-20).

¹³⁹⁶ P-12-T-195-p.17 (FRA-p.17); see also p.26-l.2-9, p.43-l.18-19 (FRA-p.27-l.12-15,, p.46-l.27-28).

¹³⁹⁷ D2-228-T-249-p.60-62 (FRA-p.55-57); D2-350-T-253-pp.43-44 (FRA-p.46); D2-300-T-318-pp.54-55 (FRA-p.45-46); D2-300-T-319-pp.6-8 (FRA-pp.6-9).

¹³⁹⁸ P-12-T-194-p. 53 (FRA-p.54); D2-236-T-244-p.8 (FRA-p.7).

¹³⁹⁹ D2-300-T-319-p.5-6 (FRA-p.6-7).

¹⁴⁰⁰ D3-707-T-328-pp.40-41 (FRA-p.34-35); D2-300-T-319-pp.6-8 (FRA-p.7-9).

¹⁴⁰¹ See video DRC-00120-293, scene 5 – referred to in EVD-OTP-00128/P-30's statement/para.109.

¹⁴⁰² EVD-OTP-00128/P-30's statement, Annex 3, para.4.

According to MONUC, on 11 and 12 May 2003, two aircrafts landed from Kigali carrying arms and with Lubanga and Bosco.¹⁴⁰³ Germain Katanga participated in defending against the attack by the UPC.¹⁴⁰⁴ When the refugees left Bunia, many fled to Walendu Bindi and Aveba. Among them were very many Hema and Katanga, increasingly a figure of authority, ordered that they be assisted and not killed.¹⁴⁰⁵

A. It is true that in our community there are people who have very bad memories of the Hemas. That is true. And so to prevent similar things from happening in an area where we had started becoming civilised; you had to prohibit such acts. So imagine someone fleeing from Bunia right to Aveba. This is more than 70 kilometres, your Honour. If you kill him again where he came and took refuge that would be inhuman and even immoral. That is why we could not accept that. We could not allow even a single Hema to be killed who was under our control.¹⁴⁰⁶

734. On the 31st May 2003, **Tchomia** was attacked between 5 a.m. and 13.00.¹⁴⁰⁷ There is no reliable evidence that the Ngiti or Katanga were involved.¹⁴⁰⁸ P-12 attributes this attack to Lendu elements.¹⁴⁰⁹ The Prosecution relies on this attack as evidence of ‘widespread or systematic attack’.¹⁴¹⁰ Since this attack did not include Germain Katanga or his group, and occurred several months after the Bogoro attack, it cannot be viewed as part of the same attack as Bogoro. For reasons stated above, in section III, EVD-OTP-00285 cannot be relied upon given the nature of its compilation.¹⁴¹¹

735. On 30th May 2003, the UN Security Council authorised the deployment of an *Interim Emergency Multinational Force* (IEMF) in Bunia, until the 1st of September 2003.¹⁴¹² On the 19 June 2003, a meeting was convened between the IEMF, MONUC and the FRPI, where Germain Katanga was present as Commander-in-chief of the FRPI. The document cited by the Prosecutor recording the meeting as being on 19 May¹⁴¹³ must be a mistake due to the fact that the IEMF was only authorised on the 30 May.¹⁴¹⁴ On the 5th June 2003, the European Union Council, by decision 2003/432/CSFP, authorized Operation Artemis.¹⁴¹⁵

736. In May, Maître Kiza, Chef d’Etat-major of the FRPI, was killed in the fighting. Germain Katanga subsequently was made Chef d’Etat-major of the FRPI.

¹⁴⁰³ EVD-OTP-00206/MONUC Special Report/para.29.

¹⁴⁰⁴ D2-300-T-316-p.22-l.13 (FRA-p.19-l.26).

¹⁴⁰⁵ D2-300-T-319-pp.21-22 (FRA-pp.24-25).

¹⁴⁰⁶ D2-300-T-319-p.22 (FRA-pp.24-25).

¹⁴⁰⁷ P-12-T-196-p.29-l.1-24 (FRA-p.23-l.27-to-p.24-l.21).

¹⁴⁰⁸ See EVD-OTP-285, paras 84-87; P12-T-196-FRA-p.24-l.16-18.

¹⁴⁰⁹ P12-T-196-FRA-p.26-l.28, p.27-l.1; P-12-T-204-p.14 (FRA-p.13).

¹⁴¹⁰ PFB, paragraph 36.

¹⁴¹¹ PFB, para. 36; Report, paras 84-87.

¹⁴¹² EVD-OTP-00213/UN Security Council Resolution 1484 (2003), 30 May 2003.

¹⁴¹³ EVD-D02-00236/MONUC Bunia Sitrep, 20 June 2003, mentions a meeting with the IEMF, MONUC, Katanga and Pichou on the 19 May 2003.

¹⁴¹⁴ This is evidenced by reference in the document to the date of 1 September which is mentioned in the Security Council Resolution. It is further evidenced by the fact that the document itself is dated 19 June 2003.

¹⁴¹⁵ D2-300-T-319-p.47-l.18-19 (FRA-p.52-l.23-24).

737. On the 11th June 2003, **Kasenyi**, a PUSIC stronghold, was attacked. The prosecution again refers to the UN Secretary General's special report (EVD-OTP-00285).¹⁴¹⁶ For the same reasons previously advanced, it is submitted that no weight can be attached to it.

738. Katanga went to Kinshasa for the first time in August 2003 for meetings of the **CCGA**.¹⁴¹⁷ From this time, when a helicopter was available, Katanga attended the meetings of the CCGA in Bunia once or twice a month.

739. Katanga met P-12 for the first time in Kinshasa in August 2003.¹⁴¹⁸ P-12 handed him his phone and a person introduced himself as [REDACTED]. He told Katanga he was [REDACTED] on his way back from Kinshasa. Katanga agreed, but because the itinerary to go via Entebbe changed, Katanga got off the plane at Bunia.¹⁴¹⁹ On a later occasion in Bunia, while the CCGA met, Katanga agreed to meet with [REDACTED] [P-12] and as a result a number of visits were made by Katanga to Uganda, including meetings with President Museveni.

740. On 8th February 2004, Katanga issued a declaration announcing the formal separation of the FRPI from the FNI. In fact, since at least May and the retaking of Bunia by the UPC the two groups had effectively parted. This declaration denounced the violence and massacres and supported the resolutions of the Commission of Pacification. It further stated as one of the reasons for the rupture the circulation of false rumours tarnishing the reputation of the FRPI.¹⁴²⁰

741. In June 2004, the demobilisation site became operational in Aveba. It ran until November 2004 and Germain Katanga fully cooperated with the process.

742. On 11 December 2004, age 26, Germain Katanga was nominated *Brigadier Général* by President Kabila.¹⁴²¹

743. On the 25th February 2005, radio OKAPI reported the murder of 9 Bangladeshi 'casques bleus' in Kafe, to the North East of Bunia, far from Walendu Bindi and never associated with the accused in any way.¹⁴²² The killings were the reason given for the initial arrest of the Mr

¹⁴¹⁶ PFB, para 36; Report, para.89.

¹⁴¹⁷ D2-300-T-319-p.25 (FRA-p.27).

¹⁴¹⁸ D2-300-T-319-p.25 (FRA-p.27).

¹⁴¹⁹ D2-300-T-319-p.32 (FRA-pp.34-35).

¹⁴²⁰ EVD-D02-00046/Déclaration politique d'indépendance de la présidence du FRPI, signed by Katanga, dated 8 February 2004.

¹⁴²¹ EVD-OTP-00242/Décret n° 04/094 du 11 Déc. 2004 portant nomination dans la catégorie des officiers généraux des Forces armées de la République Démocratique du Congo, 11 December 2004.

¹⁴²² ICC-01/04-01/07-891-Conf-Exp and its public version ICC-01/04-01/07-949; T-65-pp.112-113 (FRA-pp.103-104).

Katanga.¹⁴²³ Katanga was in Kinshasa. There has been no reasonable basis advanced for that allegation and it has not been pursued. On 26th February 2005, Katanga was arrested by DEMIAP and confined to hotel premises. Until his arrival in The Hague he had had no contact with his wife since leaving Ituri. His lawyers were never given access to the *dossier*. On 9th March 2005 he was taken to prison. On 10th March 2005, a warrant was issued for the arrest of the accused.¹⁴²⁴

744. An international warrant of arrest was issued on 2nd July 2007 and an official request for his arrest and surrender was filed by the Registrar on 6th July 2007.¹⁴²⁵

V- LEGAL AND FACTUAL SUBMISSIONS ON THE ALLEGED CRIMES

V1- THE CONTEXT

A- Facts Relevant to Article 8 Chapeau Elements – War Crime

The nature of the conflict

745. It is not disputed that the Bogoro attack took place in the context of an armed conflict. The more contentious issue is the nature of that conflict as international or non-international. The Pre-Trial Chamber held that the attack took place within the context of an international armed conflict and confirmed the charges on this basis.

746. The prosecution has failed to prove an international armed conflict. This may have more to do with failures in the prosecution investigations than a reflection of the reality. There may well be evidence to demonstrate one, but that evidence is not before the Chamber and in terms of article 74 (2) of the Statute, the Chamber is constrained to rule on the evidence before it.

747. There is evidence of foreign intervention.¹⁴²⁶ Uganda has violated the sovereignty of the DRC, by occupying its territory. It also involved itself in extensive armed conflict prior to Bogoro in a manner that caused untold suffering to the Ngiti and other communities. The Ngiti militia developed as a result of the need to defend their territory from foreign attack by

¹⁴²³ T-65-pp.112-113 (FRA-pp.103-104).

¹⁴²⁴ EVD-OTP-00227.

¹⁴²⁵ ICC-01/04-01/07-1-tENG, WARRANT OF ARREST FOR GERMAIN KATANGA, dated 2 July 2007; ICC-01/04-01/07-6-tENG, REQUEST TO THE DEMOCRATIC REPUBLIC OF THE CONGO FOR THE ARREST AND SURRENDER OF GERMAIN KATANGA, dated 6 July 2007.

¹⁴²⁶ See generally EVD-OTP-00206, pp.12-14.

the UPDF. In the meantime, on the 6 January 2003, the UPC reportedly formed an alliance with RCD-Goma supported by Rwanda, while Rwanda supplied it arms. In the meantime, the DRC through RCD-K/ML planned and coordinated the Bogoro attack. However, the prosecution has produced no evidence to show that the UPC was actually under the overall control of Rwanda at the time of the Bogoro attack.

748. In *Tadic*, the Appeals Chamber held that a state may exercise the required degree of control when it ‘has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.’¹⁴²⁷ In *Rajic*, an international armed conflict was held to exist between the Bosnian Croats and the Bosnian government on the territory of the latter because of the degree of control which Croatia exercised over the Bosnian Croats.¹⁴²⁸ In that case, in addition to providing the Bosnian Croats with the kind of assistance which the United States provided Contras in the Nicaragua case, Croatia inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats.

749. It is possible to have more than one armed conflict operating within the same territory simultaneously. Thus, in the *Nicaragua* case the International Court of Justice held that there was taking place at the same time both an international armed conflict between the United States and Nicaragua and a conflict of a non-international character between the rebel group the *Contras* and the government of Nicaragua.¹⁴²⁹ It ruled that the former conflict was subject to the rules applicable in international armed conflicts and that the latter conflict was subject to the rules applicable in conflicts of a non-international character. This was despite the existence of military training and support of the *Contras* by the United States. This principle of the possibility of the simultaneous existence of an international and non-international armed conflict within the territory of a state has been confirmed in the cases of *Tadic*¹⁴³⁰ before the ICTY and also in the case of *Lubanga*¹⁴³¹ before the ICC.

750. Uganda’s occupation of Ituri created an international armed conflict with the DRC. However, the prosecution has not conclusively established that Bogoro was part of the international armed conflict between Uganda and the DRC; nor has it established conclusively

¹⁴²⁷ *Prosecutor v. Tadić*, IT-94-1, Appeal Judgment, para 139.

¹⁴²⁸ *Prosecutor v Ivica Rajic (a/k/a Viktor Andric)*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ICTY Trial Chamber, para. 26.

¹⁴²⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v US*, Judgment of the 27 June 1986, ICJ Reports 1986, pp.14 *et seq.*, para. 219.

¹⁴³⁰ *Tadic*, Interlocutory Appeal Decision, paras 72-77.

¹⁴³¹ *Lubanga* Judgment, 14 March 2012, para 450.

that it was part of a confrontation between the DRC and Rwanda. It has therefore failed to prove the existence of an international armed conflict for the purposes of the charges.

The consequence of a finding that the conflict at Bogoro was non international

751. In the *Lubanga* case, the consequence of its finding that there was a non international armed conflict was that after applying regulation 55 of the Regulations of the Court to reclassify the legal characterization of the facts, the accused was convicted of the offence of using child soldiers in terms of article 8(2)(e)(vii) for offences committed between September and 2 June 2003 rather than in terms of article 8(2)(b)(xxvi) of the Statute, as confirmed by the Pre-Trial Chamber.

752. The Defence submits that while the Chamber has the power to legally define the conflict and therefore change its legal characterization from that which the Pre-Trial Chamber adopted to accord with the crimes or the conduct of the accused, it does not have the power to change the legal characterization of the charges in the absence of an earlier amendment of the charges. In the alternative, if such power exists, it may not be exercised without significant and proper notice to the accused prior to the close of the defence case.

753. The accused is entitled to absolute clarity on the charges against him before the commencement of the trial under article 67(1)(a) of the Statute. Regulation 55 does not alter this in any way because it does not address the issue of amendment of the charges at all (the word is not used), but merely the reclassification of the applicable law to the factual matrix. To this extent, it is submitted that the approach of the *Lubanga* trial Chamber in basing a conviction for a different offence under a different provision on its reclassification of the conflict is incorrect.

754. In so far as regulation 55 is held to be a provision authorizing amendment of the charges or conviction for offences other than those specified in the charges, it is submitted that this is inconsistent with article 67(1) of the Statute.

Does regulation 55 authorize the Chamber to convict for offences not charged?

755. It is submitted that the charges may not be altered at this stage, Regulation 55 is, as confirmed in Regulation 1, subject to the Statute. Article 67(1) provides that the accused shall be informed promptly and in detail of the nature, cause and content of the charge. This is not stated to be limited to the facts and therefore includes the legal nature of the charge. This is confirmed by regulation 52(b), which states that the charges must provide a ‘sufficient legal and factual basis’.

756. In terms of regulation 55, the Chamber may alter the legal characterization of the facts and is not bound by the decision of the Pre-Trial Chamber in this respect. This makes perfect sense since there is a continuing duty on the court to apply the law correctly. Article 74(2) of the Statute provides that the Chamber in its decision may not exceed the facts and circumstances described in the charges and any amendments thereto. Again, this is self-evident since the accused must have notice of the complete factual framework of the charges against him in order to meet those charges. While this inferentially allows the Chamber to address the law in a manner in which may not have been discussed previously in the charges or by the Pre-trial Chamber, it cannot, it is submitted, imply that the Chamber may unilaterally amend the charges upon which a conviction is based. The legal elements are as important to the charge as the factual basis since the facts are intertwined with the legal nature of the charges. As stated by the Appeals Chamber, ‘the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged’. This is supported by the fact that the Prosecutor is given the option to amend the charges both during the Pre-trial hearing as well as once the charges have been confirmed and before the commencement of the trial.

If the Chamber can go beyond or alter the charges at the time of judgment, should regulation 55 apply in the circumstances of this case?

757. Addressing the defence’s alternative submission, regulation 55 requires respect for the right to adequate time and facilities under article 67(1)(b) and the right to call witnesses under the same conditions under article 67(1)(e). These rights would be violated if the provision were to be applied to convict the accused on a different legal basis after the close of the defence case and without any application to amend the charges emanating from the Prosecutor.

758. If it was the intention of the Prosecutor to argue a reclassification of the applicable legal position, it had the option to request the amendment of the charges to read in the alternative: that is to say that the accused is charged under article 8(2)(b) or in the alternative under article 8(2)(e).

759. Apart from the absolute nature of the right to proper notice of the scope of the charges, prejudice will also result from the somewhat differing definitions of the crimes in the Elements of Crimes, and indeed, from the application of different rules, where relevant, of international humanitarian law that are broader in scope.

760. Therefore, it is submitted that the conflict may be legally redefined, but the charges must remain as they are and cannot now be altered to accord with the Chamber’s legal findings. That would be inconsistent with the right to a fair trial.

B- Facts Relevant to Article 7 Chapeau Elements – Crime against Humanity

Introduction

761. Katanga is charged with crimes against humanity pursuant to Articles 7(l)(a) (murder), and 7(l)(g) (sexual slavery; rape).

762. Pursuant to article 7(1), “crime against humanity” means “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” The defence submits that the prosecution failed to meet these threshold requirements.

763. The findings of the Pre-Trial Chamber that there were substantial grounds to believe that the offences committed at Bogoro were part of a widespread or systematic attack were partly based on proposed testimony which has not been brought before this Chamber. The evidence heard does not meet the required standard of proof for crimes against humanity.

Attack Directed Against a Civilian Population

Legal principles

764. This should be distinguished from the war crime, with which Katanga is also charged and which is addressed elsewhere, of intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities. While certain words like ‘directing’, ‘attacks’ and ‘civilian population’ are common to both crimes, they are based upon different sources with distinct historical development. War crimes are based upon humanitarian law derived from state practice in the form of the Geneva Conventions and their additional protocols together with the laws and customs of war. Crimes against humanity on the other hand are based upon state practice flowing from the Charter and Judgment of Nuremberg, and are understood to address the conduct which shocks the conscience of mankind regardless of whether committed in time of peace or war.

765. Pursuant to Article 7(2)(a), an “Attack directed against any civilian population” means “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.

766. The defence does not dispute that, on 24 February 2003, an attack was launched by APC soldiers together with Ngiti fighters, which was joined subsequently by Lendu fighters. The defence further does not dispute that a significant number of civilians were unfortunately killed in the course of this attack.

767. The prosecution submits that ‘a single murder or a single rape committed during the attack on Bogoro is sufficient to constitute a crime against humanity if it is committed not randomly, but within the context of a widespread or systematic attack on civilians’. It cites *Tadic* in support of this proposition.

768. Care should be taken in applying ICTY jurisprudence to this issue since crimes against humanity were not as clearly defined as they are in the Rome Statute. It is clear from the Elements of Crimes that one criminal act could constitute a crime against humanity. However, the attack itself must not only be widespread or systematic but also part a course of conduct involving a multiple commission of offences listed under article 7: the attack, which is directed against a civilian population. So even if the accused only commits one offence it must be demonstrated that it formed part of a course of conduct involving many offences having the necessary quality to be classified as crimes against humanity.

769. Furthermore, it is not sufficient that the act is ‘within the context of’ a widespread or systematic attack. It must be ‘part of’ it pursuant to article 7(1). The question is therefore more than whether the act was committed randomly. If the act is distinct from the attack directed against the civilian population then it is not part of it for the purposes of the Statute.

770. In addition, the attack must be directed against the civilian population, which implies according to the definition that it is launched pursuant to a state or organizational policy. As described in the introduction to article 7 ‘it is understood that “policy to commit such attack” requires that the state or organization actively promote or encourage such an attack against the civilian population.

771. In the light of the fact that the offending conduct must be part of the same widespread or systematic attack, it must be proved that there was a state or organizational policy actively encouraging the commission of offences against the civilian population of Ituri and that the Bogoro attack and the offending act were done in pursuance of the same plan or policy which led to the widespread or systematic attack.

Application to the evidence: preliminary remarks

772. The defence disputes that the attack was in fact directed against the civilians. On the contrary, the defence submits that on the evidence the attack was directed against the UPC base present in Bogoro. So if there was a widespread or systematic attack against civilians in another attack or attacks within Ituri, which had been planned or formed part of a state or organisational policy, it has not been demonstrated that the Bogoro attack did form part of the execution of that policy.

773. As to the Bogoro attack itself, there has been evidence, referred to by the prosecution and victims legal representatives of the killing of civilians, searches and their capture during and in the aftermath of the attack. However, there has not been the appropriate evidence to establish that these excesses, while horrific, were the result of an organisational policy as opposed to the unlawful acts of individuals. Neither, has the link been established between these excesses and excesses in other attacks in line with any organisational policy on an Ituri wide scale. The prosecution has not even proved that the organisers of other attacks were the same state or organisational structure as the one which conducted the Bogoro attack.

Organisational policy: the designers of the attack and their principle aim

The defence notes that the assertion by the prosecution in its opening statement that it proved that there was an expressed intention to wipe out or erase Bogoro has simply not materialised. As stated and expanded elsewhere in this brief,¹⁴³² the defence submits that the plan to attack Bogoro was formulated by EMOI, an initiative of Kinshasa, and the RCD-K/ML, both based in Beni.¹⁴³³ This plan to recapture Bogoro was based on a military and strategic priority to recover the territory from the UPC and neutralise its military camp there, rather than on any intention to attack civilians. Thus, it was intended to chase out the UPC soldiers who were blocking the road to Bunia and provided a security problem for the Ngiti and Lendu populations in the region.¹⁴³⁴

Organisational policy: perceptions about the situation regarding civilians

774. There was a general perception that the civilians had left Bogoro given that it had turned into a war zone and that attacks had already occurred there, as was confirmed by Iribi, the then intelligence officer of the RCD-K/ML.¹⁴³⁵ According to Iribi, this perception was shared even by the intelligence services of the RCD-K/ML. These services had difficulties cross-checking whether there were remaining civilians in Bogoro because they had difficulties accessing sources of information other than through the displaced persons in North Kivu and the radio.¹⁴³⁶

¹⁴³² See section VI on common plan.

¹⁴³³ D2-228-T-249-pp.65-66 (FRA-p.60-61); T-250-p.10 (FRA-p.9); T-252-p.49 (FRA-p.54); D2-300-T-325-p.18 (FRA-p.16), 20-22 (FRA-pp.17-19).

¹⁴³⁴ D2-228-T-249-pp.66-67 (FRA-p.61); T-252-p.27 (FRA-p.29). See also: D2-350-T-253-pp.41-43 (FRA-pp.44-46); D2-350-T-254-pp.7-14, 26-29 (FRA-pp.6-12, 22-25); D2-148-T-279-pp.18, 36 (FRA-pp.16, 32); T-280-pp.19-21, 60-61 (FRA-pp.16-18); D2-148-T-281-pp.21-22 (FRA-pp.17-18). (FRA-pp.17-18), 35 (FRA-p.30).

¹⁴³⁵ D2-228-T-252-p.55 (FRA-pp.60-61).

¹⁴³⁶ D2-228-T-252-p.55 (FRA-p.61).

775. Katanga testified that the intelligence system was not working due to the impossibility to go from Kagaba to Lakpa through Bogoro to provide intelligence.¹⁴³⁷ He stated that it was impossible to know what was at Bogoro and whether civilians were still present there in February 2003.¹⁴³⁸ This is why a reconnaissance mission was organised by APC Major Blaise Koka on 10 February 2003 to Bogoro to test the strength of the enemy forces. There was no other way of finding out.¹⁴³⁹ During that mission in which Katanga participated, they did not observe a civilian presence because they were pushed back without gaining control of the town.¹⁴⁴⁰ This is corroborated by some witnesses from Bogoro, most specifically witnesses 166 and 159, who speak about previous attacks just before the main attack of 24 February 2003. The attackers in these previous attacks were pushed back and did not focus on civilians but only on the UPC elements in the camp. They did not lead to any civilian casualties.¹⁴⁴¹

776. This is also confirmed by witness D-148 who participated in previous attacks on Bogoro and stated that during the last previous attack there were no civilians left at the point of entry into Bogoro coming from Lakpa.¹⁴⁴² Also, when Ndjabu gave an interview to *Radio France Internationale* (“RFI”) about the Bogoro victory one or two days following the attack, he had received no information about civilian casualties.¹⁴⁴³

777. The perception that the civilians had left Bogoro is shared by a number of prosecution witnesses. Prosecution witness 250 stated that “[t]here weren’t any civilians in Bogoro. It was impossible. They had left.”¹⁴⁴⁴ Later on in his testimony, he made similar submissions: “At that time an old person could not have had the strength to Bogoro. It was the rebels who were there.” He also said: “Those who were living in Bogoro were soldiers. I did not know their origin. I know that there were Hemas, there were even Ugandans, and even Rwandans amongst the population that was living there”.¹⁴⁴⁵

778. Witness 280 stated that although they started by killing civilians, “[u]sually when we started we didn’t know that there were civilians, because sometimes we would go into houses and we would find civilians, and the civilians would be armed, and that is why we would enter the houses and kill the civilians, and after that, we attacked the military camp.” He later

¹⁴³⁷ D2-300-T-317-p.59 (FRA-pp.51-52).

¹⁴³⁸ D2-300-T-318-pp.1-2 (FRA-p.2).

¹⁴³⁹ D2-300-T-317-pp.59-60 (FRA-pp.51-52).

¹⁴⁴⁰ D2-300-T-318-p.2 (FRA-p.2).

¹⁴⁴¹ P-166-T-226-pp.5-7, 9 (FRA-pp.5-7); EVD-OTP-00202, dated 17-19 février 2007 (Déclaration de témoin Mugenyi Bahemuka Tibamwenda Samuel). Under Seal, para. 58; P-159-T-120-p.71 (FRA-p.70); P-159-T-122-pp.17-19 (FRA-pp.16-19).

¹⁴⁴² D2-148-T-280-p.62 (FRA-p.55).

¹⁴⁴³ D2-236-T-243-pp.29-31 (FRA-pp.25-27); T-247-p.83 (FRA-p.75); T-251-p.48 (FRA-p.52).

¹⁴⁴⁴ P-250-T-94-p.19 (FRA-p.19).

¹⁴⁴⁵ P-250-T-98-p.33 (FRA-p.34).

repeated that they killed civilians, but that they “didn’t know that there were civilians. In fact, the families had weapons at home. Even if the person was a civilian, they had weapons at home”.¹⁴⁴⁶

779. Elsewhere, the defence argues that these witnesses were in fact not present at Bogoro. However, their testimony about the absence of civilians indicates that this was a shared perception.

Organisational policy: instructions relating to civilians

780. Apart from the perception about civilians having left Bogoro, the Chamber also heard evidence of specific instructions from the organisers of the attack not to target civilians. To ensure that the attackers would not go beyond the objective set, namely to dislodge the UPC Camp at Bogoro, formal instructions were given not to kill civilians.¹⁴⁴⁷ Iribi testified that he met with people from the general staff of EMOI who were saying that the weapons were not distributed for the purpose of killing civilians in Bogoro.¹⁴⁴⁸ Katanga testified that also the APC provided rules of conduct for the protection of civilians because the main goal was to protect civilians and their property.¹⁴⁴⁹

Organisational policy: strategy employed on the ground

781. Contrary to the Pre-Trial Chamber’s preliminary finding that, in the early morning of 24 February 2003, FRPI and FNI combatants “encircled Bogoro village from all the roads leading to it”,¹⁴⁵⁰ witness D-148 testified that Bogoro was not encircled, but that there were breaches through which one could leave, and that the civilians lived in peripheral areas of Bogoro.¹⁴⁵¹ According to D-148, when planning a war, one cannot cut off all routes, for you have to leave some way of retreat for those who carry weapons.¹⁴⁵²

Organisational policy: prosecution evidence

782. The above evidence is sufficient to raise a reasonable doubt as to a state plan or organisational policy with respect to attacking the civilian population. The prosecution has failed to produce any concrete evidence that would undermine the defence evidence and establish such a plan or policy to attack the civilian population. The evidence produced relates to instances during the attack and would require inferences to be drawn, but the evidence fails

¹⁴⁴⁶ P-180-T-156-p.40-l.13-17(FRA-p.39-l.15-19); P-280-T-157-p.19-l.7-9 (FRA-p.19-l.14-17).

¹⁴⁴⁷ D2-228-T-252-pp.56-57 (FRA-p.63).

¹⁴⁴⁸ D2-228-T-252-p.57 (FRA-p.63).

¹⁴⁴⁹ D2-300-T-325-pp.15-16 (FRA-p.14).

¹⁴⁵⁰ Confirmation Decision, para. 403.

¹⁴⁵¹ D2-148-T-280-pp.24-25 (FRA-p.21).

¹⁴⁵² D2-148-T-280-p.24 (FRA-p.21).

to reach the level of necessary inference such that the Chamber could reasonably be sure of the existence of an organisational policy to attack the civilian population.

783. Reference was made by P-219 and P-28 to songs. According to their testimony, the lyrics of these songs included insults and made reference to catching a Hema or the enemy and killing him.¹⁴⁵³ Elsewhere in this brief, it is argued that these witnesses are so lacking in credibility that their evidence should be accorded no weight. To the extent that songs were sung about the enemy, this is not prohibited by international humanitarian law and does not necessarily imply that the assailants directed their attack against a civilian population. Armies generally and throughout history, have patriotic, derogatory, even violent lyrics to boost morale.¹⁴⁵⁴ While confirming that there was a lot of shouting through cow horns and singing coming from a big group of attackers including civilians, P-176 testified that “[w]e knew all this was designed to intimidate us and this was what was often done”.¹⁴⁵⁵

Organisational policy: potential explanations for civilian deaths

784. The prosecution evidence (subject to issues of credibility) does provide a picture of civilians being targeted at the attack. In order to make an inference of a state or organisational policy, there would have to be no other reasonable explanation for the events. Witnesses have placed numbers on those killed but the circumstances of their deaths remains, on the evidence, largely unexplained in most cases. The proportion of those killed as a result of unruly actions as opposed to incidental killings is not clearly established, perhaps partially because of the failure to investigate, diligently and properly, the scene of the crimes (dealt with elsewhere). With regard to the unruly actions it is not established that these were supported by the high command on the ground.

(i) Incidental losses

785. Naturally, there must have been collateral damage given the nature of the weapons used and the location of civilians in the line of fire. This is confirmed by the testimony of D-148 who conceded that some civilians may have been killed by stray bullets outside the camp.¹⁴⁵⁶ The witness did not leave the camp, and so could not otherwise confirm if these civilians were

¹⁴⁵³ See P-219-T-205-p.38-l.8-11(FRA-p.37-l.25-28); P-28-T-217-pp.56 (FRA-p.49).

¹⁴⁵⁴ See, for example, *La Marseillaise*, which refers to “Fearsome soldiers” coming to “Cut the throats” of the sons and consorts of the fatherland; to the enemy as a “Horde of slaves of traitors and conspiratorial kings”; to supporting “Our avenging arms”; and the calling “To arms citizens, Form your battalions, march, march, Let impure blood Water our furrows.”

¹⁴⁵⁵ D2-176-T-255-p.35 (FRA-p.35).

¹⁴⁵⁶ D2-148-T-280-pp.31-32 (FRA-p.27).

deliberately killed, and did not see them being killed.¹⁴⁵⁷ He realised only later that civilians had been killed.¹⁴⁵⁸

786. Furthermore, many of the civilians were in fact armed. The evidence mainly refers to victims in the Bogoro Institute, which was part of the UPC Camp. The attackers could easily have confused them with UPC soldiers or armed associates. D-148 testified that he saw that civilians had been killed at the Bogoro Institute, but that there was a mixture of people at Bogoro, the majority of whom was armed.¹⁴⁵⁹ According to P-287, there were UPC child soldiers, as well as female UPC soldiers.¹⁴⁶⁰ It is then understandable that the attackers could not always distinguish unarmed civilians from armed combatants.

(ii) Unruly and uncontrollable elements

787. Apart from the incidental loss of life, the evidence, if believed, indicates definite unruly and evil actions against elements of the civilian population. These could be explained by uncontrollable elements or the presence of elements from other groups at the scene who were not incorporated in the line of command of those who had designed the attack on Bogoro.

788. It is plain that given the conditions at the time there may not have been a high degree of organisation within the militia and even the APC (whose presence in Beni was the result of having been ousted from Bunia).

789. Katanga conceded that there were uncontrollable elements among the combatants who also threatened Hema refugees who had fled Bunia when the UPC took over in August 2002. Such refugees were threatened as they passed through Kagaba, Medu or Olongba.¹⁴⁶¹ Even at Aveba, some elements among the combatants or APC soldiers would threaten Hema refugees passing through or taking shelter.¹⁴⁶² Whenever Katanga observed such behaviour in his area of command in Aveba, he would intervene. In such situations he would remind them that their ideology is to allow the civilian population to live freely in peace.¹⁴⁶³ Katanga also testified that they had certain reservations about providing ammunition to combatants who did not behave properly to the civilian population. There were cases where combatants did not deserve to have ammunition and did not deserve to be entrusted with a particular type of mission.¹⁴⁶⁴

¹⁴⁵⁷ D2-148-T-280-pp.31-32 (FRA-pp.27-28).

¹⁴⁵⁸ D2-148-T-280-p.32 (FRA-p.28).

¹⁴⁵⁹ D2-148-T-279-pp.21-22 (FRA-p.19).

¹⁴⁶⁰ P-287-T-130-p.37 (FRA-p.37).

¹⁴⁶¹ D2-300-T-325-p.16 (FRA-pp.14-15).

¹⁴⁶² D2-300-T-325-p.16 (FRA-p.15).

¹⁴⁶³ D2-300-T-325-p.16 (FRA-p.15).

¹⁴⁶⁴ D2-300-T-325-p.18 (FRA-p.16).

790. On this issue, Katanga stated that:

sometimes instinct takes the forefront, if you will. And sometimes the soldiers are chased out, but rather than actually running away, they go into the homes of civilians and they might shoot soldiers who are patrolling, who are checking for security reasons. They would shoot each other and that's what changed the situations. So when someone saw their brother fall, a second and third fall as well, he either fired or launched a rocket at the house - or sometimes they just did whatever they liked.¹⁴⁶⁵

(iii) *Individuals outside the line of command*

791. Some of the civilians in the Bogoro Institute were killed with bullets, and others with machetes.¹⁴⁶⁶ It is unclear who killed the civilians. Most attackers carried firearms. Those who attacked by machetes could easily have been civilians from surrounding villages who arrived at Bogoro after the battle for purposes of pillage. For instance, prosecution witness 280 stated:

"In Zombe, it is during the fighting, even in Lagura, if there is someone, a civilian who wishes to go to the front, he can follow the soldiers. So you had such people with machetes, others with knives, and others even had arrows."¹⁴⁶⁷

792. Defence witness 176 was one of the UPC fighters at Bogoro. He testified that the attackers behaved like civilians and were dressed as such.¹⁴⁶⁸ The entire population of the *collectivité* came to fight, including the women and soldiers.¹⁴⁶⁹ He stated that some women had machetes and started cutting down people.¹⁴⁷⁰

Widespread or Systematic

793. The terms 'widespread' and 'systematic' are not defined in the Statute or the Elements of Crimes. However, article 22(2) of the Statute requires that the definition of a crime be strictly construed and that in case of ambiguity interpreted in favour of the accused. The introduction to the Elements of Crimes commentary on article 7 acknowledges this in relation to crimes against humanity in particular on the basis that one should take into account the fact that 'crimes against humanity' as defined in article 7 are among the most serious crimes of concern to the international community as a whole.

794. The widespread requirement is understood as requiring large-scale activity involving a great number of victims.¹⁴⁷¹ It was held in *Blaskic* that systematic entailed four elements: (1)

¹⁴⁶⁵ D2-300-T-325-pp.15-16 (FRA-p.14).

¹⁴⁶⁶ D2-148-T-280-pp.25-31 (FRA-pp.22-27).

¹⁴⁶⁷ P-280-T-158-p.51 (FRA-p.51).

¹⁴⁶⁸ D2-176-T-256-p.38 (FRA-p.33).

¹⁴⁶⁹ D2-176-T-255-p.35 (FRA-p.35); T-256-p.38 (FRA-p.33).

¹⁴⁷⁰ D2-176-T-256-p.39 (FRA-p.34).

¹⁴⁷¹ Darryl Robinson, "The Elements of Crimes Against Humanity", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers Inc., 2001), 63; Rodney Dixon, "Crimes Against Humanity", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (C.H. Beck, Hart, and Nomos, Second Edition, 2008), 178.

the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; (2) the perpetration of a criminal act on a very large scale against a group of civilians or the continuous and repeated commission of inhumane acts linked to one another; (3) the preparation and use of significant public or private resources, whether military or other; (4) the implication of high level political and/or military authorities in the definition and establishment of the methodical plan. The criterion for a 'systematic' attack also therefore incorporates a notion of a very large number of victims.

795. The defence submits that the attack was not widespread or systematic.

796. The prosecution submits that the Bogoro attack must be in the 'context of' - and the defence submits it 'must be part of' - a widespread or systematic attack. The prosecution submits that the attack was both widespread and systematic. In support of this the prosecution relies first on the Bogoro attack itself being widespread and systematic, second on what it describes as a general military campaign with a number of attacks involving the same actors, and third what it describes as the general ethnic conflict in Ituri.

The Bogoro attack of 24 February as a widespread or systematic attack

797. The only authority cited by the prosecution for its proposition that it is not necessary to establish other attacks is the Trial Chamber judgment in *Akeyesu*. However, the paragraph cited by the prosecution does not support this proposition at all. In any event the Rwanda Tribunal was concerned with a widespread and systematic attack against the entire Tutsi population of the country.

798. State and judicial practice has reserved the crime against humanity for the very large-scale atrocities manifesting a certain degree of continuity and geographical scope. Thus, one can cite the holocaust - executed over an entire ethnic group over several years and across several state borders; the genocide in Rwanda - enveloping the entire ethnic Tutsi population of the country over a period of months; the widespread and well planned excesses against entire ethnic groups over a continuous period during the conflict in the former Yugoslavia. Applying article 22(2) and having regard to the fact that crimes against humanity are reserved for the worst examples of atrocities against humanity, the defence suggests that the scale of the attack against the civilian population must be exceptionally large and not confined to a single attack on a village, involving a military objective, on one day, leading to less than 200 civilian casualties with virtually no clarity as to who was targeted. While horrific, this kind of attack, taken at its highest, does not by itself stand out as an atrocity on such a massive scale

that it distinguishes itself from the thousands of other abhorrent attacks against civilians in times of war committed during the conflicts over the last 50 to 100 years. It is submitted that in order for one single attack on one date to fall within the definition of a widespread or systematic attack on a civilian population it would have to constitute, in normal circumstances, a massive attack involving for example the use of a weapon of mass destruction or a coordinated attack across a wide geographic area or temporal period.

799. The word ‘widespread’ suggests that one is dealing with a geographically wide course of conduct. Given that the notion of systematic itself includes the commission of acts on a very large scale, and the word ‘widespread’ is distinct and alternative, this supports the proposition that the offences must be committed on a geographically wide basis to fulfil this criteria. It is therefore submitted that the Bogoro attack cannot in itself be considered as a widespread attack within the meaning of the Statute.

800. The notion of systematic on the other hand, does not necessarily entail a wide geographic scope, but should, it is submitted, be understood to entail a course of conduct planned and executed in a detailed and repetitive manner implying a degree of continuity. A single attack lasting over several hours, such as the Bogoro attack, would not normally, it is submitted, provide a sufficient basis for describing a systematic attack for the purposes of the definition of a crime against humanity. Neither is that single attack vested with such a degree of exceptionality to put it in the same class as those attacks that have to date been considered as systematic attacks for the purpose of crimes against humanity.

Other attacks by the same policy makers

801. The Chamber has heard evidence in relation to attacks before and after the Bogoro attack. The prosecution’s second submission involves linking these attacks to the Bogoro attack so as to suggest that the attacks together amount to a widespread or systematic attack against the civilian population. These attacks have been described in the contextual analysis of this brief.

802. The defence submits that in order that the attacks together be capable of constituting one united attack of a widespread or systematic nature against the civilian population of Ituri, it would be necessary to establish a nexus between these various attacks with regard to the motive for the attack, the identity of the perpetrators, the identity of the planners and the strategy and methodology of attack.

803. The defence submits that there is insufficient evidence to establish beyond reasonable doubt that the Bogoro attack was part of a widespread campaign of military attacks directed against civilians in the region of Ituri.

Pre-Bogoro: Nyankunde

804. With regard to attacks prior to the Bogoro attack the evidence has addressed the attack on Nyankunde (5 September 2002). It is submitted that the evidence does not demonstrate that this attack was planned and executed by the same organized group or groups as the attack on Bogoro. Nor have the attackers been clearly identified in terms of which villages they emanated from. Nor has the Bogoro attack been connected to the Nyankunde in a way that demonstrates a common strategy. The circumstances of the Nyakunde attack were very different from those of the Bogoro attack. The defence accepts that Ngiti fighters and APC soldiers were involved in attacking Nyakunde. However, none of the leaders in this attack are alleged to have been involved in the Bogoro attack. As confirmed both by prosecution and defence witnesses, the principal persons associated with the Nyakunde attack were Major Faustin, chief of the 12th APC battalion, assisted by Kandro, one of the central figures among the Ngiti fighters at that time.¹⁴⁷² Neither of them participated in the Bogoro attack. While Kandro was dead at the time of the Bogoro attack, Faustin was not. Most importantly, there is insufficient evidence to link Katanga or anyone under his command with the Nyakunde attack.

805. Prosecution witness 219 claims he saw Katanga at Nyakunde on the day after the attack.¹⁴⁷³ In his statement, this witness however stated that he went to Nyakunde two days after the attack.¹⁴⁷⁴ In any event, he cannot affirm that Katanga participated in the attack. During the entire 45 hours interview, he did not mention that he saw Katanga take anything from Nyakunde. In court, however, he stated that Katanga took a Honda 250cc motorbike. The witness also indicated in court that he did not see Katanga kill or loot.¹⁴⁷⁵ The Defence argues elsewhere in this brief that this witness is unreliable and should not be relied on for any finding against the accused.

¹⁴⁷² P-250-T-98-pp.38-47 (FRA-pp.38-46); T-99-pp.20-22 (FRA-pp.19-22); T-101-pp.8-10 (FRA-p.8-10); P-219-T-204-p.57 (FRA-pp.58-59); T-207-pp.59-60 (FRA-p.61-62); D2-136-T-241-pp.21-23 (FRA-pp.19-21); D2-350-T-253-p.33 (FRA-p.36); D2-129-T-271-p.21 (FRA-pp.18-19); D2-001-T-276-pp.11-12, 13 (FRA-pp.9-11); T-277-p.29 (FRA-p.26); D2-148-T-279-pp.8-9 (FRA-p.7-8); T-279-pp.54, 55 (FRA-p.48); EVD-OTP-00206/UN SC, Special report on the events in Ituri, January 2002-December 2003, S/2004/573 (16 July 2004) at DRC-OTP-0129-0267, paras. 56-58.

¹⁴⁷³ T-204-pp.57-59 (FRA-p.59).

¹⁴⁷⁴ P-219-T-207-p.61 (FRA-pp.63-64).

¹⁴⁷⁵ P-219-T-207-pp.61-62 (FRA-pp.63-64).

806. Prosecution witness 12 testified that he never spoke with Germain Katanga about the Nyakunde attack of September 2002.¹⁴⁷⁶ However, the witness then stated that Germain Katanga told him that he was in Cotrojene (phon.) until Kandro died, and that he was too young, but that he did take part in this Nyankunde attack.¹⁴⁷⁷ Germain Katanga did not give further details.¹⁴⁷⁸ Witness 12 thus contradicts himself as to whether he spoke to Germain Katanga about the Nyakunde attack. This part of his evidence should therefore not be relied on. Elsewhere in this brief, it is argued that this witness is unreliable when it comes to Germain Katanga's alleged confessions.

807. Further, prosecution witness 28 stated in his second statement to the prosecution that he saw many combatants leave Aveba to repulse the UPC who had made an offensive against Singo. Among them were Commanders Besto, Benjamin, Abala, Move, and Doppel, commander of Germain Katanga's escort. However, in the course of his testimony, this witness conceded that he did not see anyone leave from Aveba as he was not there during that period. He testified that, during that time, he was still at Oicha. Rather, he had received this information from people who participated in the Nyakunde battle.¹⁴⁷⁹ At another occasion, the witness told the Court that he had participated in another Nyakunde attack,¹⁴⁸⁰ and that he was already in Aveba at that time.¹⁴⁸¹ Thus, his testimony relating to Nyakunde is completely unreliable. In addition, other than that people were killed, houses burnt and property pillaged, he could provide no details, not even the identity of the information provider.¹⁴⁸²

808. In addition, the motive for attacking Nyakunde was significantly different from the motive for attacking Bogoro. Faustin's battalion had fled to Zumbe after being chased out of Bunia and sought for a way out of Ituri to join their leader Molondo Lopondondo in Beni. The UPC base at Nyakunde blocked any route leaving the region. This was the principal reason for APC soldiers to attack Nyakunde.¹⁴⁸³

809. The Ngiti fighters were involved in part because of an ongoing conflict with the Bira community living in Nyakunde. Metu, an Ngiti who lived in Nyakunde at the relevant time informed the Court that Nyakunde was a collectivité that belonged to the Bira, but because of the hospital located there, many people from other ethnicities came to live there, initially

¹⁴⁷⁶ P-12-T-197-p.29 (FRA-p.33).

¹⁴⁷⁷ P-12-T-197-pp.29-30 (FRA-p.33).

¹⁴⁷⁸ P-12-T-197-p.30 (FRA-p.33).

¹⁴⁷⁹ P-28-T-222-pp.51-52 (FRA-pp.45-46).

¹⁴⁸⁰ P-28-T-223-pp.44-45 (FRA-p.40).

¹⁴⁸¹ P-28-T-223-pp.76-79 (FRA-pp.69-71).

¹⁴⁸² P-28-T-218-pp.9-10 (FRA-p.9).

¹⁴⁸³ D2-136-T-241-pp.20-21 (FRA-pp.18-20); P-250-T-98-pp.38-43 (FRA-p.38-43); D2-001-T-277-pp.29-34 (FRA-pp.26-30); D2-001-T-278-pp.6-8 (FRA-pp.6-8); D2-001-T-278-pp.37-41 (FRA-pp.34-37); D2-148-T-279-pp.8-9 (FRA-pp.7-8).

without any problem. The Ngiti from the Lendu-Bindi collectivité were represented in particularly high numbers.¹⁴⁸⁴ Metu testified that ethnic problems between the Bira and Ngiti intensified in 2001, 2002.¹⁴⁸⁵ According to his testimony, supported by the testimonies of D-161,¹⁴⁸⁶ David Adirodu,¹⁴⁸⁷ and Germain Katanga,¹⁴⁸⁸ all of whom were in Nyakunde at that time, in August 2001, there was unprecedented conflict between the Bira and the Ngiti. From one day to another, the Bira chased out all the Ngiti from their territory, hacking them down with machetes in the very presence and to the knowledge of the Ugandan troops.¹⁴⁸⁹ This is corroborated by a UN Special Report on the events in Ituri between January 2002 and December 2003, written in part by Prosecution witness 317. This report states that, throughout 2001 and early 2002, the Ngiti community was targeted and eventually driven out.¹⁴⁹⁰

810. An additional reason for attacking Nyakunde was that, on 31 August 2002, Kandro's camp in Songolo was attacked by the UPC that had now established itself in Nyakunde.¹⁴⁹¹ D-161, [REDACTED], testified that Ngiti civilians living in Songolo were also killed.¹⁴⁹²

811. This is corroborated by the above UN Special Report, which states that the UPC troops had replaced the UPDF in Nyakunde in August 2002, "apparently to launch attacks on the bordering Ngiti localities".¹⁴⁹³ This Report also states that the UPC "reportedly requested the assistance of the Bira community in attacking the Ngiti".¹⁴⁹⁴ It did so in relation to the Songolo attack. According to this report, the attackers consisted of 500 UPC soldiers together with around 50 Bira. On the issue of attacking the civilian population, the report provides the following details:

the attackers used mortars and rockets before entering the village. After a short fight with Lendu forces, the attackers went into houses, reportedly guided by Bira civilians, to kill the inhabitants. Many civilians, mostly women, children and the elderly, were killed in their sleep. The attack lasted nine hours. According to witness statements collected by MONUC, the attackers looted the village and the health centre of Songolo and left with hundreds of cattle. It is difficult to estimate the number of victims killed, mostly women and children. Survivors who returned to Songolo after the attack to bury the bodies did a survey among the population and found that 787 people were missing. Up to now, it has not been possible to establish how many were killed and how many simply ran away. According to a Congolese non-governmental organization, UPC abducted 12 civilians.¹⁴⁹⁵

¹⁴⁸⁴ D2-134-T-257-pp.32-33 (FRA-p.29).

¹⁴⁸⁵ D2-134-T-257-p.32 (FRA-p.29).

¹⁴⁸⁶ D2-161-T-268-pp.11-12 (FRA-p.10); T-269-pp.40-41 (FRA-pp.35-36).

¹⁴⁸⁷ D2-001-T-276-pp.9-10 (FRA-pp.8-9).

¹⁴⁸⁸ D2-300-T-315-pp.17-18 (FRA-pp.16-17).

¹⁴⁸⁹ D2-134-T-257-pp.33-34 (FRA-pp.29-30).

¹⁴⁹⁰ EVD-OTP-00206/UN SC, Special report on the events in Ituri, January 2002-December 2003, S/2004/573 (16 July 2004) at DRC-OTP-0129-0267, para. 50.

¹⁴⁹¹ D2-161-T-269-pp.41-42 (FRA-p.36).

¹⁴⁹² D2-161-T-269-p.42 (FRA-p.36).

¹⁴⁹³ EVD-OTP-00206/UN SC, Special report on the events in Ituri at DRC-OTP-0129-0267, para. 50.

¹⁴⁹⁴ *Ibid*, para. 50.

¹⁴⁹⁵ *Ibid*, para. 51.

812. Following this attack, Kandro and his men had to flee to Avenyuma where they settled, then met Faustin in Singo, where they jointly planned a counter-attack against the UPC at Nyakunde.¹⁴⁹⁶ With these motives, the Ngiti fighters and the APC soldiers remaining in Ituri jointly attacked Nyakunde.

813. Most of the inhabitants of Nyakunde were Bira, rather than Hema.¹⁴⁹⁷ Thus, unlike what was found by the Pre-Trial Chamber, the principal targeted group was Bira rather than Hema.¹⁴⁹⁸

814. It is therefore submitted that it has not been established beyond reasonable doubt that the Nyakunde attack was part of the same attack against a civilian population as the attack on Bogoro for the purposes of crimes against humanity.

Pre-Bogoro: Chai

815. Katanga testified about a battle at Chai prior to Bogoro where he was injured.¹⁴⁹⁹ This was, however, a battle between armies. No evidence has been introduced in this case about any civilian casualties in Chai. This was confirmed by Katanga who told the Court that there were only UPC soldiers present at Chai, and that the targets were strictly military. Consequently, he could not speak of any civilian casualties.¹⁵⁰⁰

Pre-Bogoro: Mandro

816. P-280 testified about having participated in one of the various attacks on Mandro, which he claims was prior to Bogoro.¹⁵⁰¹ He said that the attackers came from Zumbe and Lagura and failed to conquer Mandro.¹⁵⁰² The witness stated that the UPC and Ugandans had a very big military camp in Mandro.¹⁵⁰³ He alleged that Commander Kute ordered that Mandro be attacked with the primary purpose of looting the ammunition, weapons and guns.¹⁵⁰⁴ He does not mention the presence of any Ngiti combatants.¹⁵⁰⁵ Nor does he testify about the killing of civilians.

¹⁴⁹⁶ D2-148-T-279-pp.7-8 (FRA-pp.6-7); D2-136-T-241-pp.20-21 (FRA-pp.18-19); D2-129-T-271-pp.21-24 (FRA-pp.18-21); D2-160-T-272-pp.69-70 (FRA-pp.61-62).

¹⁴⁹⁷ See above. See also D2-300-T-315-p.45 (FRA-p.40).

¹⁴⁹⁸ This corresponds better with the evidence. See: P-28-T-218-pp.7-9 (FRA-pp.7-8); P-219-T-204-p.60 (FRA-p.61).

¹⁴⁹⁹ D2-300-T-325-p.15 (FRA-pp.13-14). P-219 also refers to this battle and Katanga's injury: T-207-p.27-30 (FRA-pp.28-29); P-219-T-209-pp.45 (FRA-p.44), 74-75 (FRA-p.73), 81 (FRA-pp.79-80).

¹⁵⁰⁰ D2-300-T-325-p.15 (FRA-pp.13-14).

¹⁵⁰¹ P-280-T-158-pp.19-21 (FRA-pp.19-20).

¹⁵⁰² P-280-T-158-pp.19-20, 47 (FRA-pp.19-20, 47-48).

¹⁵⁰³ P-280-T-158-pp.47-48 (FRA-p.48).

¹⁵⁰⁴ P-280-T-158-p.22 (FRA-p.22).

¹⁵⁰⁵ P-280-T-158-pp.23-25 (FRA-pp.22-24).

817. With regard to attacks which occurred post Bogoro, the Chamber has heard evidence in relation to Mandro (4 March 2003), Bunia (6 March 2003), Tchomia (31 May and 15 July 2003), Kasenyi (11th June 2003), Drodro (3 April 2003) and Bunia (May 2003). The prosecution only relies on the first four of these attacks.

Post Bogoro

818. As for any of the attacks post Bogoro, they are either geographically or temporally too remote from Bogoro, or the circumstances were significantly different. The Defence submits that there is no nexus between the charges and alleged attacks in the northern part of Ituri, in Katoto, Kilo and Mandro, which are clearly geographically remote from the southern part of Bunia. The Defence also disputes the nexus to the charges of alleged attacks that were launched several months after the Bogoro attack, such as those on Tchomia and on Kasenyi.

819. It is further disputed that the Ngiti and Lendu fighters should be considered as one group. They each have their distinct language, culture and circumstances and living conditions leading to different types of conduct in the course of the war. They live in different areas. So in the absence of evidence of a joint plan to execute an attack against the civilian population in Ituri, the two ethnic groups cannot be treated as the same for the purpose of determining the relationship between the various attacks.

820. The Defence submits that, geographically and temporally, only Mandro and Bunia could potentially be considered as being part of the same widespread attack as Bogoro. However, the circumstances differed. It is conceded that Ngiti fighters fought at Mandro. However, the Defence submits that Katanga did not join the fighters there. Nor did anyone from his group in Aveba.

Mandro 4 March 2003

821. Witness P-28 testified that the Zumbe combatants and the FRPI launched an attack on Mandro together.¹⁵⁰⁶ He stated that Katanga, Muhito, Sipa and Dark and others whose names he could not provide participated from the Ngiti side.¹⁵⁰⁷ However, in his first statement, he did not mention Katanga in Mandro.¹⁵⁰⁸ In addition, elsewhere in this brief, it is argued that his testimony is so contradictory that no weight should be accredited to it.

¹⁵⁰⁶ P-28-T-218-p.26 (FRA-p.23).

¹⁵⁰⁷ P-28-T-218-p.27 (FRA-p.24).

¹⁵⁰⁸ P-28-T-222-pp.12-13 (FRA-p.11).

822. Witness 219 also testified that Germain Katanga's and Ngudjolo's troops fought together at Mandro.¹⁵⁰⁹ He testified that Mandro was prepared from Aveba and that it was public knowledge that Germain Katanga participated.¹⁵¹⁰ However, he did not go there himself and initially said he did not see Germain Katanga leave.¹⁵¹¹ The credibility of this witness is contested elsewhere in this brief.

823. D-148 stated that the Zombe fighters alerted Dark who had settled in Bogoro with his troops that they needed assistance to fight the UPC at Mandro as they were being threatened. Dark then sent D-148 with a few men to Zombe with the purpose of reinforcing its troops in Mandro.¹⁵¹² Elsewhere in this brief, it is submitted that these men did not act under Katanga's command.

824. Mandro was the base of the UPC with five training camps. Not many civilians remained. Witness 317 testified that she visited Mandro within the two-week period between 24 March and 6 April 2003.¹⁵¹³ She testified that the school and the health centre were destroyed.¹⁵¹⁴ Eyewitnesses on the spot told them that the Lendu had attacked in the morning. Whilst the goal was to attack the military camp, there were civilian casualties as well.¹⁵¹⁵ Less than one hundred interviews were conducted. They compiled a list of victims amounting to approximately 100 victims.¹⁵¹⁶ However, it is unclear whether this number included combatants or civilians only. They reached this number on the basis of witness testimony that is inaccessible to the Court. They are anonymous and their stories have not been disclosed. The number of victims is thus based on anonymous hearsay evidence. The methodology of their investigations is also unclear. No forensic evidence has been produced.

825. It has not been established on the evidence that there was an attack directed against civilians at Mandro. The Chamber has not heard reliable direct evidence to this effect.

826. It is accordingly submitted that it has not been established on this evidence that the Bogoro and Mandro attacks were part of the same attack directed against a civilian population.

¹⁵⁰⁹ P-219-T-206-pp.18-19 (FRA-p.18).

¹⁵¹⁰ P-219-T-206-pp.18-19(FRA-p.18); P-219-T-207-pp.28-29 (FRA-p.29).

¹⁵¹¹ P-219-T-209-pp.23-24 (FRA-p.23).

¹⁵¹² D2-148-T-279-pp.24, 25, 40 (FRA-p.21-22; 35).

¹⁵¹³ P-317-T-228-pp.40-41, 47-48 (FRA-pp.35-36, 40-41).

¹⁵¹⁴ P-317-T-228-p.41 (FRA-p.35).

¹⁵¹⁵ P-317-T-228-p.41 (FRA-p.35).

¹⁵¹⁶ P-317-T-228-p.42 (FRA-p.36).

Bunia 6 March 2003

827. As for Bunia, the circumstances of this attack differed significantly from those of Bogoro. The Defence submits that the Bogoro attack was part of an anticipated Bunia attack. However, this anticipated attack never occurred as the UPDF had already launched an attack against the UPC in Bunia. It called upon the Lendu fighters for support. Some Ngiti fighters joined later, mainly after the battle had already completed. They were not called upon by the UPDF but were attracted to the sound of war. They came from Bogoro. Thus, this attack cannot be considered as part of the same attack as Bogoro, for the purpose of the requirement of a widespread or systematic attack directed as a matter of policy against the civilian population of Ituri.

Knowledge or intent in relation to widespread or systematic attack

828. In terms of article 7, to be responsible for a crime against humanity, the perpetrator must know that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

829. Since there is no direct and reliable evidence of an organisational policy to attack the civilian population of Ituri, it is submitted that the Chamber could not reasonably be satisfied that Katanga was aware of this circumstance let alone intended it. The question of organisational policy aside, it has not even been established that Katanga must have known of the civilian killings in other attacks in February 2003.

830. There is only evidence in relation to Katanga's presence at the attacks on Nyankunde and Mandro respectively, but it is submitted that this evidence is unreliable.

831. With respect to Nyankunde, D-148 testified about the Nyakunde battle in which he participated [REDACTED] under orders of Kandro.¹⁵¹⁷ He stated that he did not see Germain Katanga there.¹⁵¹⁸ As stated previously, Katanga himself also testified that he did not participate in the Nyakunde battle.¹⁵¹⁹ Accordingly, the evidence linking Katanga to Nyakunde is unreliable, inconclusive and largely based on hearsay. It is also directly contradicted by the direct evidence of D-148. Thus, the prosecution clearly failed to establish that Katanga was present in Nyakunde during or in the aftermath of the battle.

832. With respect to Mandro P-12 and [REDACTED] P-160 both testified that Germain Katanga had told them that he led the operations at Mandro. They had decided to attack

¹⁵¹⁷ D2-148-T-279-pp.58-59 (FRA-pp.51-52).

¹⁵¹⁸ D2-148-T-279-p.11 (FRA-p.10).

¹⁵¹⁹ D2-300-T-315-p.44 (FRA-p.39).

Mandro to show they were not party to the agreement between the Hema and the Lendu.¹⁵²⁰ This conversation allegedly took place at a dinner in the house [REDACTED]. [REDACTED], P-12 and P-160 cannot be considered as [REDACTED] witnesses. In significant parts of their testimony, they contradict each other. Elsewhere in this brief, it is argued that neither witness can be relied on in relation to what Germain Katanga allegedly told them. Even if their story is believed, this does not then lead to the conclusion that Germain Katanga went to Mandro or was in charge of the operation. He may simply have been boasting.

833. Witness 250 testified that the FNI and FRPI soldiers attacked Mandro together.¹⁵²¹ According to his testimony, Ngudjolo and Katanga both participated in Mandro.¹⁵²² However, he also places Yuda at Mandro even though Yuda was injured and still in hospital at that time.¹⁵²³ He further states that the attack took place on the third day after the Bogoro attack [27 February 2003],¹⁵²⁴ while in reality, Mandro was attacked on 4th March 2003, over a week after Bogoro was attacked. The witness also testified that the Mandro fight lasted three or four days,¹⁵²⁵ while in reality, it only lasted a day.

834. His testimony about the planning of Mandro is contradictory. At one point, he testified that the FNI and FRPI did not fight together in a planned attack after Bogoro.¹⁵²⁶ At another point, he stated that the FRPI planned Mandro and some elements of the FNI at Bogoro participated in it as an opportunistic attack. At yet another moment, he testified that the FNI planned it and carried it out with the FRPI.¹⁵²⁷ Thus, his testimony relating to Mandro is filled with contradictions and should be accredited no weight. In addition, elsewhere in this brief, it is argued that Witness 250 is inherently unreliable.

835. In addition, Iribi and Malivo heard he had participated in Mandro but neither of them was there. Nor have their sources been identified.¹⁵²⁸ The testimony of Malivo on this aspect was particularly vague. In Court, the prosecution read out his written statement that he had given to the defence. In this statement, he had said that he did not know whether or not Germain Katanga participated in the Mandro attack, which he then confirmed in the

¹⁵²⁰ P-12-T-197-p.25 (FRA-p.28); P-160-T-210-pp.72-73 (FRA-pp.62-64), 77-78 (FRA-pp.67-68).

¹⁵²¹ P-250-T-99-pp.36-37, 38 (FRA-pp.37-39); P-250-T-98-p.58-59 (FRA-pp.58-59).

¹⁵²² P-250-T-103-p.65 (FRA-pp.62-63) (The president of the FRPI was present at Mandro, together with his guards).

¹⁵²³ P-250-T-103-pp.63-65 (FRA-pp.60-62).

¹⁵²⁴ P-250-T-99-pp.37-38 (FRA-p.38).

¹⁵²⁵ P-250-T-98-pp.55-56 (FRA-pp.55-56); P-250-T-99-p.36 (FRA-p.37).

¹⁵²⁶ P-250-T-94-pp.83-84 (FRA-pp.86-87) ; P-250-T-103-p.61 (FRA-pp.58-59).

¹⁵²⁷ P-250-T-98-pp.58-59 (FRA-p.59); P-250-T-99-pp.23-24 (FRA-pp.23-24); P-250-T-94-pp.83-84 (FRA-pp.86-87) ; P-250-T-103-p.53 (FRA-p.51).

¹⁵²⁸ D2-228-T-250-p.11 (FRA-p.10); T-251-pp.68-70 (FRA-pp.74-75); T-252-pp.23-24, 61 (FRA-pp.25-26, 68); D2-129-T-272-pp.7, 11-12 (FRA-pp.6, 9-10).

courtroom.¹⁵²⁹ In re-examination, the witness conceded when asked if Germain Katanga participated in Mandro, that he does not know if he really was in Mandro.¹⁵³⁰ He could not recall the circumstances under which he heard that Germain Katanga participated in Mandro.¹⁵³¹

836. In this regard, it is worthy to note Judge Cotte's instruction to one of the legal representatives "not forget the situation of the witness at the time of the facts, what he was able to see, what he was able to hear, and what he could have received as information. So it is that period that is of interest to us. Whatever he might have learned later indirectly does not present the same interests to the Chamber."¹⁵³²

837. D-148, on the other hand, who himself fought at Mandro, testified that he did not see Katanga at Mandro.¹⁵³³

838. In conclusion on the subject of knowledge or intent, it is submitted that the prosecution has failed to prove beyond a reasonable doubt that Germain Katanga was aware of or intended that an attack of a widespread or systematic nature be directed by virtue of a state or organisational policy against the civilian population in Ituri.

V2- The alleged crimes

A- Intentionally Directing Attacks Against the Civilian Population of Bogoro

The Charge

839. Germain Katanga is charged with intentionally directing an attack against the civilian population of the village of Bogoro under article 8(2)(b)(i).

840. According to Elements of Crimes the basic components of this war crime are that: (a) the perpetrator directed an attack; (b) the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities; (c) the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

841. As with other war crimes it must also be shown that the conduct took place in the context of and was associated with an international armed conflict, and that the perpetrator was aware of factual circumstances that established the existence of an armed conflict. There

¹⁵²⁹ D2-129-T-272-pp.11-15 (FRA-pp.9-12).

¹⁵³⁰ D2-129-T-272-p.41 (FRA-p.36).

¹⁵³¹ D2-129-T-272-p.41 (FRA-p.36).

¹⁵³² D2-129-T-272-pp.32-33 (FRA-p.28).

¹⁵³³ D2-148-T-279-p.25 (FRA-p.22).

is no contest here on the element of being aware of the factual circumstances that established the existence of an armed conflict. It is contested that this offence, if committed, was done so in the context of and was associated with an international armed conflict.

842. The first and third elements of the offence are the subjective material elements of the offence. According to the Pre-Trial Chamber's analysis of the theory of common plan all the subjective material elements of the crime must be fulfilled. This must be correct since article 25 deals with individual and not collective criminal responsibility. It follows that, for the purposes of convicting Katanga of this offence whether on the basis of individual or joint conduct, acting alone or through another, the expression 'the perpetrator' in this instance must be taken to mean or at least include Germain Katanga. It is not sufficient that there was a person or persons under his authority who fulfilled these subjective elements.

The perpetrator directed an attack

843. The reference to an attack should, it is submitted, be taken to mean engagement with an adversary in line with the definition in article 49(1) of 1977 Protocol I to the Geneva Conventions of 1949. Consequently, this crime is limited to conduct during the course of hostilities and does not apply to conduct against the civilian population once it had fallen under the control of the attackers. In analyzing this offence we are therefore only concerned with the period immediately before and during the attack, and not with conduct after the capture of Bogoro.

844. The Prosecutor has focused his arguments around the theory of common plan. This is based on the Pre-Trial Chamber's reading of 25(1)(a). In doing so, he has not always directly addressed the material elements of the crimes alleged. The defence contests the theory of common plan as interpreted by the Pre-Trial Chamber. Nonetheless, even on the basis of this theory, as stated above and also acknowledged by the Prosecutor, one of the eight pre-conditions for the application of the doctrine is that the subjective elements of the crime are satisfied.

845. Nowhere in his final arguments does the prosecution directly address the issue of whether Germain Katanga 'directed the attack' on Bogoro as required for the commission of the crime of directing an attack against a civilian population. They only address the issue indirectly in their attempt to justify the execution of a common plan. Thus, one notes that in section 7.2.1 of the Prosecutor's brief the prosecution tackle the issue of whether Katanga headed all the Ngiti combatants and the Ngiti combatants of Aveba, and whether he was President of the FRPI prior to the Bogoro attack. In another section, 9.1.5.2, the prosecution addresses the issue of whether Germain Katanga participated in the attack. So, one notes as a

preliminary observation that it seems to be assumed that if it is proved that he headed the FRPI or the Ngiti combatants and it is proved that he participated in the attack, that it is necessarily proved that Germain Katanga directed the attack on Bogoro. However, this would not be a correct assumption. A person can head a military organization and participate in a particular attack without necessarily being the one who directed it. Position in the hierarchy could be determinative without the need to demonstrate other positive conduct when the charge is formulated as one of command responsibility, but Katanga is not charged in this way. This flaw in the logic of the prosecution leaves a gaping hole in their analysis of this crime because no explanation is offered as to why the prosecution asserts that it was Germain Katanga who directed the attack.

846. The defence will therefore consider here to what extent the evidence supports the proposition that Germain Katanga actually directed the attack, an essential subjective element of the crime under discussion. In this respect the evidence is thin, as well as strongly and convincingly contradicted by other evidence.

847. The evidence clearly does not demonstrate that Katanga directed the attack, contrasting perhaps with the position of Yuda.

848. P-28, even if not credible, alleged the participation of Katanga, but in a manner suggesting that Katanga did not direct the attack. He said:

Germain était là. Il faisait partie du groupe des combattants. Il était en train de se battre, lui aussi. Et nous avançons ensemble. Vous savez, au front, il n'y a pas de chef. Il n'y a pas de chef et des troupes. Tout le monde doit se battre selon l'expérience qu'il a.¹⁵³⁴

849. In arguing that Germain Katanga had authority over the combatants, the prosecution relies upon the facts that he was head of the combatants at Aveba by September 2002, that he replaced Kandro as the head of all the Ngiti combatants, that he was president of the FRPI before the Bogoro attack, and that he had effective control over the commanders and combatants of the FRPI. None of these assertions can in themselves establish that it was Germain Katanga who directed the attack on Bogoro. In any event, the defence contests that the evidence has established beyond a reasonable doubt any of these four assertions (see section on control of Germain Katanga).

The object of the attack was a civilian population

850. The question as to whether there was in fact an attack against the civilian population that could be classified as widespread or systematic for the purpose of the commission of crimes

¹⁵³⁴ P-28-T-217-FRA-p.53-l.5-8.

against humanity is dealt with elsewhere.¹⁵³⁵ That offence focuses on the consequences. The question here is rather whether the civilian population was the object of the attack. This element of ‘the object’ must be understood within the context of the phrasing of the offence: that is ‘directing an attack against’. This element therefore focuses on the conduct of the commander or commanders who were directing the attack and ‘object’ must be taken to mean ‘the aim or objective’ rather than ‘the consequence’. It is not therefore a matter of inquiring into whether civilians were in one or more instances attacked, but rather a question of examining whether ‘the attack’, which is the subject of the direction, was aimed at civilians.

851. The crime of directing an attack against a civilian population could be committed where the object of the attack is both military and civilian. However, it is submitted that this crime is not committed where the object of the attack is exclusively a military target, but civilians happen to be in the vicinity of that military target. Also since the object of the attack must be the civilian population, it is submitted that this particular crime is not committed where the object is a military one and not civilian but the accused knows that excessive incidental loss of life or injury to civilians will be caused. This is covered by another crime set out in article 8(2)(b)(iv).

852. In terms of article 52 of Protocol I to the Geneva Conventions, an objective is military if by its nature, location, purpose or use it makes an effective contribution to military action, and where its total or partial destruction, capture or neutralization, in the circumstances ruling at the time offers a definite military advantage.

853. The evidence has clearly established that there was a UPC military camp in Bogoro on the 24th February 2003. The soldiers were many and heavily armed. With respect to civilian presence, some witnesses testified that some or most of the civilian population had already fled as a result of the previous attacks on Bogoro. P-323, the UPC soldier fighting from the Institute, states that there were not many civilians at the time.¹⁵³⁶ There is enough evidence to give the accused the benefit of the doubt that this may have been the belief on the part of those who planned the attack.

854. The charge suggested that the attack was designed to wipe out Bogoro. However, there has been no evidence of any plan to that effect. The evidence shows that the institute of Bogoro was a significant UPC military base, which was used as a launch pad for attacks on Lendu, Ngiti and Bira villages. Its nature, location, purpose and use therefore made it an effective contribution to military action by the UPC. Its occupation by the UPC also presented

¹⁵³⁵ See section V1-B on Widespread or systematic attacks against civilians.

¹⁵³⁶ P-323-T-117-p.35-l.17-18 (Fra-p.34-l.5-6).

a significant obstacle to the Lendu militia and APC reaching and capturing Bunia. The evidence establishes that Bogoro was a strategic location in that it fell on the route to Bunia and interrupted the supply line between Bunia and the South of Ituri. There was therefore a political objective to getting control of Bogoro and a necessity to dislodge the military there in order to secure freedom of movement between Bunia on the one hand and Walendu Bindi and Walendu Tatsi on the other. Consequently, its total or partial destruction, capture or neutralization, in the circumstances ruling at the time offered a definite military advantage.

855. In the light of this, the attack on the Bogoro Institute plainly had a military objective. The question which arises is whether it had equally the object of an attack on civilians who were there. There has been very little evidence to support the proposition that the civilian population of Bogoro was in fact the objective of the attack on the institute of Bogoro. The prosecution relies on the fact that civilians were murdered or killed. This cannot by itself prove the fact that the civilian population was the object of the attack. It is noteworthy that according to witness 323, the injured people were in the room of the institute where the ammunition was kept.¹⁵³⁷ This would indicate first that the Institute building was a legitimate military target, but also that there was an increased risk of explosions and shrapnel in the event of a bullet or missile penetrating this room. So the number of casualties is not necessarily an indicator.

856. It is suggested that the existence of previous attacks indicates that the object was the civilian population. This would not be a reasonable finding, since previous attacks may have involved different attackers and different commanders. In any event, the evidence suggests that previous attacks did not in fact provide a picture either of a significant civilian presence. According to Katanga he participated in a reconnaissance mission on the 10th February but they were pushed back without being able to enter Bogoro, and consequently did not observe a civilian presence.¹⁵³⁸ Prosecution witnesses 166 and 159, as well as defence witness 148 confirm that attacks prior to the 24th were directed against the UPC and that there was a clear absence of civilian casualties.¹⁵³⁹

857. The prosecution relies on the evidence of actual chasing and killings of civilians to say that no distinction was made between soldiers and civilians.¹⁵⁴⁰ This could corroborate other evidence on the object of the attack, but in itself it may be simply an indication of excesses

¹⁵³⁷ P-323-T-117-p.36-l.22 (Fra-p.35-l.9).

¹⁵³⁸ D-02-P-300-T-318-p.2 (Fra-p.2).

¹⁵³⁹ P-166-T-226-pp.5-7 and 9 (Fra-pp.4-6 and 7); EVD-OTP-00202, Déclaration de témoin [REDACTED] (Under Seal), para. 58; P-159-T-120-p.71 (Fra-pp.69-70); P-159-T-122-pp.17-19 (Fra-pp.16-18); P-148-T-280-p.62 (Fra-pp.54-55).

¹⁵⁴⁰ Prosecution brief: paras 47-57.

which were not planned by the top commanders of the attack, but committed by certain individuals within one or more of the groups and not necessarily within all the groups of attackers. The prosecution refers to the fact that the majority of those civilians who did not flee were killed.¹⁵⁴¹ However, this statement is based on the evidence of one witness, 250, who the defence asserts has been shown not to be credible.¹⁵⁴² They also refer to the number of bodies seen after the attack, of all ages. Evidence was given that most if not all of the civilian population had taken refuge in the UPC camp behind the UPC line of fire. With respect to those civilians killed in the camp during the fighting, the fact that bullets reached them could have been the natural consequence of them being physically located behind the UPC soldiers, and not because they were a target. This could explain a number of the civilian deaths although perhaps not all.

858. Finally, reference is made to songs containing the words kill the Hema. However, it is submitted that the witness who gave this evidence was not credible (see section II on credibility). In any event, the fact that this was sung would not necessarily imply that civilians were targeted since the UPC was in the minds of the militia and in fact a largely Hema organization. It could therefore have been a motivational song about the UPC. It could equally have been a song known by the militia but having no correlation to the attack's aim.

The perpetrator intended the civilian population as an object

859. In line with the pre-requisites of article 30(2)(a) of the Statute, intention here means that the accused meant to engage in the conduct. Since the object of the attack refers to the conduct and not the consequence this is not a situation where one asks whether the object of the attack being civilians is what would occur in the normal course of events under article 30(2)(b).

860. There has been no evidence that Germain Katanga intended the civilian population of Bogoro to be an object of attack. Nothing in the evidence demonstrates that he personally meant the civilian population to be the object of attack. Since the objective of the attack related to the conduct of directing an attack and not the consequences, the question of whether he could have known that the civilians becoming the object would happen in the normal course of events does not arise. The elements of common plan cannot supersede the basic mental element of the offence.

861. In any event, if one inquires into what he would have known to happen in the normal course of events, it is not established that the targeting of civilians fell within this knowledge.

¹⁵⁴¹ Prosecution brief: para 49.

¹⁵⁴² See section II-A on Credibility and reliability on P-250.

The existence of previous attacks cannot inform this intention since Germain Katanga was not involved in attacks which penetrated the village. There has been a witness who suggested that she heard he was, but this evidence is of little weight in the light of the weight of the evidence relating to Katanga's situation. Even if that evidence were to be accepted, while it may be a factor of evaluation, it cannot be presumed that civilians were or would have been the objective on the 24th February because of what occurred in previous attacks.

The conduct took place in the context of and was associated with an international armed conflict

862. While the defence does not dispute that there was an international armed conflict in Ituri, it does contest that the attack on Bogoro was associated with that international conflict. There is insufficient evidence to establish the presence of a foreign army at the battle of Bogoro or the use of proxies by warring states. The conflict was between national groups exercising national interests. Thus, it cannot be properly said that this attack was associated with an international armed conflict, although perhaps in the context of one.

B- Murder and willful killing

Introduction

863. Failure by the prosecution to investigate properly the number of those killed during the 24 February attack raises reasonable doubt as to the evidence in question. Deficiency in the evidence extends to the lists of victims on which the prosecution rely, not the least of which because these too, have not been properly vetted to sustain findings beyond reasonable doubt. Nor has the prosecution established where relevant – and beyond reasonable doubt – the effective control by Mr. Katanga over the crimes, or the protective status otherwise required under article 7(1)(a) and 8(2)(a)(i) of the Statute, or under article 8(2)(c)(i). Serious questions arise also with regard to the distances and locations from which prosecution witnesses claim to have observed events, and with regard to their credibility generally. Alone, these shortcomings are tantamount to questionable evidence, at best. Read together, the prosecution has but failed to prove beyond reasonable doubt the numbers in question.

Lack of effective prosecution investigation into the number of those killed

864. [REDACTED] (CHM-1) conceded that the number of dead is “very vague”, because the prosecution does not have access to exact figures.¹⁵⁴³ She conceded further, “of course this is

¹⁵⁴³ See CHM-P-00001-T-81-pp.21-22 (FRA-pp.27-28).

always an estimate.”¹⁵⁴⁴ Moreover, the prosecution did not identify which witnesses, exactly, on whom it relied for information as to the numbers in question.¹⁵⁴⁵ At least some of these witnesses may not even have been present in Bogoro on 24 February, calling into even greater question the reliability of the information at hand.

865. Nor did the prosecution count any bodies, or indeed attempt to identify those who died in the 24 February attack.¹⁵⁴⁶ By the time that they had access to the crime scene, “it was simply a long time from the commission of the crime.”¹⁵⁴⁷ In fact, the first prosecution reconnaissance mission to Bogoro village was in February/March 2007,¹⁵⁴⁸ some three years after the relevant events.

866. Furthermore, and in terms of identifying the dead as civilians, the prosecution used witness sources from certain individuals in or from Bogoro village.¹⁵⁴⁹ The defence reiterates that some of these very witnesses may not have been present in Bogoro during the attack. And whilst [REDACTED] [CHM-1] testified that the prosecution did not compile these lists – but were instead relying on information from civilians that could distinguish civilians from the fighters present – she explained that there “absolutely” were casualties among the fighters.¹⁵⁵⁰ Crucially, as examined below, it does not identify these deaths from the others.

867. Finally with regard to the lack of an effective investigation into the numbers of those killed, the prosecution “did not see the need”, according to [REDACTED] [CHM-1], for a full exhumation in Bogoro.¹⁵⁵¹ Identification was made in only two cases, after the people returned there in 2005.¹⁵⁵² This deficiency in its investigation, together with other major investigative shortcomings, and in light the further submissions below, all raise reasonable doubt – and a very reasonable one at that – insofar as the actual numbers are concerned.

Lack of effective control by Germain Katanga over the crimes

868. The defence incorporates by way of reference its submissions with regard to the lack of effective control by Germain Katanga over the crimes, to its submissions on murder and

¹⁵⁴⁴ CHM-P-0001-T-81-p.72 (FRA-p.90).

¹⁵⁴⁵ CHM-P-0001-T-81-pp.21-22 (Testifying that the number of dead is based on information given by prosecution witnesses who were present at the site during or soon after the attack, and who were involved in counting the civilian casualties of the attack. It also based its numbers on external information done by different organisations that were present shortly after the attack) (FRA-pp.27-28).

¹⁵⁴⁶ CHM-P-0001-T-81-pp.22, 24-25 (FRA-pp.27, 31-32).

¹⁵⁴⁷ CHM-P-0001-T-81-p.25 (The prosecution did not match them forensically to, for example, existing relatives) (FRA-p.31).

¹⁵⁴⁸ CHM-P-0001-T-81-p.21 (FRA-p.26).

¹⁵⁴⁹ CHM-P-0001-T-81-p.22 (FRA-p.27).

¹⁵⁵⁰ CHM-P-0001-T-81-pp.22-23 (FRA-pp.27-28).

¹⁵⁵¹ CHM-P-0001-T-81-p.64 (FRA-p.80).

¹⁵⁵² See P-166-T-225-pp.71, 72 (FRA-p.63). See also P-233-T-83- pp.43-44 (FRA-pp.51, 54).

wilful killing¹⁵⁵³, and develops here the relevant evidence with respect to these latter two charges. A similar test applies for the purposes of common plan.

869. That civilians killed at Bogoro was confirmed by P-233 with respect to the Bira civilian attackers;¹⁵⁵⁴ by D2-176, according to whom the entire population of the collectivité came to fight, including women with machetes who killed people;¹⁵⁵⁵ by P-287, who saw women with weapons;¹⁵⁵⁶ by P-159, who testified that the second group of attackers was composed of armed civilians whose objective was to murder;¹⁵⁵⁷ by P-280, who similarly testified (with regard to Mandro), that civilians wishing to go to the front did so by following the soldiers, and were armed with machetes to kill;¹⁵⁵⁸ and by P-279, according to whom the dead included those killed by machete.¹⁵⁵⁹ The prosecution has failed to identify such murders from the others. As developed next, the lists of victims must be scrutinised accordingly.

The lists of victims

870. Sonia Bakar (P-317) testified of the first UN report into the number of deaths as a result of the Bogoro attack, that it was compiled on the basis of names provided by persons they interviewed.¹⁵⁶⁰ However, the purpose of a human rights mission, on which Bakar's evidence is based, differs significantly from a criminal trial, insofar, for example, as issues of credibility are concerned. A fact-finding exercise is not necessarily going to investigate reported claims as would a party in a criminal trial, particularly when that very evidence may be used to sustain a conviction.¹⁵⁶¹

871. This issue as to credibility is highlighted by Bakar's testimony that the heads of villages that were attacked had a tendency to exaggerate the numbers, and so were not asked how

¹⁵⁵³ That effective control over the perpetrators must be established conclusively with specific regard to murder and/or wilful killing, see *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008, paras 39-41, 48 (Invalidating the decision of the trial chamber because it did not make any findings as to whether the principal perpetrators, who were not identified, were under the effective control of the accused's only identifiable culpable subordinate); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, para. 2140 (The affiliation of the perpetrators who committed the killings in question had not been established; the trial chamber found accordingly, that the accused did not have effective control over this group). See further *ibidem*, paras 2074-2075, 2177-2181, 2219, 2138-2140, 2153-2155, 2219. See also generally *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgement, 10 July 2008, paras 389-390 (Dismissing the charges of cruel treatment on account *inter alia*, of the evidence not being specific as to the persons who carried out the relevant acts, and that that it had not been established that the accused exercised effective control over them); *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgement, 20 June 2007, para. 1659 (requiring "conclusive evidence" of the actual exercise of effective control "over an identifiable group of subordinates").

¹⁵⁵⁴ P-233-T-88-p.27 (FRA-pp.27-28, 34-35).

¹⁵⁵⁵ D2-176-T-256-pp.38, 39 (FRA-pp.33-34).

¹⁵⁵⁶ P-287-T-130-pp.19-20 (FRA-pp.19-20)

¹⁵⁵⁷ P-0159-T-119-pp.60-61 (FRA-p.60).

¹⁵⁵⁸ P-280-T-158-pp.47, 48, 51, 55-56 (FRA-pp.50-51, 55-56).

¹⁵⁵⁹ P-0279-T-145-p.27 (FRA-pp.28-29).

¹⁵⁶⁰ P-317-T-228-pp.36-37 (FRA-pp.31-32); P-317-T-229-pp.71-72 (FRA-pp.62-63); EVD-OTP-00205, para.69.

¹⁵⁶¹ The defence has not had a chance, of course, to test the reliability of these interviewees, and emphasises that they may not as a matter of determined fact, all have been present at the time of the attack.

many people were killed.¹⁵⁶² That these administrators were not consulted does not mean, however, that this list is nevertheless reliable. Bakar confirmed that the persons listed were not necessarily all killed, and allowed for the possibility that certain names were invented.¹⁵⁶³ Also, it includes UPC soldiers, without specifying their status as such.¹⁵⁶⁴ And whilst 173 may have been under the age of 18,¹⁵⁶⁵ this does not exclude either that they were combatants, or their having directly participated in hostilities. Those between the ages of 15 and 18 could have been combatants and therefore legitimate targets, as could those under the age of 15, when taking direct part in hostilities.¹⁵⁶⁶

872. Similar criticism is levelled against EVD-OTP-00203, [REDACTED]'s list of victims of various Bogoro attacks, including that of 24 February. First, the information therein with regard to 24 February was compiled in 2005, some two years after the attack, by people that "tried" to remember those that had died, including those that had disappeared¹⁵⁶⁷ (i.e., were not necessarily killed). Also with regard to 24 February, it includes names given by the chiefs of the four localities, and was drafted by [REDACTED].¹⁵⁶⁸ As noted above, [REDACTED] exaggerated the numbers of victims.

873. Furthermore, [REDACTED] did not in any way assess the reliability of the information provided to him. Whilst V-04 admitted that she lied both in court and in her victim witness statement about her uncle having been killed on 24 February,¹⁵⁶⁹ his name is nevertheless included in EVD-OTP-00203, as having been killed that day.¹⁵⁷⁰ EVD-OTP-00203 lists other such mistakes, including at number 114, [REDACTED] that she is in fact, alive.¹⁵⁷¹ And if, as the defence suggests, number 177 is indeed alive, this mistake is the fault of her father, according to [REDACTED], because this man told [REDACTED] that she had been killed.¹⁵⁷²

¹⁵⁶² Bakar, Sonia P-317-T-229-pp.71-72 ("[...] in the past what we discovered was that our figures were usually smaller than the figures given by the heads of the villages that were attacked") (FRA-pp.62-63).

¹⁵⁶³ Bakar, Sonia, P-317-T-230-p.21 (FRA-p.18); Bakar, Sonia, P-317-T-229-p.72 (FRA-p.63).

¹⁵⁶⁴ Bakar, Sonia, P-317-T-228-pp.40 (FRA-p.37); Bakar, Sonia, P-317-T-229-pp.31-33 (FRA-pp.27-28).

¹⁵⁶⁵ See Bakar, Sonia, P-317-T-229-p.71 (FRA-p.62); Bakar, Sonia, P-317-T-p.40 (FRA-p.34); Bakar, Sonia, P-317-T-229-pp.31-32 (FRA-pp.27-28).

¹⁵⁶⁶ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Geneva 2009), p. 60 ("[...] even civilians forced to directly participate in hostilities or children below the lawful recruitment age may lose protection against direct attack").

¹⁵⁶⁷ EVD-OTP-00203. P-233-T-86-p.29 (FRA-p.36); P-233-T-87-p.6 (FRA-p.7). See also [REDACTED].

¹⁵⁶⁸ [REDACTED].

¹⁵⁶⁹ V-19-P004-T-234-pp.16, 19-20, 44-60 (FRA-pp.14, 16-18, 38-52); EVD-D02-00110.

¹⁵⁷⁰ V-19-P004-T-235-pp.25-29 (FRA-pp.22-26).

¹⁵⁷¹ P-166-T-226-pp.27-28 (FRA-pp.25); P-166-T-227-pp.48-50 (FRA-pp.43-44).

¹⁵⁷² [REDACTED].

874. Information with regard to those killed during other Bogoro attacks is also misleading. D2-176 testified that [REDACTED].¹⁵⁷³ However, she is included on EVD-OTP-000203, according to which she died during the 9 January 2001 Bogoro attack. “It was difficult”, [REDACTED], to verify the information given to [REDACTED] by those that said they survived the attack, and in then compiling [REDACTED] list.¹⁵⁷⁴

875. These difficulties extend to the alleged protective status of those listed: information as to the persons’ combatant status was simply not given, and P-166 allowed for the possibility that EVD-OTP-00203 includes those directly participating in hostilities, as well as combatants¹⁵⁷⁵, including two women.¹⁵⁷⁶

876. Based on its own calculations, the defence initially arrived at 150 victims of the 24 February 2003 attack, as does the prosecution, reduced from the initial “no less than 200” originally charged.¹⁵⁷⁷ This number by the defence did not include the errors [REDACTED], however. Nor are listed numbers 40 and 198 included, about which [REDACTED] confirmed having made mistakes, or numbers 174, 253, and 254, for which similar mistakes were made,¹⁵⁷⁸ which then brings the number to 142.

877. Omitted from this are the totals of those killed by civilians, for which as noted above, Mr. Katanga cannot be held liable, as well of those having directly participated in hostilities and of combatants, for lack of reference in the list to this effect. EVD-OTP-00203 must be scrutinised accordingly, also in light of the following: there was a general mobilisation and recruitment in Bogoro into the UPC;¹⁵⁷⁹ the UPC comprised people from Bogoro;¹⁵⁸⁰ and approximately 70 UPC soldiers were killed during fighting on 24 February¹⁵⁸¹, of between 300 and 400 UPC stationed at the Bogoro Institute, the Kivali school, and Mount Waka.¹⁵⁸² These UPC deaths may be included in this list, but to an unknown extent.

878. The UPC deaths are not charged¹⁵⁸³ and do not, as a matter of law, constitute murder or wilful killing. The same is true too, of those having directly participated in hostilities, insofar

¹⁵⁷³ D2-176-T-255-p.19 (FRA-pp.18-19).

¹⁵⁷⁴ P-166-T-226- pp.60-61 (FRA-pp.56).

¹⁵⁷⁵ See P-166-T-226-pp.60-61 (FRA-pp.55-56). See also CHM-P-0001-T-81-pp.22-23 (There “absolutely” were casualties among the fighters) (FRA-p.28).

¹⁵⁷⁶ See P-268-T-108-p.17; P-268-T-108-pp.37, 47 (“The position where we could find many soldiers was the position at the Bogoro Institute”).

¹⁵⁷⁷ See P-166-T-226, p.31 (FRA-p.28); CD, paras 20, 21, 420. See also *ibidem*, paras 305, 425; DCS, para. 34.

¹⁵⁷⁸ [REDACTED].

¹⁵⁷⁹ EVD-OTP-00202, paras 125, 128-132.

¹⁵⁸⁰ P-323-T-118-pp.47-48 (FRA-pp.45-46).

¹⁵⁸¹ D2-176-T-255-pp.35, 40 (The UPC was losing “a lot” of men) (FRA-pp.35, 40).

¹⁵⁸² P-268-T-107-pp.30, 20, 22-24, 25 (FRA-pp.19, 25, 30); P-268-T-108-pp.17, 38, 37, 47 (“The position where we could find many soldiers was the position at the Bogoro Institute”) (FRA-pp.16-17, 36-37).

¹⁵⁸³ CD, para. 288.

as the undetermined inclusion of their numbers is concerned, and insofar as their loss of protective status exempts Mr. Katanga from the crimes with which he is charged, to which the defence now turns.

The prosecution failed to establish the protective status of at least some of the victims

879. Contrary to the finding by the Pre-Trial Chamber,¹⁵⁸⁴ as the attacking force of a party gradually gains control of the targeted village, not all civilians in these successive areas are necessarily afforded protective status within the meaning of article 4 of Geneva Convention (GC) IV. Pocketed resistance by those directly participating in hostilities could continue: during this time and until such time as they no longer so participate, these civilians do not benefit from article 4 protection (they lose the protection afforded to civilians for such time as they so participate,¹⁵⁸⁵ but retain their civilian status as such). In other words, their killing during their armed resistance, even if Bogoro was under the control of, or when it gradually came under the control of the belligerent party, is not a crime.

880. That protected status excludes persons *hors de combat* and those taking direct part in hostilities, is also the case of armed conflict not of an international character.¹⁵⁸⁶ Germain Katanga cannot then be held liable for any such deaths – and regardless of the qualification of the conflict – because they do not constitute murder or wilful killing: international humanitarian law (IHL) does not prohibit the killing of combatants or of those directly participating in hostilities that are otherwise not protected by IHL.

881. Also contrary to the finding by the Pre-Trial Chamber,¹⁵⁸⁷ reference to protection afforded pursuant to a *levée en masse* is not applicable in the current case.¹⁵⁸⁸ Civilians that

¹⁵⁸⁴ CD, paras 288, 292, 293.

¹⁵⁸⁵ See generally ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Geneva 2009); Jean-Marie Henckaerts and Louise Dowswald-Beck, *Customary International Humanitarian Law (Volume I: Rules)*, Cambridge: Cambridge University Press (2005), pp 19-23; Article 51(3) of Additional Protocol I. The ICTY Appeals Chamber has noted when with regard to the case law considering whether or not victims of Article 3 crimes were participating in hostilities at the time of the offence, that “this jurisprudence does not redefine the meaning of the term ‘civilian’, but merely refers to the rule laid down in Article 51(3) of Additional Protocol I, according to which civilians enjoy ‘general protection against dangers arising from military operations’ unless and for such time as they take a direct part in hostilities”). *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgment, 8 October 2008, paras 298, 299.

¹⁵⁸⁶ See article 2(c)(i)-1 (War crime of murder) in relevant part: “1. The perpetrator killed one or more persons. 2. Such person or persons were either *hors de combat*, or were civilians [...] taking no active part in hostilities.” See also Common Article 3 of the Geneva Conventions, applicable to armed conflict non of an international character at (1)(a) in relevant part, which prohibits murder of all kinds of “[p]ersons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* [...]”; Article 13(3) of Additional Protocol II (“Civilians shall enjoy the protection afforded by this Part [Article 13 – Protection of the civilian population], unless and for such time as they take a direct part in hostilities”); Articles 4(1) and 4(2)(a) of Additional Protocol II. See also Geneva Convention IV, article 32, which forms part of Part III relative to the “Status and Treatment of Protected Persons.”

¹⁵⁸⁷ CD, para. 287 (Article 44 of Additional Protocol I).

take up arms to resist a belligerent party of the same State are said to directly participate in hostilities, and, as indicated above, lose their protective status until such time as they are *hors de combat* (i.e., no longer so participate). Their deaths during their armed resistance do not constitute murder or wilful killing. The defence next examines the specific failures by the prosecution to establish the protective status of at least some of the victims.

Direct participation in hostilities at Bogoro

882. The attacks, the insecurity of Bogoro, the schools closed, and the advance notice of possible attacks all made it such that by 24 February, most people had left Bogoro for the safety of other places.¹⁵⁸⁹ Some 800 civilians remained, according to D2-176.¹⁵⁹⁰ P-323 similarly testified that many civilians left before the attack, as did others.¹⁵⁹¹ Arguably, and as P-166 testified, a number of those that remained in Bogoro did so at the behest of the UPC, to help them defend Bogoro.¹⁵⁹² The defence submits that such was the case with the Bogoro Security Youth Group, which was introduced by the UPC when it first arrived in Bogoro in 2001.¹⁵⁹³ According to P-233, it comprised virtually all the youngsters from Bogoro.¹⁵⁹⁴

883. And whilst the Ugandan military trained thousands of Hema youth in Ituri, Uganda, and in Rwanda, the Hema militiamen were not the only ones to carry weapons: each family in Bogoro was reportedly given weapons.¹⁵⁹⁵ It is reasonable to expect that some of these weapons were used on 24 February by members of the Bogoro Security Youth Group, who were armed when carrying out patrols.¹⁵⁹⁶

¹⁵⁸⁸ A *levée en masse* occurs only against armed forces of another State, and is not applicable in an ongoing armed conflict. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Geneva 2009), p. 25 (“As far as the *levée en masse* is concerned, all relevant instruments are based on the same definition, which refers to the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war”).

¹⁵⁸⁹ P-233-T-88-p.18 (FRA-p.22); P-233-T-88-p.10 (All schools in Bogoro were closed down from 2001) (FRA-p.13).

¹⁵⁹⁰ D2-176-T-256-p.54 (FRA-pp.45-46).

¹⁵⁹¹ P-323-T-117-p.35 (“Many civilians left before the attack, but I wouldn't say that there were that many civilians living in Bogoro. The civilians settled in Bogoro when things calmed down. Otherwise, they were in Bunia or Kasenyi. They only returned to Bogoro to find food. And when the attack took place, some civilians were on site there”) (FRA-p.34). See also P-161-T-114-p.44 (FRA-pp.41-42); P-161-T-109-p.32 (FRA-pp.31-32); P-161-T-113-pp.27-29 (FRA-pp.27-28); P-161-T-114-p.40-41, 43-44 (FRA-pp.41-46); P-161-T-111-p.23 (FRA-p.22); P-161-T-114-p.40-41, 43-44 (FRA-pp.41-46); P-161-T-113-p.28-29 (FRA-pp.27-28); V-2-T-231-pp.26-31 (FRA-pp.21-26).

¹⁵⁹² See P-166-T-227-pp.47-48 (FRA-pp.41-42).

¹⁵⁹³ See P-166-T-227-pp.47-48 (FRA-pp.41-42). See also P-233-T-88-pp.12-15, 53-54 (FRA-pp.16-19, 67-68).

¹⁵⁹⁴ P-233-T-88-pp.12-15 (FRA-pp.16-19, 67-68).

¹⁵⁹⁵ Bakar, Sonia, P-317-T-229-pp.77-79 (FRA-pp.68-69); EVD-OTP-00205. See also P-280-T-156-p.40 (FRA-p.39); P-280-T-157-p.19 (“[...] the families had weapons at home. Even if the person was a civilian, they had weapons at home”) (FRA-p.19).

¹⁵⁹⁶ See P-233-T-88-pp.21, 54 (FRA-pp.25-26, 68).

884. Having already been established some two years prior to the attack in question, it cannot reasonably be excluded that members of this group took direct part in events on 24 February 2003. This is particularly so in light of P-166's evidence that young Hema trained by the UPC fought to defend the village.¹⁵⁹⁷ Such persons were therefore not afforded protective status at the relevant time. The defence submits that the death of those belonging to this group during their armed resistance does not amount to wilful killing or indeed to murder.

885. That at least some persons directly participated in hostilities on 24 February is confirmed by P-166, who testified that there were civilians at about 30 metres from the camp and that when the attack took place, some of them helped the soldiers to transport essential equipment, such as munitions.¹⁵⁹⁸

UPC child soldiers

886. As with those having directly participated in hostilities, the death of UPC child soldiers during their armed resistance does not amount either to wilful killing or to murder. P-166 participated in such recruitment meetings and accepted that a UPC delegation carry out an awareness campaign in Bogoro, and is said in this sense, to have contributed to recruitment. It is not surprising, then, that whilst he admitted that the UPC recruited kadagos/children, he denied that this occurred in Bogoro:¹⁵⁹⁹ such an admission would otherwise implicate him in the recruitment of children into an armed group. Indeed, P-268 confirmed having seen UPC child soldiers aged approximately between eight or ten, and dressed in civilian clothing;¹⁶⁰⁰ P-287 also confirmed that there were UPC child soldiers.¹⁶⁰¹ Because children were recruited by the UPC between August 2002 and February 2003,¹⁶⁰² any such children that directly participated in the events of 24 February were not afforded protective status.

¹⁵⁹⁷ P-166-T-226-pp.44, 51 (FRA-pp.41, 47).

¹⁵⁹⁸ P-166-T-226-pp.44, 51 (FRA-pp.41, 47). It must be recalled with regard to P-166's evidence that he did not see adult civilians participate in the defence of Bogoro, that he had, in fact, left Bogoro [REDACTED] prior to the attack in question, and followed the situation in Bogoro from there. See P-166-T-225-pp.18-20 (FRA-pp.15-17); DRC-D2-176-T-255-p.46 (FRA-p.45); EVD-OTP-00202, paras 24, 60, 121.

¹⁵⁹⁹ See EVD-OTP-00202, paras 124, 125, 128-132.

¹⁶⁰⁰ P-268-T-108-pp.46-47 (FRA-pp.45-46). See also P-267-T-163-pp.65-66 (The witness conducted disarmament of children in the UPC) (FRA-pp.67-68).

¹⁶⁰¹ P-287-T-130-p.37 (FRA-p.37).

¹⁶⁰² See EVD-OTP-00202, paras 128-130. See also Baguma, Jonathan, D02-0136-T-241-p.27 (FRA-p.25); EVD-D02-00117. See also EVD-OTP-00120. Children from the UPC were included in EVD-OTP-00120. See Mbodjima, Mbaraza Christian, D02-0160-T-273-p.80 (Confirming that children from the UPC were at the Aveba demobilisation site) (FRA-p.74).

Difficulty in distinguishing

887. D2-176 testified that not all UPC soldiers, [REDACTED], were in uniform at the time of the attack.¹⁶⁰³ There was a mixture of people at Bogoro, the majority of which was armed.¹⁶⁰⁴ P-280 testified with regard to the fighting itself, that it was difficult to distinguish between civilians and fighters.¹⁶⁰⁵ P-28 similarly testified of those that died, that “it was not possible for us to ascertain whether they were civilians or soldiers, [b]ecause they all had weapons.”¹⁶⁰⁶ And whilst soldiers’ bodies were in the firing pits, one could see that their uniforms had been removed.¹⁶⁰⁷ Furthermore, the UPC also included female soldiers at the relevant time.¹⁶⁰⁸ This renders all the more difficult distinction made beyond reasonable doubt between the UPC members, including children, those having directly participated in hostilities, and both male and female civilians of fighting age.

The burden of establishing protective status rests with the prosecution

888. It is for the prosecution to establish the protected status of the victim.¹⁶⁰⁹ The prosecution must similarly prove that the perpetrator could not reasonably have believed that the victim was a member of the UPC,¹⁶¹⁰ or that the perpetrator could not reasonably have believed that the victim was not entitled to civilian protection at the relevant time. Whilst civilian status under IHL is presumed in case of doubt,¹⁶¹¹ this provision is intended for the specific situation to which IHL is intended to apply; that is, to ensure the greatest possible protection to persons not directly participating in hostilities in situations of armed conflict.

¹⁶⁰³ D2-176-T-255-pp.34, 37 (The witness saw a UPC commander wearing a blue-coloured pair of trousers rather than his military uniform) (FRA-pp.34, 37). See also P-268-T-107-pp.52-53 ([REDACTED], a UPC soldier, was dressed in civilian clothes) (FRA-pp.51-52).

¹⁶⁰⁴ D02-0148-T-279-pp.21-22 (FRA-p.19).

¹⁶⁰⁵ P-280-T-162-pp.7-8 (FRA-pp.6-7). The defence maintains that P-280 was not present at Bogoro, but recalls his evidence should the trial chamber find otherwise.

¹⁶⁰⁶ P-28-T-219-pp.9, 10-11 (FRA-pp.7-10); P-28-T-217-pp. 60-61 (FRA-pp.52-54). The defence maintains that P-28 was not present at Bogoro, but recalls his evidence should the trial chamber find otherwise.

¹⁶⁰⁷ P-0219-T-205-pp.57-58 (FRA-p.57). The defence maintains that P-219 was not present at Bogoro, but recalls his evidence should the trial chamber find otherwise.

¹⁶⁰⁸ P-287-T-130-p.37 (FRA-p.37).

¹⁶⁰⁹ Cf. CD, para. 297.

¹⁶¹⁰ See *Prosecutor v. Kordić and Čerkez*, Case No. IT-95/14/2-A, Judgement, 14 December 2004, para. 53 (“[...] Article 52(3) of Additional Protocol I provides that in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Appeals Chamber notes that the imperative “in case of doubt” is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether an object is a civilian one rests on the Prosecution”). Emphasis added. See also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003, para. 55 (“For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant”).

¹⁶¹¹ Article 50(1) of Additional Protocol I.

889. The provisions of IHL, at the time of their drafting, were never intended to be utilised as such in criminal proceedings. As a result, elementary considerations that are integral for a criminal trial, such as the burden of proof resting with the prosecution, do not feature in the text. To presume civilian status in a criminal trial would be a wholesale reversal of the burden of proof.

890. The same applies with regard to the entitlement of civilian protection for those directly participating in hostilities, which includes civilians that spontaneously take up arms to resist the invading forces. It is for the prosecution to prove that such persons were not directly participating in hostilities at the relevant time (and thus not entitled to protective status). That the burden still rests with the prosecution in such circumstances has been confirmed by the ICTY Appeals Chamber.¹⁶¹² In case of doubt in a criminal trial of the status of the victims or of the protection to which they are entitled at the relevant time, the principle *in dubio pro reo* must apply.¹⁶¹³

891. Indeed, it cannot reasonably be excluded that at least some of the deaths in question were of those directly participating in hostilities, and that they occurred during the armed resistance of 24 February. The prosecution has failed to establish beyond reasonable doubt protective status in such cases of doubt,¹⁶¹⁴ and in order to enter a conviction for the crimes as charged.

The witnesses on which the prosecution relies

892. Whilst admitting that there was a “long distance” between his hiding location and the UPC camp, P-268 testified that he easily heard what people beside this camp said. When asked the distance in metres, the witness could not confirm, and instead explained that “it might have been very far or very close.” In actual fact, the distance separating P-268 from the

¹⁶¹² See *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008, para. 172 (“In order to prove cruel treatment as a violation of Common Article 3 under Article 3 of the Statute, the Prosecution must prove beyond reasonable doubt that the victim of the alleged offence was a person taking no active part in hostilities”). See also Rogier Bartels, “Discrepancies Between International Humanitarian law on the Battlefield and in the Courtroom: The Difficulties of Applying International Humanitarian Law During International Criminal Trials”, in: Marcel Brus et al. (eds), *International Law Between Conflict and Peacetime: In Search of the Human Face*, T.M.C. Asser Press (forthcoming); William Fenrick, “International Humanitarian Law and Criminal Trials”, 7 *Transnational Law & Contemporary Problems* (1997), p. 26.

¹⁶¹³ See *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Judgement, 27 September 2007, para. 21 (“The Appeals Chamber is satisfied that the principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged. This approach is consistent with the case-law of the International Tribunal and is a logical approach, given that, in the context of issues of fact, the principle is essentially just one aspect of the requirement that guilt must be found beyond a reasonable doubt”).

¹⁶¹⁴ See e.g., Article 22(2) of the RS (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”).

Lagura Hotel was approximately 650m,¹⁶¹⁵ or roughly a seven and a half minute walk.¹⁶¹⁶ It is doubtful, to say the least, that P-268 – or indeed anyone for that matter – could hear spoken words over such a distance.

893. Nor was it possible, the defence submits, for P-161 to hear “very well”, and thus to understand, or indeed identify those at the Bogoro Institute or atop Mount Waka, from his house or his hidden place: he was located at some 500 metres, or approximately six minutes by foot, from Mount Waka, and at around 400 meters from the Bogoro Institute.¹⁶¹⁷ Furthermore, Constance Lojenga (CHM-2), the Ngiti language expert called by the Chamber about an excerpt of his evidence in this regard, urged that care be taken in relation to the in-court interpretation of what P-268 claims heard to have been said.¹⁶¹⁸

894. Similar caution must be exercised in weighing the evidence of P-323, who conceded that he was unable to observe what was happening in Bogoro when 4 kilometres from it, despite his prosecution statement to the contrary.¹⁶¹⁹ The defence notes that a 4 kilometre distances is walked in approximately one hour. That he moved “closer” to Bogoro to observe events – but without specifying this distance now separating him¹⁶²⁰ – raises doubt, however slight, as to whether was able to see the events in question.

895. With regard to credibility generally of the relevant prosecution witnesses, the defence develop the following submissions, with specific reference to the charges under article 7(1)(a) and 8(2)(a)(i) of the Statute, or under article 8(2)(c)(i). In addition to arguments developed elsewhere herein that P-219 was not present at Bogoro, his evidence of having allegedly seen “no less than 300 bodies” inside and outside the classroom and in the pitch of the school¹⁶²¹, raises even greater doubt as to the evidence in question, given that the prosecution’s own case is that half this number was killed.

¹⁶¹⁵ See P-268-T-107-pp.15-16, 22-24, 30, 32-33, 69 (FRA-pp.14-15, 22-25, 30, 32-33); P-268-T-108-pp.67, 68-69 (FRA-pp.66, 67-68); EVD-OTP-00044.

¹⁶¹⁶ See e.g., P-161-T-109-p.27 (FRA-p.26); P-161-T-111-pp.37-42 (One kilometre is walked in fifteen minutes) (FRA-pp.35-39).

¹⁶¹⁷ P-161-T-109-pp.38-39, 42-43, 49 (FRA-pp.39, 41-43, 48); P-161-T-110-p.57(FRA-p.54); P-161-T-111-p.38 (FRA-p.36); P-161-T-112-pp.40-42, 44-52, 64-69 (FRA-pp.40-53, 65-71); P-161-T-113-pp.55-57 (FRA-pp.54-56); EVD-D02-00014 ; EVD-OTP-00049 ; ICC-01/04-01/07-3234-Conf-Anx, *Procès verbal de l’opération de transport judiciaire en RDC*, paras 77-86. See also D2-0258-T-287-p.18 (FRA-pp.16-17); EVD-D02-00164; EVD-D02-00212; EVD-D02-00204; Dhengachu, Jean Logo, D02-0258-T-286-p.79 (FRA-pp.70); EVD-D02-00162.

¹⁶¹⁸ Lojenga, Constance, CHM-P-0002-T-159-pp. 25-26, 39-41 (FRA-pp.26-27, 39-40, 41-42); EVD-CHM-0003, and accompanying Annex.

¹⁶¹⁹ P-323-T-118-pp.6-7 (FRA-p.6).

¹⁶²⁰ P-323-T-118-pp.2-8, 38-39 (FRA-pp. 2-7, 37-38); P-323-T-117-pp.47, 48, 61 (FRA-pp.46, 47, 59-60); EVD-OTP-00052.

¹⁶²¹ P-0219-T-205-p.57 (FRA-p.57); P-0219-T-209-p.22 (FRA-pp.21-22).

896. With regard to P-161, the discrepancies in his evidence as compared to his previous statement – and even within his testimony about his wives present and the killings that he allegedly witnessed – are so flagrant and so numerous¹⁶²² that no trier of fact could base findings beyond reasonable doubt, on this evidence.

Conclusion

897. Germain Katanga cannot be held responsible for the extent of the killings, even in reduced figure as conceded by the prosecution: too many reasonable uncertainties remain. Proof has simply not been established as otherwise required by the prosecution. Also, the evidence suggests excesses of the few rather than intent of the many, insofar as the existence of any criminal common plan is concerned. The evidence must be weighed accordingly and where reasonable doubt exists, in favour of Mr. Katanga. It has further not been proved that all victims were afforded protected status under Geneva Convention IV or the Additional Protocols, or that the conduct was associated with an international armed conflict.

C- Pillage

Introduction

898. The prosecution has failed to prove beyond reasonable doubt that Germain Katanga exercised the requisite effective control for a conviction to be entered for pillage, whether in international or in non-international armed conflict. The prosecution has failed too, to meet the standard of proof with regard to the mental element and the gravity requirement of the crime, insofar *inter alia*, as opportunistic pillaging is concerned. Nor can it be excluded that at least some of the goods constituted war booty, or were appropriated for reasons of military necessity. And with regard both to international and non-international armed conflict, the prosecution has failed to distinguish the pillaging of protected property¹⁶²³ as defined by international humanitarian law instruments applicable to both types of conflict from other

¹⁶²² See P-161-T-109-pp.16, 18, 21, 27, 28, 24, 40-41 (FRA-pp.22-29, 39-40); P-161-T-110- pp.67-69 (FRA-pp.67-69); P-161-T-112-p.42 (FRA-p.42); P-161-T-116-pp.35, 41 (FRA-pp.37-42); P-161-T-111-pp. 59-61 (FRA-pp.59-60); P-161-T-113-pp.40, 42-43, 47-51 (FRA-pp.49-51); P-161-T-113-pp.43-52 (His [REDACTED] wife, [REDACTED], had previously left Bogoro) (FRA-pp.43-45). However, the witness also testified that those present at his house at the time of the attack included [REDACTED]. See P-161-T-109-pp.18, 28-29 (“My [REDACTED] wife was with my child [REDACTED], but the mother of that child had accompanied the child [REDACTED]. There were three people [REDACTED], but there were two of us at home with other children who had stayed in the house. [...] In the house there was my [REDACTED] wife, [REDACTED]. Then there was [REDACTED]”) (FRA-pp.17, 27-29). The witness also confirmed that his [REDACTED] wife [[REDACTED]] had previously fled Bogoro because of the ethnic killings, and was therefore not on the scene at the relevant time, and that he had [REDACTED]: “It was [REDACTED]. She’s the one who had left. I stayed with the others. [REDACTED] was already gone”; P-161-T-111-pp.38-42 (FRA-pp.37-42); EVD-OTP-00049; P-161-T-112-p.41 (FRA-pp.41-42).

¹⁶²³ Both with regard to the nature of the goods concerned as well as the persons from whom the goods were allegedly taken.

property, for which no such prohibition exists. Also, the prosecution relies on witnesses that in the submission of the defence, no trier of fact could rely on in findings beyond reasonable doubt, including with regard to pillage. Finally, liability for pillage, if any, is offset by the prevailing circumstances at the time of the events in question: appropriation as indispensable for survival.

Lack of effective control by Germain Katanga over the crime

899. The defence submits that liability for pillage pursuant to the case law, is attributed only once, *inter alia*, a twofold and conclusive determination is made: firstly, that the perpetrators are identified, and secondly, that the accused exercised effective control over them at the material time. For example, in *Hadžihasanović*, the ICTY Chamber found that civilians committed the acts in question, but limited its analysis with regard to the responsibility of the accused, to the soldiers that pillaged and over whom the accused exercised effective control.¹⁶²⁴ That the accused must have exercised effective control over the perpetrators in order to be found liable for pillage has also been confirmed by the SCSL.¹⁶²⁵

900. In the present case, the defence maintains as elaborated elsewhere herein, that Germain Katanga did not exercise effective control over the relevant physical perpetrators, including civilians, for which in his capacity as a member of the militia, Mr. Katanga is not responsible. With regard to the participation of civilians, P-233 described the attackers as those who had come from the locality where the Bira were living, and believes that they were Bira in civilian clothing, consisting mainly of women and children. They were described as such on the basis of the direction from which they arrived, because of the language they spoke, and because others told him that they had also seen Bira attackers. Indeed, P-233 saw that these women and children carried away stolen goods.¹⁶²⁶

¹⁶²⁴ *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Judgement, 15 March 2006, paras 1876-1886, 1903, 1862-1865, 1903, 1905, 1943-1944, 1952; 1943-1944 (The trial chamber, in noting that acts of pillage may have been carried out by civilians, determined on this basis that it was unable to establish beyond reasonable doubt the identity of the perpetrators, and as a result, the participation of the relevant brigades in the acts in question to sustain a conviction. It found too, that the accused did not exercise effective control over the armed group that actually carried out the acts of pillage, and concluded that the accused could thus not be held responsible as charged). See also *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgement, 17 October 2003, para. 875 (The Chamber was not satisfied on the basis of the evidence that the accused was liable for pillage based *inter alia*, on civilians having carried out the appropriation, who in turn, received instructions from other civilians, and on the basis of a lack of control of any kind.)

¹⁶²⁵ *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgement, 2 August 2007, paras 838-840.

¹⁶²⁶ P-233-T-83-p.59 (FRA-pp.72-73); P-233-T-88-pp.22-23, 27 (The witness saw attackers arrive from the Bira collectivite at approximately 0600 hours) (FRA-pp.27-28, 33-34). See also P-268-T-108-pp.44-45 (The witness confirmed his previous statement, according to which he saw a group of fighters come along a path from the Bira territory) (FRA-pp.42-43); P-0159-T-120-p.20 (Some Bira people arrived last, and took the goods that the fighters had forgotten) (FRA-p.20).

901. That civilians appropriated goods is also confirmed by P-161, who testified that some of the women that participated in the appropriation of goods carried babies on their backs,¹⁶²⁷ and by Sonia Bakar, according to whom the attacking forces were accompanied by children and by women, who were there to steal and transport the goods.¹⁶²⁸ In fact, women and children stole goods in different houses,¹⁶²⁹ and children carried stolen goods to their own villages.¹⁶³⁰ It was “a lot” women “from everywhere” (i.e., from different villages) that came to take things.¹⁶³¹ D02-176 similarly testified that the entire population of the collectivité came to fight, including the women: in looking at them, it was easy to say that they were all civilians, for they behaved like civilians and were dressed as such.¹⁶³² Women and children were even present at the Bogoro Institute on the morning following morning, to transport objects.¹⁶³³

902. The evidence suggests then, that the participation of civilians in the appropriation of goods was of an opportunistic nature, rather than the result of control of any kind by Germain Katanga. P-12 testified in this regard that during events, people would go to take away what they could to their homes.¹⁶³⁴ P-219 similarly testified that the population would follow the fighters, to take things from the locality.¹⁶³⁵ And with regard to the Ngiti civilians that returned to Bogoro to recover what they had left there, they had “no connection whatsoever” to the combatants.¹⁶³⁶

903. Indeed, and whilst the prosecution concedes that civilians participated in the appropriation of goods, it has failed to establish any control by Mr. Katanga over these very perpetrators, and refers instead to the combatants merely having “priority” over the stolen goods.¹⁶³⁷ In fact, Germain Katanga did not exercise control of any kind with regard to

¹⁶²⁷ P-161-T-111-pp.12-13 (FRA-pp.12-13).

¹⁶²⁸ Bakar, Sonia, P-317-T-228-p.38 (FRA-p.32); P-0159-T-120-p.28 (Women helped to transport the goods that had been pillaged) (FRA-p.28).

¹⁶²⁹ P-323-T-117-p.63 (FRA-p.61).

¹⁶³⁰ P-132-T-140-p.45 (FRA-p.47).

¹⁶³¹ P-132-T-140-p.54 (FRA-p.56).

¹⁶³² See D2-176-T-256-p.38 (FRA-p.33). See also D2-176-T-255-p.35 (There was a lot of shouting, and a big group of attackers, including women, men, and children, to intimidate us through noise (including through cow horns) and signing) (FRA-p.35).

¹⁶³³ See P-268-T-107-pp.62, 64 (FRA-pp.57, 61-62); P-268-T-108-pp.12, 27 (The women and children were carrying property. The combatants were taking part in the war, and whenever they had the upper hand on the enemy, whenever they defeated the enemy, the women and children transported the property or items) (FRA-pp.11-12, 26).

¹⁶³⁴ P-12-T-197-pp.65-66 (FRA-pp.72-73).

¹⁶³⁵ P-219-T-206-pp.19-20 (FRA-pp.19-20). See also P-280-T-158-p.51 (Civilians that wished to go to the front at Mandro could follow the soldiers. After the battle, all those that followed could take part in the pillaging) (FRA-pp.51-52).

¹⁶³⁶ D2-300-T-324-pp.52-55 (FRA-pp.48-49).

¹⁶³⁷ See PFB, para. 100. See also VFB, paras 182, 184.

pillage. P-219 testified in this regard, “[y]ou can’t stop looting that soldiers are carrying out.”¹⁶³⁸ D02-148 similarly testified about this lack of control over combatants:

Sometimes one out of ten combatants would go back to see the commander and they would say, ‘Well, this is what I’ve looted. I will give you 100 francs from what I looted,’ but this was not the case for everyone. Each combatant had his weapon. Each one behaved in his own manner. If as a commander you go asking the combatants to give you part of the loot, a gunfight could break out. A combatant can come to give you a hundred francs, but you cannot force them to give you what they looted.¹⁶³⁹

Similarly, Germain Katanga could ask fighters to give property back that they had pillaged; crucially, however, the fighters in Aveba did not always follow his orders.¹⁶⁴⁰ No effective control by him can therefore be established in this regard.

904. In failing to establish beyond reasonable doubt the effective control by Mr. Katanga over the relevant perpetrators at Bogoro, he cannot be said to have pillaged for personal use, as otherwise required for conviction to ensue. Nor can it be said that opportunistic appropriation was carried out with the intent to destroy Bogoro or to displace those that lived there, as otherwise required by the pre-trial chamber under article 8(2)(b)(xvi).¹⁶⁴¹

905. Furthermore, article 8(1) of the Statute requires a high threshold jurisdictional *and* statutory gravity requirement in respect of war crimes: “[...] in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” As noted above and elsewhere herein, pillage and the taking of goods at Bogoro was committed by perpetrators – civilian and armed forces and alike – not under the effective control of Germain Katanga. Appropriation of an opportunistic nature cannot be said to have been carried out pursuant to, or indeed as part of, a plan or policy of Germain Katanga; nor can pillage by those not under his effective control. Also, P-279 testified that the plan to pillage did not exist: it was the soldiers themselves who carried out this pillaging.¹⁶⁴²

906. Nor does the pillage at Bogoro constitute part of a large-scale commission of such crimes, also as otherwise required, or as required in the alternative.¹⁶⁴³ This limitation of

¹⁶³⁸ P-219-T-205-p.60 (FRA-pp.59-60).

¹⁶³⁹ D2-148-T-280-pp.66-67 (FRA-pp.57-59).

¹⁶⁴⁰ D2-P-0134-T-259-p.75 (FRA-pp.68-69). *See also* P-12-T-197-pp.65-66 (Whilst Germain Katanga attempted to secure the return of pillaged Ugandan goods, there is no conclusive evidence that he was successful in so doing) (FRA-pp.72-73).

¹⁶⁴¹ CD, para. 229 and accompanying footnote.

¹⁶⁴² P-0279-T-148-pp.24-25 (FRA-p.25).

¹⁶⁴³ *See Situation in the Democratic Republic of the Congo*, ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, 13 July 2006, para. 70.

jurisdiction to¹⁶⁴⁴, and statutory requirement of, criminal acts of a certain gravity is also limited, the defence submits, with respect to the relevant physical perpetrators. The gravity criterion must be assessed on the basis of the perpetrators over whom Mr. Katanga exercised effective control at the relevant time.

907. In this regard, in order to qualify as pillage under the Rome Statute, the defence submits firstly that appropriations must i) have been carried out beyond reasonable doubt by these very perpetrators and secondly, pursuant to the case law, that ii) there must be more than sporadic acts or “petty property expropriation”, be “large-scale”, and go beyond “mere sporadic acts of violations of property rights.”¹⁶⁴⁵ This latter determination of the crime of pillage in *Bemba* was made bearing in mind the goals of the Statute as enumerated in article 1, and the description of such war crimes as “serious”. In particular, “cases of petty property expropriation” might not be within the scope of the said provision; hence determination to be made on the seriousness of the violation, in light of the particular circumstances of the case.¹⁶⁴⁶

908. Even if analysed in the context of Bogoro as a whole¹⁶⁴⁷, the defence submits that the gravity criterion is not met, absent effective control by Mr. Katanga over the physical perpetrators at the time in question, and that appropriations justified by military necessity do not constitute the crime of pillaging. What is left after removing from the analysis the taking of goods by civilians and by persons falling outside the scope of effective control by Germain Katanga – irrespective of the position of the defence that the relevant acts cannot be attributed to him – and removing too, appropriation justified by military necessity, does not amount to “large-scale commission.”

909. And whilst the statutory requirement of either “part of a plan or policy” or “part of a large-scale commission” is not absolute, but is instead qualified by the expression “in particular”¹⁶⁴⁸, the Court is nevertheless to focus, both with respect to its jurisdictional and

¹⁶⁴⁴ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court –Observers’ Notes, Article by Article 2nd ed., (C.H.Beck Hart Nomos, 2008), 409.

¹⁶⁴⁵ See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 317.

¹⁶⁴⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 317.

¹⁶⁴⁷ See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1091, Decision on 653 Applications by Victims to Participate in the Proceedings, 23 December 2010, para. 32 (“The Chamber considers that each single act of pillage shall not be assessed in isolation but shall be analysed in the context of the pillaging of a town or a place”).

¹⁶⁴⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 211.

statutory requirements, on crimes meeting this specific gravity threshold.¹⁶⁴⁹ The defence submits for the reasons set forth above and as developed next with regard to war booty and military necessity, that the gravity threshold for conviction under article 8(2)(b)(xvi) or 8(2)(e)(v), is not met.

The goods allegedly pillaged: military necessity and protected property in IAC and in NIAC

910. In addition to the right of requisition or seizure, a party to an IAC may lawfully take weapons and military equipment of the enemy found on the battlefield as war booty,¹⁶⁵⁰ for which no justification is needed under IHL.¹⁶⁵¹ And whilst the ICRC Customary IHL Study could not identify a rule with regard to NIAC that, according to international law, would allow the seizure of military equipment belonging to an adverse party, nor was a rule found that would prohibit such seizure under international law.¹⁶⁵² Indeed, the Elements of Crimes prohibit pillage both in IAC and in NIAC, save as justified by military necessity.¹⁶⁵³ It cannot be excluded in the present case that the appropriation of an SMG (a sub-machine gun), a large

¹⁶⁴⁹ See ICC Statute, Preamble [4], articles 1, 5 and 8bis and corresponding Elements of Crimes (The Crime of Aggression as constituting “a manifest violation” of the United Nations Charter). See also ICC Statute, articles 17(1)(d), 53(1)(c), 53(2)(b) and (c). Schabas has noted that although “[...] genocide and crimes against humanity would appear to be prima facie serious enough to warrant intervention by the Court, his will not always be the case for war crimes”; hence the adoption of article 8(1). Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2011, p. 127. That the gravity criterion is both a jurisdictional and a statutory requirement is also evidenced by the following: Knut Dörmann, “War Crimes – para. 1”, in: O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (2008), at 307 (Dörmann argues that the words “in particular” in paragraph 1 of article 8 make clear that a plan, policy, or a large-scale commission is not an absolute prerequisite for the Court to commence investigations, and that the Court retains discretion to exercise jurisdiction over crimes that are not part of such a plan, policy, or large-scale commission of crimes. He concludes that “[t]he Prosecutor might for instance also take into consideration other factors like the egregiousness of a particular crime, the seriousness and scale of a single crime, or the official function of the alleged perpetrator”); *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-356, Pre-Trial Chamber, Prosecution’s Response to the Defence Challenges to Jurisdiction, 14 October 2011, para. 14 (“The Court has jurisdiction because the crimes against humanity alleged under Article 7 are within the Court’s subject matter jurisdiction. Whether Article 7 applies on its face to particular acts, however, is a matter of statutory interpretation, not jurisdiction. And whether the evidence establishes the predicate elements of the crime, including, as here, the element of an organizational policy to commit attacks against the civilian population, is a sufficiency issue, not a jurisdictional one”). Similarly argued, the gravity element in article 8(1), read in conjunction with the general gravity requirement of the Court, must be assessed by the trial chamber at this stage of the proceedings.

¹⁶⁵⁰ Article 33 of Geneva Convention IV. Jean Pictet (ed.), *Commentary to the Fourth Geneva Convention*, pp 226-227; Jean-Marie Henckaerts and Louise Dowswald-Beck, *Customary International Humanitarian Law (Volume I: Rules)*, Cambridge: Cambridge University Press (2005), pp 173-175. See further Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), p. 277, referring to Lassa Oppenheim, *International Law: A Treatise*, (Lauterpacht ed., 7th edition, 1952), Volume II, p. 401 *et seq.*

¹⁶⁵¹ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press (2002), p. 272. Seizure of material obviously related to the conduct of military operations, though restricted, are lawful in principle. See The Hague Regulations, Article 53 (2), quoted in *Prosecutor v. Naletilić*, Judgment, Case No. IT-98-34-T, 31 March 2003, para. 616. See also *Prosecutor v. Martić*, Judgment, Case No. IT-95-11-T, 12 June 2007, para. 102.

¹⁶⁵² Jean-Marie Henckaerts and Louise Dowswald-Beck, *Customary International Humanitarian Law (Volume I: Rules)*, Cambridge: Cambridge University Press (2005), p. 174.

¹⁶⁵³ Elements of Crimes Article 8(2)(b)(xii)(5); Article 8(2)(b)(vxi)(2 and accompanying footnote); Article 8(2)(e)(v)(2 and accompanying footnote).

six-battery radio, a solar panel, and in the given situation, food in the UPC camp,¹⁶⁵⁴ were not justified by military necessity. Accordingly, this and other such appropriation does not beyond reasonable doubt, amount to pillage.

911. Furthermore, the instruments of IHL applicable to IAC and NIAC explicitly prohibit only the pillaging from “persons who do not take a direct part or who have ceased to take direct part in hostilities, whether or not their liberty has been restricted.”¹⁶⁵⁵ The appropriation of goods belonging to the UPC or to those that directly participated in hostilities at the relevant time, does not, therefore, amount to pillage. That the burden rests with the prosecution to prove the protective status of persons has been confirmed by the ICTY Appeals Chamber (see paras 888-891, *supra*), and should therefore extend also to proving beyond reasonable doubt, the protected property in question. Little, if indeed any such distinction has been made in the present case, however. In case of doubt in a criminal trial of the status of the property or of the protection to which it is entitled at the relevant time, the principle *in dubio pro reo* must apply (see paras 888-891, *supra*). Liability pursuant to article 8(2)(b)(xvi) or to article 8(2)(e)(v) cannot be attributed absent any such distinction made *beyond reasonable doubt*.

Not all property was unlawfully appropriated

912. At least some of the persons that appropriated the property in question were, in fact, the owners of that property. Mr. Katanga testified that Lendu-Nord and Lendu-Sud were in Bogoro when he passed through there on 8 March (people were descending from the Monts Bleus/Bede-Ezekere, through Lakpa).¹⁶⁵⁶ The civilians that came back to Bogoro during and in the aftermath of the attack were those that used to live there, including many Ngiti, who had previously abandoned their homes and had fled to neighbouring areas (to Lakpa, Nombe, and to Tcharukaka (phon)).¹⁶⁵⁷ Whilst their farms were in Bogoro, they did not have access to them, and so returned to recover the property that they had left behind.¹⁶⁵⁸

913. Indeed, the Lendu were the first to leave Bogoro in 1999, early 2000, when the population learned that the fighting would reach Bogoro. Persons displaced as a result of the

¹⁶⁵⁴ PFB, paras 101, 99. See also VFB, paras 180, 184 (referring to the pillaging of the Bogoro Institute – the UPC military camp, of generators, of vehicles); P-280-T-160-pp.61-62 (FRA-pp.61-62). See also P-279-T-148-p.24 (Weapons were also retrieved) (FRA-pp.24-25). With regard to the appropriation of food in the UPC camp, such appropriation can be justified by military necessity. See e.g., article 54(3) of Additional Protocol I.

¹⁶⁵⁵ Article 4(2)(g) of Additional Protocol II. See also Geneva Convention IV, article 33, which forms part of Part III relative to the “Status and Treatment of Protected Persons.”

¹⁶⁵⁶ D2-300-T-318-p.33 (The witness could not confirm whether people from Bedu-Ezekere participated in the Bogoro attack, other perhaps, than the population that had left its property in Bogoro came back to recover it) (FRA-p.29).

¹⁶⁵⁷ See D2-300-T-318-pp.23-24 (FRA-p.21).

¹⁶⁵⁸ D2-300-T-318-pp.24, 28 (FRA-pp.21, 29).

war then came out of the bush into Bogoro, and occupied the empty Lendu houses.¹⁶⁵⁹ Such property cannot be said to have “belonged” to the displaced persons that resettled there. Nor then, can the property be said to have been appropriated without the consent of the owner, an element otherwise required for the crime of pillage.¹⁶⁶⁰ Importantly, the consent must come from the rightful¹⁶⁶¹ or legitimate¹⁶⁶² owner.

914. Furthermore, and also contrary to what is otherwise required for the appropriation to be unlawful, the recuperation of property was not committed against the “adverse party” to the conflict. Instead, the property in question belonged to individuals whose “allegiance” was to a party to the conflict that was not adverse or hostile to the perpetrator.¹⁶⁶³ The return of the rightful owners to recover their own property does not in such circumstances, amount to unlawful appropriation.

The witnesses on which the prosecution relies

915. The prosecution relies on witnesses for which as developed elsewhere herein, there are serious, but reasonable questions as to their credibility. This includes the evidence of P-280, who, after having allegedly participated in the Bogoro battle, [REDACTED].¹⁶⁶⁴ Also, P-280 testified on the one hand, that he never saw soldiers abduct people and bring them back to Lagura¹⁶⁶⁵, and that women were so abducted¹⁶⁶⁶, on the other. His evidence that hostages were taken to transport the pillaged goods¹⁶⁶⁷ certainly cannot then be relied upon.¹⁶⁶⁸

916. Similarly, P-219 could not in one day have walked the approximately 100 kilometre return distance from Aveba to Bogoro, including over steep hills, given the [REDACTED] injury that he had sustained previously, and for which he had been hospitalised

¹⁶⁵⁹ D02-176-T-256-pp.47-50 (FRA-pp.41-43). See also P-233-T-87-p.46 (Certain groups started leaving Bogoro as early as around 1992) (FRA-pp.55).

¹⁶⁶⁰ Cf. CD, paras 328, 329 (and accompanying footnote), 332 and in particular, the following Element of Crime otherwise required of pillage: “the appropriation was without the consent of the owner.” See also *idem*, para. 333; ICC Elements of Crimes, Article 8(2)(b)(xvi)(3).

¹⁶⁶¹ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 318 (“Lastly, the Chamber finds that, to the extent possible, a description of the ‘expropriated’ property is required in order to ascertain whether indeed ‘certain property’ was appropriated without the consent of the rightful owner”).

¹⁶⁶² *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-121-Corr-Red, Corrigendum of the “Decision on the confirmation of Charges”, 7 March 2011, para. 121 (Referring to appropriated property not having been returned to its “legitimate owners”).

¹⁶⁶³ Cf. CD, para. 329 and accompanying footnote.

¹⁶⁶⁴ P-280-T-160-pp.61-62 (FRA-pp.61-62); P-280-T-158-pp.15-16 (FRA-pp.15-16); Dhengachu, Jean Logo, P-0258-T-288-pp.37-38 (FRA-pp.34-35); EVD-D02-00163 ; EVD-D02-000204.

¹⁶⁶⁵ P-280-T-155-p.55 (FRA-pp.54, 56).

¹⁶⁶⁶ P-280-T-158-pp.59-60 (FRA-pp.58-61).

¹⁶⁶⁷ P-280-T-156-pp.45-46 (FRA-pp.44-46); P-280-T-158-pp.10-12 (FRA-pp.10-12).

¹⁶⁶⁸ Cf. VFB, para. 185.

[REDACTED].¹⁶⁶⁹ To do so would have required 24 hours of consecutive walking¹⁶⁷⁰, which does not tally with P-219's evidence that he *left* Aveba at approximately 0900 hours and that he returned to Aveba that same day, or indeed his evidence that *arrived* at Bogoro at approximately 0900 hours on 25 February, having left Aveba early that morning.¹⁶⁷¹ Despite having allegedly taken a shortcut that day, P-219 does not identify by how much this otherwise lengthy distance was reduced.¹⁶⁷² His evidence therefore remains unconvincing – and is certainly not beyond reasonable doubt with regard to his actual presence at Bogoro. Nor then, can his evidence, as that of P-280 and of what they claim to have witnessed, be relied upon.

917. For his part, and contrary to the prosecution's own case, P-250 testified that nobody had goods that they could take from the Bogoro area, for only trees were left: "there was nothing, nothing to pillage. Everything had been burnt. There were only the bricks in the houses that had been built in Bogoro that were left."¹⁶⁷³ That nothing was left contradicts P-250's evidence too, that goods were, in fact, pillaged.¹⁶⁷⁴ Again, no trier of fact could possibly rely on evidence – and from a prosecution witness, no less – that not only is so fundamentally contradictory in and of itself, but also, with the very case that the prosecution is seeking to advance.

918. Similar criticism with regard to the credibility of P-161, who has dual witness-victim status, is also advanced. Whilst P-161 welcomed the possibility of compensation for the loss of [REDACTED] – at a value of almost [REDACTED]¹⁶⁷⁵ – the evidence suggests instead that a loss, if indeed any, was incurred during the [REDACTED] Bogoro attack.¹⁶⁷⁶ That P-161 did not lose [REDACTED] as a result of the 24 February 2003 attack is also confirmed by D2-176.¹⁶⁷⁷ In fact, the evidence allows for the possibility that P-161 may be seeking compensation for [REDACTED] that may not all have belonged to him at the relevant

¹⁶⁶⁹ P-219-T-208-pp.77-79 (FRA-pp.67-69); D2-300-T-317-pp.58-59 (FRA-pp.50-51); P-258-T-286-p.42 (FRA-p.37).

¹⁶⁷⁰ See P-0219-T-209-pp.8-9 (FRA-pp.8-10).

¹⁶⁷¹ P-219-T-208-pp.76-77 (FRA-pp.66-67). Cf. P-219-T-205-pp.54-55 (FRA-p.54); P-219-T-209-pp.7-9 (FRA-pp.7-10); EVD-D02-00076.

¹⁶⁷² See P-219-T-209-pp.7-9 (FRA-pp.7-10); EVD-D02-00076; P-219-T-208-pp.72-73 (FRA-pp.66-67).

¹⁶⁷³ See P-250-T-106-pp.22-23 (FRA-p.22).

¹⁶⁷⁴ P-250-T-100-p.11 (FRA-p.11).

¹⁶⁷⁵ P-161-T-112-p.43 (FRA-pp.43).

¹⁶⁷⁶ EVD-OTP-00202, dated 17-19 février 2007 (Déclaration de témoin [REDACTED]), para. 58 ("En tout, il y a eu entre trois et quatre affrontements. J'ai seulement gardé la date précise de l'affrontement du 16 décembre 2002. Ce jour là les combattants ont emporté les vaches d'un éleveur de Bogoro nommé [REDACTED]"); ICC-01/04-01/07-3202-Conf, Defence Notice of an Admission, 15 November 2011 ("[...] DRC-OTP-P-161's nickname is [REDACTED]").

¹⁶⁷⁷ See D2-176-T-255-p.48 (FRA-pp.47-48); D2-176-T-256-p.41 (FRA-pp.36-37). V-04 and D2-176 did not lose cattle on 24 February, D2-176 having testified, "I refuse to say that [REDACTED] lost anything on the 24th. I could not tell you anything that is not true. On 24 [February], the [REDACTED]. Even our own [REDACTED] was in [REDACTED].").

time.¹⁶⁷⁸ In such circumstances, and given in particular the dual status of P-161; that is, his vested interest that a conviction be entered against Mr. Katanga for compensation to be awarded, his evidence cannot then be relied upon. The same is said too, of V-04, whose alleged loss totals some [REDACTED].¹⁶⁷⁹ And whilst like P-161, V-04 also lost [REDACTED], it was not on 24 February, at which time V-04's [REDACTED] were in [REDACTED]. D2-176 was able to confirm this because his [REDACTED] were also in [REDACTED] at the time.¹⁶⁸⁰

Appropriation as indispensable for survival

919. The prevailing circumstances at the time of the events in question must be weighed when determining the occurrence – if indeed any – of pillage. Appropriation of certain goods for the purposes of survival has been held at the ICTY not to constitute pillage, provided that this threat to survival was present; that the appropriation was the only means to avoid this harm; that it was not disproportionate; and that the situation was not willingly brought about by the perpetrator himself.¹⁶⁸¹ The defence submits that such was the case in North Kivu generally at the relevant time and at Bogoro in particular, for the reasons set forth below.

920. P-12 testified that people lacked the necessary resources with which to survive, and that everyone faced difficulties for their own survival. This witness cited by way of example the person responsible for the FLPI and in charge of and responsible for Bogoro, Nombe, and Kagaba Bahagaleso (phon), who did not even have enough money to buy shoes. And whilst the Hema controlled the custom points at the borders, and were therefore lucky, according to P-12, others had “virtually nothing”. Even when the Hema regained control of Bunia – and despite having given the assurance that everything would be fine, they pillaged: otherwise, P-12 testified, they had nothing else with which to survive. This was the situation for

¹⁶⁷⁸ D2-176-T-255-pp.43-44 ([REDACTED]) (FRA-pp.43-44); P-161-T-109-pp.10, 18-19 (The witness was [REDACTED]) (FRA-pp.10-11, 17-18).

¹⁶⁷⁹ V-04-T-234-pp.26-27, 29 (FRA-pp.23-27).

¹⁶⁸⁰ D2-176-T-255-p.48 (FRA-pp.47-48); D2-176-T-256-p.41-42 (FRA-pp.36-37).

¹⁶⁸¹ *Prosecutor v. Orić*, Case No. IT-03-68, Rule 98bis Decision (Oral), 8 June 2005, T. 9027, 9029-9032. This was confirmed in *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Judgement, 15 March 2006, para. 53. The ICTY Chamber in *Orić* noted that “[...] various heads of cattle were taken away, sometimes by fighters, most of the time by apparent civilians.” The defence in the current case maintains its position that liability for pillage may arise, *inter alia*, only if the accused person exercised effective control over the perpetrator(s) in question. A ground for excluding criminal responsibility before the ICC similar to that in *Orić* is in Article 31(d), which reads in relevant part: “In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct: (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and that person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be [...] (ii) Constituted by other circumstances beyond that person’s control.”

everybody, and one had to then fend for himself. In short, people were compelled to do what they did because of prevailing circumstances.¹⁶⁸²

921. P-267 similarly testified that children in an armed group benefited from pillaging, because they had no other means of survival during the war.¹⁶⁸³ D2-148 stated in this regard, “[i]f you were under the same conditions, you might also be tempted to pillage, even if there are certain fetish conditions that apply [prohibiting pillage even after battle].”¹⁶⁸⁴ Even soldiers that collected taxes at the entrance to markets did so because they did not have any money with which to buy food.¹⁶⁸⁵

922. The threat to survival was therefore clearly present. Material difficulties abound, the appropriation of food or of other supplies or necessities required to ensure one’s survival was the only means to avoid the said harm. Just as cattle rustlers were stealing in Bogoro between August 2002 and February 2003, thieves similarly came from other villages to Bogoro, to steal cattle or food, according to P-233.¹⁶⁸⁶ Also, P-323 testified in this regard that there were not many civilians living in Bogoro (they settled there when things calmed down); otherwise, they were in Bunia or in Kasenyi, and only returned to Bogoro to find food.¹⁶⁸⁷ Such was the case too, with the 2001 Bogoro “attack”, the assailants of which comprised the members of the population, whose only aim was to steal goods.¹⁶⁸⁸

923. With regard to the proportionality of the goods so appropriated at the relevant time, there is no evidence to show that their taking was disproportionate given the circumstances.¹⁶⁸⁹ Nor can it be said that the situation generally in North Kivu, where the family income of the poorer households in 2003 was approximately 140 USD a year,¹⁶⁹⁰ or indeed in Bogoro, was voluntarily brought about either by the persons concerned or by the perpetrators themselves. In essence then, criminal liability, if any, that could be attributed to

¹⁶⁸² See P-0012-T-197-pp.42, 51-53 (FRA-pp.57-59).

¹⁶⁸³ P-267-T-171-pp.4-5 (FRA-p.4). See also P-0219-T-207-p.6 (When people were going to battle, children seized the opportunity to go and possibly take the loot) (FRA-p.7).

¹⁶⁸⁴ D2-148-T-280-pp.37-38 (FRA-pp.32-33).

¹⁶⁸⁵ P-0219-T-205-pp.22-23 (FRA-pp.21-22). Germain Katanga gave further evidence of appropriation as a means of survival and that the situation was such in Ituri at the time, that there existed a dire need of goods indispensable for survival: D2-300-T-316-pp.44-45 (The Sages gave instructions not to bother the population, “but because we did not have salaries, what do you think would happen when you find something? You will take it”) (FRA-pp.39-40). Cf. PFB, para. 102; VFB, para. 179.

¹⁶⁸⁶ P-233-T-88-pp.6, 10 (FRA-pp.7-9). See also P-250-T-101-p.8 (When the witness was in Zumbe, the UPDF attacked the groupement of Bedu-Ezekere “a lot” and pillaged everything) (FRA-p.8).

¹⁶⁸⁷ P-323-T-117-p.35 (FRA-p.34).

¹⁶⁸⁸ See V-02-T-232-p.26 (FRA-pp.22).

¹⁶⁸⁹ See e.g., *Prosecutor v. Orić*, Case No. IT-03-68, Rule 98bis Decision (Oral) (08/06/05), T. 9027-9031 (The appropriation of a few hundred heads of cattle during or following the attacks was not disproportionate).

¹⁶⁹⁰ P-267-T-173-pp.9-10 (FRA-pp.9-10).

Mr. Katanga is offset by the real and present necessity to acquire the basic needs with which to survive.

Conclusion

924. The defence submits on the basis of the foregoing, that Germain Katanga cannot be held to account with regard to pillage, be it under the relevant prohibition in international or in non-international armed conflict. The requisite elements of effective control, high threshold gravity criterion, and intent have not been met; nor in every instance, was the appropriation unlawful or indeed of protected property, insofar as the rules governing both international and non-international armed conflict are concerned. Credibility issues abound, the evidence in question is certainly not of sufficient reliability on which to corroborate, and much less base, findings beyond reasonable doubt. And in case of a finding on the charge of pillage made otherwise, the context within which appropriation took place – as a matter of survival – must be taken into account. It has further not been proved that there was an international armed conflict and that the conduct was associated with it.

D- Destruction of property

Introduction

925. The prosecution has failed to prove beyond reasonable doubt that Germain Katanga exercised the requisite effective control for a conviction to be entered for destruction of property, whether in international or in non-international armed conflict. Nor has it specifically identified, as otherwise required for liability to arise, that the property destroyed belonged to the “adverse” party to the conflict, or made a distinction between the property that could qualify as such and the property that could not. The evidence must be weighed accordingly, and where reasonable doubt exists, in favour of Mr. Katanga.

Lack of effective control by Germain Katanga over the crime

926. Germain Katanga cannot be held liable as with for the crimes of pillage and murder and wilful killing, for the destruction of property carried out by perpetrators, including civilians, over whom he did not exercise effective control.

927. The defence recalls by way of reference the participation of civilians in the attack, and of a big group of attackers, including women, men, and children, that there was a lot of shouting: “we all knew this was designed”, D2-176 testified, “to intimidate us as this was

what was often done.”¹⁶⁹¹ That civilians destroyed property during the Bogoro attack is confirmed by P-132, who, in describing the pillage testified, “There were a lot of women who took things, and everybody saw how they took these things, and then they burnt the houses”¹⁶⁹², and by P-159, according to whom the second group of attackers was composed of civilians who could burn the houses.¹⁶⁹³ Absent identification beyond reasonable doubt of who were the perpetrators that destroyed certain property, Mr. Katanga cannot be held liable for destruction of that property.¹⁶⁹⁴

Not all property destroyed was that belonging to an “enemy” or “hostile” party to the conflict

928. Contrary to what is otherwise required for the destruction to be unlawful under article 8(2)(b)(xiii), the destruction of property was not committed in all instances, against the “adverse party” to the conflict.¹⁶⁹⁵ Instead, at least some of the property in question belonged to individuals who were “aligned” with the attacking party. For example, homes in Bogoro had previously been abandoned by many Ngiti who used to live there, and that had fled to neighbouring areas.¹⁶⁹⁶ Indeed, the Lendu were the first to leave Bogoro in 1999, early 2000, when the population learned that the fighting would reach Bogoro. Persons displaced as a result of the war then came out of the bush into Bogoro, and occupied the empty Lendu houses.¹⁶⁹⁷ The destruction of this and of other such property does not fulfil the “enemy” property requirement under article 8(2)(b)(xiii). Nor does the return of the rightful owners of that property to take parts of it (*i.e.*, of their own property), amount to destruction thereof.

929. That the burden rests with the prosecution to prove the protective status of persons has been confirmed by the ICTY Appeals Chamber (*see paras 888-891, supra*), and should therefore extend also to proving beyond reasonable doubt, the protected property in question. No such distinction has been made in the present case, however. In case of doubt in a criminal trial of the status of the property or of the protection to which it is entitled at the relevant time, the principle *in dubio pro reo* must apply (*see paras 888-891, supra*). Liability pursuant to article 8(2)(b)(xiii) or to article 8(2)(e)(xii) cannot be attributed absent any such distinction made *beyond reasonable doubt*.

¹⁶⁹¹ D2-176-T-255-p.35 (FRA-p.35).

¹⁶⁹² P-132-T-140-p.54 (FRA-p.56).

¹⁶⁹³ P-0159-T-119-pp.60-61 (FRA-p.60).

¹⁶⁹⁴ In addition to civilians having destroyed at least some of the property in question, evidence that a witness merely heard that houses were being destroyed (*see e.g.*, P-132-T-139-p.10 (FRA-p.9); P-132-T-141-pp.36-37 (FRA-pp.36-37)), cannot be used to sustain a conviction against Mr. Katanga for destruction of that property.

¹⁶⁹⁵ CD, paras 309, 310, 329 and accompanying footnote.

¹⁶⁹⁶ *See* Katanga, Germain, D02-0300-T-318-pp.23-24, 28 (FRA-pp.24-25, 29).

¹⁶⁹⁷ D2-176-T-256-pp.47-50 (FRA-pp.41-43). *See also* P-233-T-87-p.46 (Certain groups started leaving Bogoro as early as around 1992) (FRA-p.55).

Conclusion

930. The defence submits on the basis of the foregoing, that Germain Katanga cannot be held to account with regard to destruction of property, be it under the relevant prohibition in international or in non-international armed conflict. The requisite elements of effective control have not been met; nor in every instance, was the destruction of property belonging to the “adverse” party to the conflict, as otherwise required for conviction to ensue. Nor has it been proved that the conduct was associated with an international armed conflict.

E- Sexual Slavery and Rape

931. Germain Katanga has been charged with four sexual offences, of rape and sexual slavery, both as crimes against humanity pursuant to Article 7(1)(g)1 and 2 of the Statute, and as war crime pursuant to Article 8(2)(b)(xxii)1 and 2 of the Statute. He is charged for having committed, on or about 24 February 2003, jointly with Ngudjolo through other persons, the rape and sexual enslavement of civilian female residents or present at Bogoro village.¹⁶⁹⁸ The Prosecution has recognized that the crimes of rape and sexual slavery were not part of the common plan, with which the defence agrees, but argued that Katanga and Ngudjolo knew that they would occur in the ordinary course of events,¹⁶⁹⁹ with which the Defence disagrees.

932. The defence notes that the basic mental element differs for each type of offence. In the case of the crime against humanity, the prosecution must demonstrate that the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. In the case of the war crime, the perpetrator must be aware of the factual circumstances that established the existence of an armed conflict.¹⁷⁰⁰ In order to be found responsible for rape or sexual slavery, in accordance with Article 30 of the Statute the prosecution must additionally demonstrate that Germain Katanga acted with intent and knowledge in relation to each of the material elements of the offence.¹⁷⁰¹ That is he must mean the conduct to take place and must be aware of the material circumstances. This implies *dolus directus*, as confirmed by the Pre-Trial Chamber, and not *dolus eventualis*.¹⁷⁰²

¹⁶⁹⁸ ICC-01/04-01/07-716-Conf, Decision on the Confirmation of Charges (“CD”), 26 September 2008, pp 212-213.

¹⁶⁹⁹ PFB, para. 668.

¹⁷⁰⁰ See CD, para. 341.

¹⁷⁰¹ See CD, para. 346. ICC-01/05-01/08-424, paras 163, 284.

¹⁷⁰² CD, fn. 229 (referring to ICC-01/04-01/06-803-tEng, para. 351), paras. 346, 433, 441, 531.

933. Whilst sexual slavery is a continuing crime, rape is not: rather, it is a specific act, which, of course, may be repeated.¹⁷⁰³ In such circumstances, fairness dictates that the defence has proper notice of the date on which the offence was committed in the charge itself. Accordingly, it is submitted that only rape committed on or about 24 February 2003 may be the subject of a conviction, if any, on these charges.

(1) Rape: Insufficient evidence regarding the commission by Germain Katanga through others at Bogoro on or about the 24th February 2003

934. There is insufficient evidence to establish beyond reasonable doubt that persons under the effective control of Germain Katanga committed the crime in question immediately before, during, and/or immediately after the February 2003 Bogoro attack. Only two witnesses testified that they were raped at Bogoro on or around the relevant time, P-132 and P-249; they are unreliable, however, because they made no such mention of it when first interviewed by the prosecution. Furthermore, other witnesses testified that they never heard about any incidents of rape at Bogoro and that it was prohibited, and thus not a common practice.

(a) Insufficient evidence regarding the war crime of rape

P-132's Testimony regarding the commission of rape at Bogoro

935. P-132 alleged that she was raped at Bogoro and then taken as a forced wife to [REDACTED] but the Defence submits that her evidence should not be relied on because she has provided highly conflicting accounts, especially on the issue of rape and sexual slavery, but not only.

936. The defence accepts that P-132 was present in Bogoro on 24 February 2003, that she [REDACTED], that she was abducted from Bogoro by Ngiti combatants, and that she remained with the Ngiti until she arrived in [REDACTED], where she [REDACTED], [REDACTED]. The difficulties arise with regard to the following aspects of her evidence, given in particular, that P-132 was cooperative in her answers given to the prosecution, the legal representatives, and to the Bench, but was evasive, and did not want to respond to questions in cross-examination when asked to explain details of her evidence, and was hostile, even, when questioned by the defence.

¹⁷⁰³ For the criteria of the continuing crimes, see ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 179, and ICC-02/11-15, Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, paras 68-69, fn. 44.

937. Whilst the defence accepts that her being upset was genuine and understandable at times in her evidence, it was less so at others. This was particularly so when used as a means to evade providing answers to what was believed to be her real date of birth and age, the current location of her husband, and whether one of her electoral cards was a forgery, [REDACTED], by saying that she would answer “another day”.¹⁷⁰⁴ The postponement of such answers appears to have been an attempt to consult [REDACTED]. It is therefore apparent that her husband may have influenced her testimony in at least in some way.¹⁷⁰⁵

938. The hearing was adjourned at her request, after having been asked about very limited information concerning her wedding ceremony (whether she received any gifts).¹⁷⁰⁶ This reaction is believed to have been set against a particular history that she has not shared with the Court, and was therefore used as a buffer between her and her questioner¹⁷⁰⁷ - it is the defence case that P-132 married [REDACTED]. In fact, the witness even suggested speaking to the prosecution alone.¹⁷⁰⁸

939. Despite the Trial Chamber having granted the request by P-132 for an adjournment, the hearing the following day was also cancelled because the witness apparently did not feel well after her limited cross-examination.¹⁷⁰⁹ This is worrisome, given that P-132 never had any such reaction during the approximately 42 hours of interviews by the prosecution.¹⁷¹⁰

940. When the hearings did take place, and when P-132 did provide answers in cross-examination, she was inconsistent regarding her name, place of birth, and the identity of her parents, particularly when one compares the information on her passport and on her different electoral card disclosed by the VWU and by the prosecution.¹⁷¹¹ She unconvincingly explained that she provided different details in the said documents to help or protect

¹⁷⁰⁴ Cf. P-132-T-141-pp.75-78 (FRA-pp.77-80) ; P-132-T-142, page 14-l.25 (FRA-p.15-l.8-9) ; P-132-T-141-p.53 l.15-21 (FRA-p.55-l.3-10), p.54 l.19-22 (FRA-p.56-l.5-10); EVD-CHM-00002; P-132-T-141-p.73-l.12, to p.75 (FRA-p.75-l.7-p.77) ; P-132-T-142-p.12-l.2 to p.17-l.2 (FRA-p.12-l.9-p.17-l.11); P-132-T-141-pp.72-73 (FRA-pp.73-75), p.75-l.1-5 (FRA-p.77-l.1-5) ; P-132-T-141-p.75-l.6-7 (FRA-p.77-l.6-7).

¹⁷⁰⁵ See P-132-T-142-pp.2-4 (FRA-pp.1-4). Closed session.

¹⁷⁰⁶ P-132-T-142-p.50 (FRA-pp.50-51). The objection of P-132 led to the end of the hearing.

¹⁷⁰⁷ P-132-T-143-p.4 (FRA-pp.3-4).

¹⁷⁰⁸ P-132-T-141-p.80-l.14-17 (FRA-p.82-l.14-17).

¹⁷⁰⁹ P-132-T-143-pp.1-9 (FRA-pp.1-9).

¹⁷¹⁰ P-132-T-143-pp.3, 5 (FRA-pp.4, 4).

¹⁷¹¹ With regard to these differences, see EVD-CHM-00001;EVD-CHM-00002; EVD-OTP-00112 ; T-138-pp. p.24-l.16, 28-l.2-3, 25-l.9-15, 27-l.6-7, 43-59, 60-67 (FRA-pp.24-l.21-22, 28-l.17-19 [discrepancies noted], 25-l.16-24, 27-l.19-20, 45-62, 63-70). Her real name appears to be [REDACTED]. However, in all her prosecution interviews, she instead gave the name [REDACTED]. In court, though, she admitted that [REDACTED] was not her real name. See P-132-T-141-p.81 (FRA-p.83). And whilst she said that she was born on [REDACTED], her three identity documents indicate that she was instead born in [REDACTED]. In her initial prosecution interview, she said that she was born in [REDACTED], but said in an interview that year, that she was born in [REDACTED], but grew up in [REDACTED]. See T-138-p.25-l.23 (FRA-p.26-l.9-10).; T-138-p.26-l.8-9, p.62 (FRA-pp.26-l.22, 65); P-132-T-141-pp.55-56 (FRA-p.55). With regard to P-132 acknowledging that the name of her parents on EVD-OTP-00112 are incorrect, see P-132-T-141-p.63-l.14-20 (FRA-p.64-l.21-p.65-l.4); P-132-T-141-p.63 (FRA-pp.64-65).

herself,¹⁷¹² and with regard to her passport, issued in 2009, that she simply “forgot” to change her place of birth.¹⁷¹³ The Defence notes that it is surely perverse to adopt as ‘protection’ [REDACTED], the only name that those searching for you know you by.

941. When asked the same question again the following day, P-132 testified in relevant part, “I can even lose consciousness if you lead me into this issue. It distresses me very much, and it brings back very bad memories,”¹⁷¹⁴ whereupon a break ensued.

942. These inconsistencies, combined with the belated disclosure to the defence – including during her testimony, no less – significantly hampered the defence in its investigations of her story. To cite one difficulty by way of example, the fact that P-132 was called [REDACTED], was confirmed by P-132 only during her cross-examination.¹⁷¹⁵ P-132 acknowledged that her parents did not know her by the name [REDACTED].¹⁷¹⁶ Despite these difficulties, the defence was nevertheless able to get closer to the truth as to her identity and indeed, as to her account.

943. Other inconsistencies wholly unrelated, the defence submits, to protecting her identity, arose from her evidence that in 2003, [REDACTED], but then testifying, firstly, that her father died during the Bogoro attack, and then, that he was already deceased before the Bogoro attack.¹⁷¹⁷ Also contradictory is her having then specified that she married [REDACTED].¹⁷¹⁸ During her interview in December 2007, she described herself as unmarried but with a partner, whom, she confirmed in Court, was [REDACTED].¹⁷¹⁹

944. With regard to her Bogoro evidence, P-132 testified that she was visiting her family at Bogoro when the war began and stayed in a house located [REDACTED].¹⁷²⁰ This departs significantly from her statement, according to which, “Our home was [REDACTED].”¹⁷²¹ And with regard to her injury allegedly sustained, the expert medical reports could not

1712 See, *inter alia*, T-138-p.62-63 (FRA-p.65), P-132-T-141-p.59-l.20-24 (FRA-p.61-l.1-5). See also P-132-T-141-p.56 (FRA-p.57).

1713 T-138-p.63-l.14-23 (FRA-p.65-l.22-p.66-l.5).

1714 P-132-T-142, p 8-l.18 to p.10. l. 8 (FRA-p.8-l.21-p.10-l.9).

1715 P-132-T-141-pp.60-61 (FRA-pp.61-62). See also P-132-T-142-p.20-l.13-19 (FRA-p.20-l.20-p.21-l.2), where P-132 said that it was her name and that some other people may have the same name; P-132-T-141-pp.58-59 (FRA-pp.59-61) (The defence put to the witness that the name [REDACTED] was a Hema name, whilst that of [REDACTED], which she gave to the prosecution was incorrect, and that P-132 was not known in her family by these names. The witness conceded that her parents did not know the name [REDACTED]).

1716 P-132-T-141-pp.58-59 (FRA-p.60-61).

1717 P-132-T-142-p.21-l.8-19 (FRA-p.21-l.16-25); T-138-p.70-l.8-13 (FRA-p.73-l.7-13); T-138-p.71-l.18-19, p.73-l.5-7 (FRA-pp.74-l.19-21, 76-l.9-11).

1718 Name of P-132’s husband written by P-132 on the paper admitted as EVD-OTP-00110; see T-138, pp 36-38 (FRA-pp.36-39); P-132-T-142-p.21-l.20-25 (FRA-p.22-l.2-7).

1719 P-132-T-143-p.14-l.5-8, p.19-l.6-24 (FRA-pp.14-l.19-21, 19-l.4-23).

1720 P-132-T-138-p.40-l.23-p.41-l.4 (FRA-p.42-l.5-11). See also P-132-T-142-p.22-l.15-25 (FRA-p.22-l.22-p.23-l.10); T-138-p.73-l.10 to p.74-l.4 (FRA-p.76-l.14-p.77-l.12); P-132-T-142-p.23-l.15-18 (FRA-p.23-l.23-25).

1721 P-132-T-142-p.23 (FRA-p.23).

corroborate conclusively her story, stressing instead that there was no such certainty, and that the injury in question could not be dated.¹⁷²²

945. The inconsistencies extend to her evidence about having been captured the day following the Bogoro attack¹⁷²³ (i.e. the 25th), which departs significantly from her statement, in which she said that she was captured the third day of the Bogoro attack (i.e. the 26th). This was not a mere “error”,¹⁷²⁴ but was instead a deliberate obfuscation by P-132 of the truth.

946. This is all the more apparent when contrasting her evidence that she was raped at Bogoro¹⁷²⁵ with her previous statement, in which she said that she was raped around [REDACTED].¹⁷²⁶ Her husband’s influence on her answers given when interviewed by the prosecution, is apparent: after five days of having been interviewed, she then first tells of being raped at Bogoro.¹⁷²⁷ However, both before and after the intervention of her husband, she told the investigators that it was the first time she had had a sexual intercourse (when in fact she had been [REDACTED]).

947. Even in the event this rape occurred at Bogoro, the circumstances in which she says it happened do not suggest that this was other than a relatively isolated event. She said that she was not further raped *en route* to [REDACTED]. Nor did she draw this to anyone’s attention later or make any complaint to authority. This incident of rape she said she was subjected to was committed surreptitiously - in bushes. This was not an act that would necessarily have come to the attention of authority or to those not directly participating in the assaults.

948. P-132’s motives for giving evidence may be affected by a belief that she is eligible for compensation and further benefits that come with relocation. The witness filed an application for reparation *after having given evidence*, as did her husband, also after completion of her testimony, and after the trial chamber outlined at the beginning of her testimony, the procedure by which she could undertake to become eligible for compensation.¹⁷²⁸ When asked in cross-examination if she felt that she was a victim and therefore eligible for compensation,

¹⁷²² [REDACTED].

¹⁷²³ P-132-T-141-p.36-l.21, to p.37-l.22 (FRA-p.37-l.12-p.38-l.15).

¹⁷²⁴ P-132-T-142-p.27-28 (FRA-p.27).

¹⁷²⁵ P-132-T-139-p.13-l.15-18, p.14-l.1, p.19-l.2-25, p.20-l.1-7 (FRA-p.13-l.13-16, p.13-l.25, p.18-l.24-p.20-l.3, p.20-l.3-10); P-132-T-141-p.37-l.3-22 (FRA-p.37-l.20-p.38-l.15).

¹⁷²⁶ P-132-T-143-p.23-l.15-21 (FRA-p.23-l.9-15).

¹⁷²⁷ P-132-T-143-p.25 (FRA-pp.24-25).

¹⁷²⁸ See P-132-T-141-pp. 21-22, 42-46 (FRA-pp.21-22, 44-47); ICC-01/04-01/07-2194-Conf-Exp-Anx1-Red, Rep a/1205/10, dated 25 May 2010; ICC-01/04-01/07-2194-Conf-Exp-Anx2-Red, Rep a/1206/10, dated 25 May 2010. By Oral Decision, the Trial Chamber stated that the applications were filed late and could not be recorded, but that participation in the proceedings is not a prerequisite for filing an application for reparations: T-186-Red-p.1-l.15, to p.5-l.11 (FRA-pp.1-4).

the witness asked if there was a difference between a victim and a witness.¹⁷²⁹ Of note also, is her complaint in her prosecution statement – at which her partner was present – that the NGOs “did not help [her] at all.”¹⁷³⁰ This is to be read in conjunction with P-132 having confirmed, when she was first interviewed by the prosecution, that she had already heard that someone by the name “Germain Katanga” had been arrested and transferred to The Hague.¹⁷³¹ Her evidence must thus be weighed accordingly.

949. Also, P-132 was relocated by the prosecution, despite the initial refusal of the Registry to do so, and to include her in the ICC protection programme (“ICCPP”).¹⁷³² Also as to the credibility of P-132, she was introduced to the prosecution by Intermediary P-143,¹⁷³³ whose questionable influence over prosecution witnesses is a matter of grave concern to the defence. Whilst mere association with P-143 is not of itself a basis to disbelieve P-132’s account of events, the fact remains that intermediary P-143 is linked with a number of other witnesses that have similarly provided flawed and untruthful evidence (witnesses 28, 279, 280, and 287).

P-249’s Testimony regarding the commission of rape at Bogoro

950. **P-249** alleged that she was raped at Bogoro and then kept as the wife of a soldier at [REDACTED], but the defence submits that the discrepancies regarding her identity and her description of some specific events are so extensive that no reasonable tribunal could find her evidence reliable or credible.

951. It is of significance, first and foremost, that the prosecution informed the defence that the intermediary of P-249 was P-316, yet P-249 denied knowing him.¹⁷³⁴ Also the Trial Chamber noted that P-249 seemed annoyed when counsel conducted his cross-examination,

¹⁷²⁹ P-132-T-143-p.15 (FRA-p.15).

¹⁷³⁰ P-132-T-143-pp.14-15, 19 (FRA-pp.14-15, 19).

¹⁷³¹ P-132-T-142-p.20-l.24, to p.21-l.2 (FRA-p.21-l.7-10).

¹⁷³² Once she was relocated by the prosecution, the Pre-Trial Chamber ordered the Registry to take charge of her; she was accordingly included in the ICCPP. See the following admission as read out in court, at P-132-T-141-p.67-l.21-25 (FRA-p.69-l.10-14): “Witness 132 was preventively relocated by the Office of the Prosecutor, together with her family, on [REDACTED]. The Victims and Witnesses Unit accepted Witness 132 in the ICC Protection Programme on 19 May, 2008. As of April 2010, the immediate costs of the Office of the Prosecutor expended for Witness 132 were of \$6,635.89.” See also ICC-01/04-01/07-398, Prosecution’s Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238 and 287, 16 April 2008, and ICC-01/04-01/07-423-Conf, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 21 April 2008.

¹⁷³³ The following admission was read in Court: ‘On 20 November, 2007, intermediary P-143 met with Witness 132 and facilitated the first contact of Witness 132 with the OTP.’ P-132-T-141-p.67 (FRA-p.68). See also ICC-01/04-01/07-2214-Conf-AnxB, 25 June 2010, p.2.

¹⁷³⁴ ICC-01/04-01/07-2214-Conf-AnxB, p.8 and P-249-T-137-pp.14, 16-l.10-13 (FRA-pp.14, 16-l.22-25).

and asked her to remain calm,¹⁷³⁵ an attitude she had not displayed before and which could show a bias against the Defence.

952. Furthermore, it is worth noting that P-249 was relocated [REDACTED],¹⁷³⁶ which as submitted elsewhere, may be an incentive to testify against Germain Katanga.

953. From the outset of her evidence, and compared to her previous statements, the witness gave vastly differing accounts of her name, her age, and her place and date of birth.¹⁷³⁷ She explained unconvincingly that the date and place of birth on the passport are an “error”, and that those interviewing her from the prosecution were “confused” when they took her statement, despite her having signed it, of course.¹⁷³⁸

954. P-249’s original account given to the prosecution about the events in question is also markedly different from her testimony, in several significant aspects. For example, P-249 first said in her evidence that during the attack on Bogoro 24 February 2003, she was in [REDACTED].¹⁷³⁹ According to her previous statement, however, she “had been staying in Bogoro a long time. My mother and father live there, which is why I was there”. When this discrepancy was put to her, she replied that she did not live in Bogoro; and with regard to her having said in her statement, “My mother’s house was [REDACTED], in Bogoro”, she first replied that it was correct, and then that she was not “aware” of this information.¹⁷⁴⁰ Also when her statement was put to her (“After the Ngiti overran the village and chased the Hema militia away, the Ngiti militia had a camp in the school in the village. This school was the [REDACTED]”), she responded that their house was [REDACTED].¹⁷⁴¹ Of note is that the Bogoro Institute was not a Catholic primary school; rather, the Catholic primary school was the Kavali Institute.

955. Also according to her 2006 statement, during the Bogoro attack, “My family just ran away as soon as we heard the gun-fire [...] My mother and I ran separately. We couldn’t determine which direction was best. We just ran.” P-249 testified that her family was in [REDACTED], and not in Bogoro.¹⁷⁴² Despite other such statements, including that her mother’s house in Bogoro was burned in the attack, and that “the members of my family who

¹⁷³⁵ P-249-T-137-p.20, 33-l.12-15, p.56-57 (FRA-pp.20, 33-l.14-17, 55-57).

¹⁷³⁶ P-249-T-137-pp.22-23 (FRA-pp.21-24); ICC-01/04-01/07-1033-Conf-Exp 07-04-2009, para. 44.

¹⁷³⁷ P-249-T-135-p.30-l.4-17 (FRA-p.31-l.6-19); P-249-T-137-p.17-l.4-6 (FRA-p.17-l.16-18); P-249-T-136-p.40-l.13-24, p.41-l.11 (FRA-p.42-l.25-p.43-l.10, p.43-l.21); EVD-OTP-00056, p.21, [REDACTED]; P-249-T-137-pp.17-19, 21, 37 (FRA-pp.17-20, 21-22, 37).

¹⁷³⁸ P-249-T-135-p.31-l.12-16 (FRA-p.32-l.12-16); P-249-T-136-p.41-l.1-4, p.42-l.22, to p.43-l.2 (FRA-p.43-l.12-15, p.45-l.5-8); P-249-T-137-pp.21, 36 (FRA-pp.21-22, 36).

¹⁷³⁹ P-249-T-135-Red-p.38-l.18-24, 39 (FRA-p.39-l.3-13, 39); P-249-T-136-p.71 (FRA-p.74).

¹⁷⁴⁰ P-249-T-137-pp.37-38 (FRA-pp.37-38).

¹⁷⁴¹ P-249-T-137-p.50 (FRA-pp.49-50).

¹⁷⁴² P-249-T-137-p.38, 48 (FRA-pp.38, 47-48).

fled when Bogoro was attacked were my mother, my first daughter,” P-249 reiterated in her evidence that she was instead living in [REDACTED].¹⁷⁴³

956. That initial interview took place in December 2006, when events were fresher in her recollection, and was conducted over several days with three interviewers and an interpreter, and the record read back and agreed. The accuracy of the record of the interview cannot be in doubt. Indeed, the Prosecutor stated it had all been recorded. When asked why the 2006 interview got it so wrong, P-249 replied that their house that was burnt was in [REDACTED], not Bogoro, and that that is what she told the investigators. When counsel asked whether she noticed all these inconsistencies when the 2006 statement was read back to her in Swahili, she replied:

“I see that you want to confuse me. I think that we have to stop. Please leave -- let me be. You are confusing me. (...) Should I accept lies, that I said lies? No. (...) You see -- so I propose that we stop because these are things that I don't know. I cannot accept lies that I don't know. (...) It is as if you want to cause confusion. You want me to tell lies that I don't know.”¹⁷⁴⁴

957. When interviewed a second time in 2009, P-249 provided an account similar to that in her evidence (that she was living in [REDACTED], and only visiting Bogoro). In explaining these inconsistencies, she testified that these were all “mistakes” and “misunderstandings”.¹⁷⁴⁵ And despite the prosecution having been given the opportunity by the Presiding Judge “to try to re-establish with the witness what [it] considers need[ing] to be re-established, given that she has been evasive with regards to the different interviews that were carried out and which happened on successive occasions,”¹⁷⁴⁶ there was no such re-examination.

958. In the description of her arrival at Bogoro, she was also inconsistent between her 2009 interview and her testimony.¹⁷⁴⁷ P-249 testified that during the night, the attack on Bogoro began. She ran, was hit in the [REDACTED], and hid under a tree close to the roundabout.¹⁷⁴⁸ She testified that in the morning, she went out and was seen by a group of [REDACTED] soldiers who brought her in the bush and all of them raped her. She does not know their ethnicity but ‘could say that they were Ngiti because they were small in stature’.¹⁷⁴⁹ Yet, her original 2006 statement spoke of only [REDACTED] men who took her, with only one raping her, [REDACTED].¹⁷⁵⁰ In Court, P-249 repeatedly referred to [REDACTED] as the main

¹⁷⁴³ P-249-T-137-pp.48-49, 52 (FRA-pp.48-49, 51-52).

¹⁷⁴⁴ P-249-T-137-pp.55-56 (FRA-p.55).

¹⁷⁴⁵ P-249-T-137-p.58 (FRA-pp.57-58).

¹⁷⁴⁶ P-249-T-137-p.47 (FRA-pp.46-47).

¹⁷⁴⁷ P-249-T-135-p.46 (FRA-p.46); P-249-T-136-p.72 (FRA-p.75); P-249-T-137- pp.27-28, 32, 72-73 (FRA-pp.27-28, 32, 71-72).

¹⁷⁴⁸ P-249-T-135-Red-pp.40, 46 (FRA-pp.40-41, 46); P-249-T-137-p.34 (FRA-p.34).

¹⁷⁴⁹ P-249-T-135-Red-pp.41, 50 (FRA-pp.41, 50).

¹⁷⁵⁰ P-249-T-137-pp.73-74 (FRA-pp.72-73).

assailant and the man with whom she was kept.¹⁷⁵¹ Despite this clear and repeated reference to [REDACTED], P-249 provided a different protagonist, [REDACTED], in her 2006 statement.¹⁷⁵² P-249 had to be led to mention the name [REDACTED].¹⁷⁵³ She said that she mentioned [REDACTED] since 2006, while his name does not appear at all in her statement.¹⁷⁵⁴ P-249 acknowledged that the fact that she was raped by [REDACTED] men was not in her statement; she said she was ashamed at the time of her statement, but was ‘prepared to say it today’.¹⁷⁵⁵ Given these numerous, significant inconsistencies, P-249 should not be believed in this regard.

959. It should be noted that despite leading questions, she gave very limited evidence. By her own account, she had very little opportunity to view, or to have knowledge of, what was happening at Bogoro.¹⁷⁵⁶

(b) Others Testimonies and Evidence regarding the commission of rape at Bogoro

960. P-353 testified that she did not witness any case of rape in Bogoro the day of the attack and that after the events, she did not hear people talk about it.¹⁷⁵⁷ P-287 testified to the same effect.¹⁷⁵⁸ For his part, P-279¹⁷⁵⁹ said in his statement, “I do not think that any women were abducted during the attack”, but departed without explanation in his evidence from this, explaining that he could have “forgotten” to mention it initially.¹⁷⁶⁰ Similarly, P-250 did not mention any occurrence of rape at Bogoro or elsewhere, whilst he allegedly participated in the Bogoro attack, as well as in others.¹⁷⁶¹

961. Importantly, Sonia Bakar’s ‘*Report on the Abuses Committed in Ituri from January to March 2003*’ does not mention any occurrence of rape at Bogoro, despite having interviewed approximately 100 survivors of the Bogoro attack shortly thereafter. In fact, she testified that she and her team did not have any cases of rape referred to them.¹⁷⁶²

¹⁷⁵¹ P-249-T-135-pp.52, 57, 60, 62, 71 (FRA-pp.52, 57-58, 60, 62, 71-72).

¹⁷⁵² P-249-T-137-pp.73-75 (FRA-pp.72-74).

¹⁷⁵³ P-249-T-135-pp.52-53 (FRA-pp.52-53).

¹⁷⁵⁴ P-249-T-137-p.75 (FRA-p.74).

¹⁷⁵⁵ P-249-T-135-p.55 (FRA-p.55).

¹⁷⁵⁶ P-249-T-137-p.29-l.13-16 (FRA-p.29-l.14-17); P-249-T-136-p.47-l.24-p.48-l.4, 66-l.21-23, 74-75 (FRA-p.49-l.18-p.50-l.1, p.69-l.23-p.70-l.1, pp.77-78).

¹⁷⁵⁷ P-353-T-215-p.31 (FRA-pp.26-27).

¹⁷⁵⁸ P-287-T-130-p.20 (FRA-p.20).

¹⁷⁵⁹ P-279-T-148-Red-pp.21-23 (FRA-pp.22-23).

¹⁷⁶⁰ T-153-pp.5-6 (FRA-pp.5-6).

¹⁷⁶¹ There is no reference to rape, abduction of women, forced wives, etc., in his all testimony.

¹⁷⁶² EVD-OTP-00205/MONUC Final Report/paras. 67-72; P-317-T-229-p.33-l.10-13 (FRA-p.28-l.19-22).

962. The prosecution has thus failed to establish that rape was a common practice in Ituri. In fact, both Germain Katanga and P-28¹⁷⁶³ testified that rape was prohibited, in particular by the Sages at Aveba.¹⁷⁶⁴ Indeed, when *fétiches* are used in war, they carried with them instructions, such as the prohibition of rape before the battle at Bogoro.¹⁷⁶⁵

963. Also, the defence notes that none of the witnesses who described in detail the previous attacks against Bogoro, on 9 January 2001, 14 August 2002 or in the days or weeks preceding the 24 February attack, led by Lendu or Ngiti, mentioned the occurrence of rape during these previous attacks.¹⁷⁶⁶

964. That rape was not widespread is evidenced by lack of any reference by any of the more than 80 victims of the 5 September 2002 Nyakunde attack – which was organised and led by APC Commander Faustin and Ngiti Colonel Kandro with their APC, Ngiti and Mai-Mai forces – who were interviewed in the main MONUC Special Report.¹⁷⁶⁷ Nor does it mention any occurrence of rape during the 4 March 2003 Mandro attack or the 6 March 2003 Bunia attack,¹⁷⁶⁸ with which there is no direct link with Germain Katanga and/or Aveba. Nor does Sonia Bakar's '*Report on the Abuses Committed in Ituri from January to March 2003*', mention any occurrence of rape at Mandro or at Bunia, during the 6 March 2003 attack there, despite having interviewed some 70 persons.¹⁷⁶⁹ The same is noted of the MONUC Special Report documenting the 31 May and 15 July 2003 attacks against Tchomia.¹⁷⁷⁰ Importantly, none of these attacks were linked either with Germain Katanga and/or with Aveba.

965. And whilst it refers to the commission of sexual slavery and rape in general,¹⁷⁷¹ it does not specify by whom, where, or indeed when it occurred. Such general information gathered for the purposes of a human rights mission, without more, cannot be taken into account to conclude that rape and/or sexual slavery was committed widely in Ituri at the time.

¹⁷⁶³ D2-300-T-318WT-p.4-l.2-14 (FRA-p.3-l.19-p.4-l.4); P-28-T-218-p.65-l.18-p.67-l.6, p.70-l.18-p.71-l.3 (FRA-p.57-l.8-p.58-l.16).

¹⁷⁶⁴ D2-300-T-316WT-p.45-l.13 to p.46-l.11 (FRA-p.40-l.8-p.41-l.2).

¹⁷⁶⁵ P-279-T-149-Red-p.14-l.2-14 (FRA-p.14-l.13-p.15-l.1); P-280-T-157-pp7-8, 17-19 (FRA-pp.7-8, 17-18); D2-148-T-279, pp.29, 31-32, 41 (FRA-pp.25-26, 28, 36); D2-148-T-280-p.67-68 (FRA-p.59). See also D2-300-T-316-p.44 (FRA-p.39); D2-300-T-324-p.89-l.6-8 (FRA-p.80-l.25-26); D2-148-T-281-Red-pp.20-21 (FRA-pp.16-17).

¹⁷⁶⁶ See P-233, P-159, or D2-148,

¹⁷⁶⁷ EVD-OTP-00206, MONUC, Special report on the events in Ituri, January 2002-December 2003, paras 52, 56-58.

¹⁷⁶⁸ EVD-OTP-00206/MONUC Special Report/paras 71-72, 73-74. See also D2-300-T-323WT-pp.22-23 (FRA-pp.21-22)

¹⁷⁶⁹ EVD-OTP-00205/MONUC Final Report/paras 73-78, 79-84.

¹⁷⁷⁰ EVD-OTP-00206/MONUC Special Report, paras 84-87.

¹⁷⁷¹ EVD-OTP-00206/MONUC Special Report, paras 1, 35-36.

966. Another MONUC Military Daily Report of 24 July 2003 mentions an attack against Kasenyi on 25 July 2003, by 'Lendus from Ngeti' (sic), but does not mention any occurrence of rape.¹⁷⁷²

967. And whilst a HRW report references the occurrence of rape in Kilo in March 2003 in a joint UPDF-FNI attack, the FRPI was not involved therein, and exercised no effective control over the alleged perpetrators. These acts cannot then be taken into account for the charge of rape.¹⁷⁷³ The defence reiterates this submission with regard to another such report, in the absence in particular of identifying the alleged perpetrators and of where the acts, if committed, took place.¹⁷⁷⁴

968. The prosecution has therefore clearly failed to establish that rapes were frequently and consistently committed by FNI/FRPI members prior to, or after the 24 February 2003 attack on Bogoro, or indeed, throughout the region of Ituri, to amount to rape comprising part of a widespread and systematic attack against the civilian population living in Ituri.

(2) Sexual Slavery: Insufficient evidence regarding the commission by Germain Katanga through others following the attack against the village of Bogoro on 24 February 2003

969. The Defence submits that there is insufficient evidence to establish beyond reasonable doubt that following the 24 February 2003 attack on the village of Bogoro, FNI/FRPI combatants committed sexual enslavement of women abducted from Bogoro.

970. The Prosecution case regarding sexual slavery relies essentially on the direct testimony of P-132, P-249 and P-353, who all testified that they were taken as wives following the Bogoro attack. Given the analysis developed herein, their evidence is simply not credible, and should not be relied upon in this regard, and certainly not as the required proof beyond reasonable doubt.

Insufficient evidence regarding the war crime of sexual slavery

P-132's testimony regarding the commission of sexual slavery

971. With regard to the various changes in account in the course of her interviews and testimony, P-132 has no real reason, objectively speaking, to change her story. That she was found hiding in the bush on [REDACTED] as in one of her statements, and her testimony that

¹⁷⁷² EVD-OTP-00218, UN, MONUC Bunia, Military Daily Report 24 July 2003, para. 6.

¹⁷⁷³ EVD-OTP-0222, HRW Report 'Le Fléau d'or – République Démocratique du Congo', 2005, pp 0406-0410.

¹⁷⁷⁴ EVD-OTP-00195, *Rapport final de la Commission de pacification de l'Ituri*, pp 0238, 0262, 0278, 0285, 0308.

this was an error (that she was instead found on [REDACTED]), does not protect her identity, which is otherwise used as the reason for which she has given different accounts.

972. The same is true too, of having first said to the Prosecution in their interview with her, that she was taken to [REDACTED], and in a second statement, to [REDACTED] and [REDACTED], and finally, in her testimony, that these accounts were not true, and that she was instead taken to [REDACTED] camp.¹⁷⁷⁵ The issue, then, is one of credibility, and not one of seeking anonymity or protection in giving conflicting – and so very fundamentally different – accounts.

973. Also, P-132 testified that at [REDACTED] military camp, she said that she was a [REDACTED]¹⁷⁷⁶ by the name of [REDACTED];¹⁷⁷⁷ in her first statement, however, she in fact says that she told them that she was [REDACTED], that she heard from a man whose wife was called [REDACTED] that she been taken from Bogoro to a Ngiti camp.¹⁷⁷⁸ In the second part of this statement, after what appears to be the result of undue influence by [REDACTED] during a break, she says instead that she was [REDACTED].¹⁷⁷⁹

974. Other inconsistencies in her statements include the persons with whom she is alleged to have been kept,¹⁷⁸⁰ which does not tally with her evidence in court, leading inevitably, to P-132 conceding that she had not told the truth.¹⁷⁸¹ [REDACTED] influence on her answers given when interviewed by the Prosecution, is clear.¹⁷⁸² She gives details in the form of names after having had an extended break, during which it is believed that she consulted [REDACTED], who was present. The providing of such detail only after these consultations is contrasted with her inability prior to the breaks, to recall any such detail. This was the case too, in her evidence with recalling [REDACTED], only after the break in court: before the said break, she was unable to recall the name of any person of authority at Kagaba.¹⁷⁸³ Of note in this regard, is [REDACTED].

¹⁷⁷⁵ P-132-T-139-p.12-l.20-21 (FRA-p.12-l.15-16); P-132-T-143-pp.13-14, 27-30 (FRA-pp.13-14); P-132-T-143-p.19-l.25- p.21-l.16 (FRA-p.19-l.24-p.21-l.13), and more generally, pp.20-27 (FRA-pp.19-27) for the details of her January 2008 story; P-132-T-143-p.23-l.9-10 (FRA-p.23-l.1-3).

¹⁷⁷⁶ P-132-T-139-p.23-l.4-6 (FRA-p.23-l.7-9).

¹⁷⁷⁷ T-138-p.26-l.17-21 (FRA-p.27-l.4-9); P-132-T-139-p.24-l.14-15 (FRA-p.24-l.18-21).

¹⁷⁷⁸ P-132-T-143-p.19-l.25-p.20-l.1-3, p.22-l.12-24, p.23-l.2-14 (FRA-p.19-l.24-p.20-l.1, p.22-l.8-15, p.22-l.18-p.23-l.8).

¹⁷⁷⁹ P-132-T-143-p.26-l.16-25 (FRA-p.26-l.9-18).

¹⁷⁸⁰ P-132-T-139-pp.28-30 (FRA-pp.28-30); P-132-T-143-pp.19-21 (FRA-pp.19-21).

¹⁷⁸¹ P-132-T-143-pp.25-26 (FRA-pp.25-26).

¹⁷⁸² In GK cross-examination, Counsel noted that [REDACTED] when she spoke to the Prosecutors during her December 2007 interview. See P-132-T-143-pp.14-15, 19 (FRA-pp.14-15, 19).

¹⁷⁸³ P-132-T-139- pp.26-l.8-22, 31-l.3-7, 37-l.14-15, 38-l.15-17, 39-l.22 to p.40-l.8 (FRA-p.26-l.6-20, p.30-l.23-p.31-l.2, p.38-l.11-12, p.39-l.18-p.40-l.3).

975. Her story of [REDACTED], with whom she is alleged to have been kept,¹⁷⁸⁴ also contradicts fundamentally with her statement, wherein she said that at [REDACTED], she was the only woman taken from Bogoro, and alleged to have been kept with, *inter alia*, a [REDACTED] woman (and not a Hema child).¹⁷⁸⁵ Importantly, whilst she makes mention in her statement of a girl with whom she is alleged to have been kept, P-132 said of her: “I don’t know her name. I did not know her. I didn’t ask.” After a two hour break for lunch, during which the defence submits, she had the opportunity to speak to [REDACTED], who accompanied her to the interview, she gives the name in question. Her denial in court that she so consulted [REDACTED],¹⁷⁸⁶ does not stand up to belief.

976. [REDACTED], with whom she was clearly in close contact, was [REDACTED].¹⁷⁸⁷ [REDACTED] were allies of the Lendu,¹⁷⁸⁸ and it is therefore unlikely that she would have been mistreated, as she otherwise claims. And whilst P-132 recognised [REDACTED] by way of a picture,¹⁷⁸⁹ she was unable to identify his wife.¹⁷⁹⁰

977. Her evidence concerning Germain Katanga was very limited and quite simply, not believable. She claimed that she saw him three times in [REDACTED].¹⁷⁹¹ In her statement, however, she says that she only saw him only once, at [REDACTED],¹⁷⁹² and finally conceding in her evidence, “All these things are not true,”¹⁷⁹³ and in her statement,

6. [Q.] [...] And then you say at 186 about Germain Katanga. He says -- you say that you were in the hole and Germain came and looked at you in the hole, when you were in the hole with the Ngiti women, the sorcerers, and that's -- I understand that's not, as we know from your story now, that that didn't happen either; is that right?

12. A. No, that didn't happen.

13 Q. All right. But we can see, and I'm not going to go through it all, as I say, paragraph 187, 188, details, a detailed account of that.¹⁷⁹⁴

978. Her alleged escape from a place close to [REDACTED],¹⁷⁹⁵ also departs radically from her statement, for no apparent or indeed credible reason.¹⁷⁹⁶ The information that she gave in

¹⁷⁸⁴ P-132-T-139-pp.40-43 (FRA-pp.40-43). P-132 wrote the name [REDACTED] on a paper admitted as EVD-OTP-00111 on 11 May 2011 (p.42 (FRA-p.42)). P-132-T-142-p.46-l.20-22 (FRA-p.47-l.4-5); P-132-T-142-pp.46-47 (FRA-pp.46-47); P-132-T-142-p.47-48 (FRA-pp.47-49), P-132-T-141-p.38 (FRA-pp.38-39).

¹⁷⁸⁵ P-132-T-143-p.22, 26 (FRA-pp.22, 25-26).

¹⁷⁸⁶ P-132-T-143-p.28-l.13-24 (FRA-p.28-l.1-16).

¹⁷⁸⁷ P-132-T-143-p.37 (FRA-p.37).

¹⁷⁸⁸ P-132-T-143-p.51 (FRA-p.51).

¹⁷⁸⁹ [REDACTED] – see P-132-T-142-p.35-l.21 (FRA-p.35-l.19).

¹⁷⁹⁰ P-132-T-143-p.49-l.13 to p.51-l.11(FRA-p.49-l.12-p.51-l.18); [REDACTED].

¹⁷⁹¹ P-132-T-140-pp.10-l.1-5, 31 (FRA-p.10-l.10-15, p.32) ; P-132-T-142-p.46-l.2-7 f(FRA-p.46-l.10-15).

¹⁷⁹² P-132-T-143-p.19-l.25-p.20-l.1-3, p.22-l.3-10 (FRA-p.19-l.24-p.20-l.1, p.21-l.24-p.22-l.6).

¹⁷⁹³ P-132-T-153-p.27 (FRA-p.27).

¹⁷⁹⁴ P-132-T-143-p.27-l.6-14 (FRA-p.26-27).

¹⁷⁹⁵ P-132-T-140-pp.20-23 (FRA-pp.20-24).

¹⁷⁹⁶ P-132-T-143-pp.23-25 (FRA-pp.23-24).

her statement and in her evidence as to the date of birth of [REDACTED], is also wildly inconsistent.¹⁷⁹⁷

979. And in her evidence, P-132 was unable to indicate how much time she remained in the camps, while she gave detail in her January 2008 statement, in which she said that she arrived in February 2003 and left the [REDACTED].¹⁷⁹⁸ And if, as according to P-132's testimony, [REDACTED] was born on [REDACTED], she was conceived in approximately [REDACTED]. In fact, P-132 testified that she went to [REDACTED]. Also according to her evidence, she spent between [REDACTED] in the camps,¹⁷⁹⁹ which is inconsistent with her statement, in which she said consistently that she spent five months in [REDACTED].

980. The story, according to the defence, is that she instead developed a relationship with [REDACTED],¹⁸⁰⁰ [REDACTED], and entered into a form of marriage with him, whereupon he then brought her to [REDACTED]. It is likely, in the defence submission, that [REDACTED].¹⁸⁰¹ When the defence asked questions about what she had informed her Aunt, the witness first denied but then finally conceded having been photographed with this very aunt, an indication that she is concealing the truth about her story:¹⁸⁰² "A. You can take away this photograph. I do not recognise anyone on the photograph." And later,

Q. All right. Now let me invite you to look at the lady on the left, and I suggest that's [REDACTED]. Is that right or not?

A. Yes, I can see her.

[...]

Q. Now, on the other side, there's a lady sitting there on the other end of the group with a pink headscarf. Do you know who that is?

A. I know that person.

Q. And what's her name?

A. But you already know her name.

Q. Well, you tell us who it is.

A. She is [REDACTED]. At one point I lived with her

[...]

Q. Now, I'm asking you another question. Who's the lady at the other end? It looks like she's wearing a white dress and a pink headscarf. Do you know who that is? And if you do, what's her name?

A. Yes.

Q. Okay. And what's her name, the lady with the white dress and the pink headscarf?

A. That is myself. I'm the one.¹⁸⁰³

981. Her denial that she was ever married to [REDACTED]¹⁸⁰⁴ – and her story generally –

¹⁷⁹⁷ P-132-T-140-pp.25-27 (FRA-pp.26-27), P-132-T-141-p.56-l.14 (FRA-p.58-l.2), P-132-T-143-p.14-15 (FRA-p.14).

¹⁷⁹⁸ P-132-T-143-p.25 (FRA-p.25).

¹⁷⁹⁹ P-132-T-142-pp.36-38, 41-42, 45 (FRA-pp.36-38, 41-42, 45-46).

¹⁸⁰⁰ [REDACTED].

¹⁸⁰¹ P-132-T-143-pp.55-57, 59-62 (FRA-pp.55-58, 59-63); see also D2-176-T-256-pp.18-19 (FRA-pp.16-17) [*Discrepancies noted*] (testifying that she told him that she had [REDACTED]).

¹⁸⁰² P-132-T-143-pp.37-38 (FRA-pp.37-38).

¹⁸⁰³ EVD-D02-00027 and P-132-T-143, pp 46-49 (FRA-p.47-49).

must be scrutinised accordingly.

982. Also, the defence recalls that P-132's [REDACTED], was present at her interviews¹⁸⁰⁵ [REDACTED],¹⁸⁰⁶ and that he has played an intrusive role in the truthfulness of her various accounts. This is particularly so when responding to questions by the defence that she did not want to answer, she would say instead that she would "answer on another day". Upon resuming, and after not having been able to previously answer or provide details to questions, she was able to provide concrete answers to these same questions after a break, or the following day, after she having been in contact with [REDACTED].¹⁸⁰⁷

983. And whilst she testified that she knew [REDACTED] (P-287) "very well", P-287 testified for her part, that she did not hear about any incidents involving Hema women during or after the Bogoro attack,¹⁸⁰⁸ or indeed, that she knew '[REDACTED]' (P-132),¹⁸⁰⁹ which is contrary also, to the prosecution admissions otherwise.¹⁸¹⁰

984. Most importantly, perhaps, is that P-353 testified that she did not know a '[REDACTED]' (P-132), but only someone by the name of [REDACTED]. When shown a picture of P-132, she confirmed that it was with her that she had been abducted, and with whom she was taken with [REDACTED].¹⁸¹¹

985. [REDACTED] testified with regard to Bogoro, that he saw only one [REDACTED] woman who had been injured [REDACTED] who was taken to [REDACTED], where she married [REDACTED].¹⁸¹² [REDACTED] confirms only in part the testimony of P-132: that she was brought to [REDACTED], but that she was not raped or forcibly married and that instead, she decided to marry [REDACTED].

986. These contradictions, as detailed above, simply cannot be reconciled. The evidence of P-132 cannot then be safely relied on for the charges in question.

P-249's testimony regarding the commission of sexual slavery

¹⁸⁰⁴ P-132-T-143-pp.53-54 (FRA-pp.53-54), P-132-T-143-pp.54-55 (FRA-pp.54-55), P-132-T-143-pp.58-59 (FRA-pp.58-60), P-219-T-206-p.32 (FRA-p.31).

¹⁸⁰⁵ P-132-T-143-p.28-l.13, to p.29-l.25 (FRA-p.28-l.3-p.29-l.12).

¹⁸⁰⁶ P-132-T-141-p.80-l.4-17 (FRA-p.82-l.5-17).

¹⁸⁰⁷ P-132-T-141-pp.53-54, 75-78 (FRA-pp.55-56, 77-80), P-132-T-142-p.14-l.25 (FRA-p.15-l.8-9, 21); see also P-132-T-142-pp.2-4, 6 (FRA-pp.1-4, 6-7).

¹⁸⁰⁸ P-132-T-142-p.20-l.3-12 (FRA-p.20-l.9-19) ; P-287-T-130-p.20 (FRA-p.20).

¹⁸⁰⁹ P-287-T-130-p.56 (FRA-pp.57-58).

¹⁸¹⁰ The following admissions were read in Court: 'On or about 27 July 2007, Witness 287 informed Office of the Prosecutor of the existence of another victim of the Bogoro attack as mentioned in her statement. For reference, please see DRC-OTP-1013-0205, paragraph 28. In November 2007, intermediary 143 contacted Witness 287 in order to obtain the address of the victim that would become known under the pseudonym of P-132.' P-132-T-141-p.67 (FRA-p.69). See also ICC-01/04-01/07-2214-Conf-AnxB, p.9.

¹⁸¹¹ P-353-T-215-pp.63-64 (FRA-pp.54-55), EVD-D02-00081 and P-353-T-215-pp.65-66 (FRA-pp.56-57).

¹⁸¹² [REDACTED].

987. Similar doubt arises also, with regard to the evidence of P-249, who despite having allegedly been taken [REDACTED], was unable to identify him by way of photograph;¹⁸¹³ nor was she able to correctly identify his wife.¹⁸¹⁴ Also, P-249 made no mention of seeing other abducted women during her extended stay at [REDACTED].¹⁸¹⁵

P-353's testimony regarding the commission of sexual slavery

988. P-353's testimony that she had lived in Bogoro since [REDACTED], in a house very near the [REDACTED], with [REDACTED]¹⁸¹⁶ contradicts her statement in which she said that she had been living in Bogoro for about [REDACTED] before the fight.¹⁸¹⁷ When shown EVD-D02-00082, she denied that it was the [REDACTED].¹⁸¹⁸ This is irreconcilable with P-166, P-233, and D-176 identifying the same [REDACTED].¹⁸¹⁹ Perhaps then unsurprisingly, P-353 could not name any [REDACTED], despite having confirmed that [REDACTED].¹⁸²⁰

989. P-353's evidence that in [REDACTED], she was attending [REDACTED],¹⁸²¹ also does not stand up to account, because it had actually been [REDACTED].¹⁸²² [REDACTED].¹⁸²³ She is also obviously "mistaken" about having identified the soldiers at the Bogoro Institute as Ugandans, whilst they had already been replaced by the UPC in 2002,¹⁸²⁴ about their numbers, which she estimated at a "more than ten",¹⁸²⁵ when there were actually between 100 to 200 soldiers at the time, and about the location of the Bogoro Institute, which she named instead as the Muzora Institute, located at a distance of 15 minutes from the camp.¹⁸²⁶

Others witnesses' testimony

¹⁸¹³ P-249-T-135-Red-p.41 (FRA-p.42), P-249-T-135-Red-p.56 (FRA-pp.56-57), P-249-T-137-pp.78-79 (FRA-pp.77-78), regarding the picture EVD-D02-00026, P-249-T-136, p.49 (FRA-p.51).

¹⁸¹⁴ P-249-T-135-pp.64-65 (FRA-pp.64-65), T-286-Red-p.50 (FRA-pp.43-44): [REDACTED] comments two pictures of [REDACTED], EVD-D02-00029 and EVD-D02-00028, that he took himself.

¹⁸¹⁵ P-249-T-135-p.65 (FRA-p.65).

¹⁸¹⁶ P-353-T-213-pp.8, 11, 12 (FRA-pp.7, 9, 10); P-353-T-215-p.39 (FRA-p.34).

¹⁸¹⁷ P-353-T-215-p.44 (FRA-p.38).

¹⁸¹⁸ P-353-T-215-pp.37-38 (FRA-pp.32-33).

¹⁸¹⁹ P-233-EVD-OTP-00001; EVD-D02-00082; P-166-T-226-pp.43-44 (FRA-pp.39-40); D2-176-T-255-pp.51-52 (FRA-pp.51-52), D3-410-T-311-pp.79-80 (FRA-pp.67-68).

¹⁸²⁰ P-353-T-215-pp.38-l.8-9, and 44-l.18-22 (FRA-p.33-l.8-9 and p.38-l.25-p.39-l.2).

¹⁸²¹ P-353-T-215-pp.42, 46 (FRA-pp.36-37, 40).

¹⁸²² P-233-EVD-OTP-00001; P-166-T-226-pp.36-38, 42 (FRA-pp.32-35, 38-39); D2-176-T-255-p.53 (FRA-p.52).

¹⁸²³ P-353-T-215-p.42 (FRA-p.37), P-233-T-83-p.39-l.7-10 (FRA-p.47-l.13-16) (names written by P-233 on the paper EVD-OTP-00008), P-166-EVD-D02-00099; P-233-EVD-OTP-00001.

¹⁸²⁴ P-353-T-213-p.12 (FRA-p.11); P-353-T-215-pp.49-50 (FRA-pp.42-43); P-233-T-83-Red-pp.40-41 (FRA-pp.49-50), where P-233 mentioned the presence of 100 to 200 UPC soldiers at the Bogoro Institute at the time; P-166-T-226-p.17 (FRA-p.15), where P-166 testified that the camp was situated in the Bogoro Institute area, where the UPC soldiers found *manyatas* that had been constructed by UPDF soldiers; D2-176-T-256-p.7-l.16-20 (FRA-p.7-l.3-7), where D2-176 confirms that the UPC moved into Bogoro in 2002, when the UPDF left Bogoro.

¹⁸²⁵ P-353-T-215-p.49 (FRA-p.43).

¹⁸²⁶ T-83-Red-pp.40-41 (FRA-pp.48-49), P-353-T-215-p.17 (FRA p.14), pp.48-49, 51 (FRA-pp.41-43, 44-45); See for instance the sketch of Bogoro drawn by P-233, EVD-OTP-00001.

990. P-219 testified that “[...] as far as the Bogoro attack was concerned, I was living in the Walendu-Bindi *collectivité*. I did not see any woman taken hostage during the attack on Bogoro, and I don’t intend to lie on that point.”¹⁸²⁷ P-280 similarly testified he had “no idea about the women who were abducted in Bogoro.”¹⁸²⁸ Evidence of abductions to carry stolen goods, if believed, does not establish conclusively that rape or indeed sexual slavery, occurred. Also, that persons went missing after the attack does not exclude that they may simply have sought refuge elsewhere.¹⁸²⁹

Insufficient evidence regarding the crime against humanity of sexual slavery

Witnesses’ Testimony

991. P-219’s testimony confirms that rape and sexual slavery were prohibited and punished, and thus not common. Taking a woman in the absence of the ceremony that had to be performed by Kasaki, and then bringing her to the BCA could be punishable by death, because it brought bad luck to the camp.¹⁸³⁰ Importantly, P-219 confirmed that there were no Hema women at the BCA.¹⁸³¹ He also testified that he did not see any women taken hostage during the attack on Bogoro.¹⁸³² Sexual slavery was thus not a systematic or widespread phenomenon. His evidence of what allegedly occurred in Tchomia (*a priori* P-219 refers to the attack of 31 May 2003)¹⁸³³ refers only to Lendu’s troops.

992. P-280 similarly testified with regard to abductions of civilians by soldiers, that he could not confirm if it took place and that in Lagura camp, he never saw soldiers abduct people and bring them back.¹⁸³⁴ Otherwise, his evidence does not establish beyond reasonable doubt that rape or sexual slavery took place.¹⁸³⁵

993. For his part, P-12 testified that Kasenyi was attacked on 11 June and 23 July 2003 and Tchomia, on 15 July 2003.¹⁸³⁶ That people may have been abducted *during the second attack on Kasenyi* to carry food, if believed, neither confirms sexual slavery,¹⁸³⁷ nor proves that the taking of wives was systematic or indeed, a widespread phenomena following attacks at the time. In other words, this does not prove that the crimes *will* occur in the ordinary course of

¹⁸²⁷ P-219-T-206-p.48 (FRA-pp.45-46).

¹⁸²⁸ P-280-T-160-pp.58-59 (FRA-pp.57-58). Open session

¹⁸²⁹ P-317-T-229-p.34-l.2-15 (FRA-p.29-l.8-19). Public session (Numerous people who fled Bogoro and disappeared actually found refuge in Uganda); EVD-OTP-00205/MONUC Final Report/paras. 67-72 ; P-317-T-229-p.33-l.16-17 (FRA-p.28-l.26-27).

¹⁸³⁰ P-219-T-206-pp.40-41 (FRA-pp.38-39).

¹⁸³¹ P-219-T-206-p.42-l.12, to p.43-l.3 (FRA-p.40-l.4-19).

¹⁸³² P-219-T-206-p.48 (FRA-p.45).

¹⁸³³ P-12-T-196-pp.28-29 (FRA-pp.23-24).

¹⁸³⁴ P-280-T-155-p.52 l. 22-24, p.55-l.16-17 (FRA-p.54-l.13-15, p.56-l.20-21).

¹⁸³⁵ P-280-T-156-pp.45-46 (FRA-pp.45-46); P-280-T-158-pp.10-11 (FRA-pp.10-11).

¹⁸³⁶ P-12-T-196-p.32 (FRA-pp.26-27).

¹⁸³⁷ P-12-T-196-pp.32-38, 42-43 (FRA-pp.26-31, 34-35).

the events, as otherwise required for conviction, if any, to be entered. Not only is P-12's information only based on hearsay, but he confirmed in the first part of 2003, that the abduction of women was not a common practice: "I don't want to say that it was usual that every time there was fighting between the belligerents they had to take their women to take them as sexual slaves, or something similar."¹⁸³⁸ And with regard to the release in September 2003 about the release of political prisoners, P-12 testified that "abducting women for us this was really new."¹⁸³⁹ D2-161 testified also in this regard, that she never heard during her time at Aveba, of women having been captured or kept prisoner.¹⁸⁴⁰

994. P-267 confirmed that the wives of the soldiers at Aveba were of the same tribe,¹⁸⁴¹ which illustrates that Hema women were not brought to Aveba. The evidence of P-267,¹⁸⁴² if believed, cannot be used relied on for the charges at hand because it relates to events long after those at Bogoro, and does not indicate that the girls were taken from Bogoro to "FRPI camps." Alain Mula Metu testified that during his entire time in Aveba and when he was involved in humanitarian aid, he did not hear of any cases of forced marriages or sexual slaves in there.¹⁸⁴³

995. And as noted above, none of the witnesses who described in detail the previous attacks against Bogoro, in 2001, 2002 or in the weeks preceding the 24 February attack, mentioned the occurrence of abduction of women during these attacks.

Documentary Evidence

996. The Defence reiterates that the attack on Nyakunde of 5 September 2002 was not in any way linked to Germain Katanga, and that the relevant MONUC Special Report makes no reference to the occurrence of sexual slavery during the said attack.¹⁸⁴⁴

997. Indeed, P-28 heard [REDACTED] that the attack of 5 September 2002 was led by Kandoro and Cobra.¹⁸⁴⁵ P-28 makes no mention of any act of rape or of sexual slavery, and so cannot be relied upon in any finding thereof, made beyond reasonable doubt.

998. Nor does the MONUC Special report mention any occurrence of sexual slavery during the attack against Mandoro of 4 March 2003. Also, the attackers, reported to have been Lendus

¹⁸³⁸ P-12-T-196-p.80-l.10-20 (FRA-p.65-l.8-12).

¹⁸³⁹ P-12-T-196-p.81-l.9-15 (FRA-p.66-l.2-9).

¹⁸⁴⁰ D2-161-T-268-p.23-l.8-13, p.25-l.2-13 (FRA-p.21-l.27, p.22-l.8-20).

¹⁸⁴¹ P-267-T-166-pp.27-28 (FRA-pp.29-30).

¹⁸⁴² P-267-T-170-p.34-l.1-14 (FRA-p.32-l.23-p.33-l.9).

¹⁸⁴³ D2-134-T-257-Red-p.53-l.13-16 (FRA-p.48-l.7-11).

¹⁸⁴⁴ EVD-OTP-00206/MONUC Special Report, paras 52, 56-58.

¹⁸⁴⁵ P-28-T-218-pp.8-10 (FRA-pp.7-9).

from the hills Mont Bleu and from Loga¹⁸⁴⁶ have no ties whatsoever to Germain Katanga. The same is true too, of the MONUC Special Report and Sonia Bakar's Report of the Bunia attack of March 2003,¹⁸⁴⁷ the Tchomia attack of 31 May and 15 July 2003,¹⁸⁴⁸ and of the 25 July 2003 Kasenyi attack.¹⁸⁴⁹ And whilst as noted above, the MONUC Special Report mentions the commission of sexual slavery and rape in general,¹⁸⁵⁰ it does not specify by whom, where, or when; as such, it should thus not be taken into account to conclude that sexual slavery was committed widely in Ituri at the time.

999. A PUSIC document from its *Commissaire politique* indicates that: '*Les informations en notre possession font état de : -Prise en otage lors des attaques de BOGORO, MANDRO et dernièrement de BUNIA des populations civiles particulièrement les femmes Hema, des jeunes garçons déportés vers GETY où elles sont séquestrées. [...].*'¹⁸⁵¹ However, the document does not indicate that any of them has been raped and was not tendered through a witness, has not been authenticated and does not specify the source of the information; therefore it should be given a low probative value.

1000. The Defence also observes that the *Rapport final de la Commission de pacification de l'Ituri* mentions the lack of respect of the dignity of women (rape, sexual harassment, forced cohabitation) and contains a call for their protection, but it is posterior to the events (dated April 2003), does not mention the source of its allegations, does not specify by whom or where were committed the alleged rapes, etc., and Katanga did not sign it; therefore it cannot be given any significant probative value regarding the charges of sexual slavery before, during, or after the Bogoro attack.¹⁸⁵²

1001. Thus, it is not established beyond reasonable doubt that prior to and after the 24 February 2003 attack against Bogoro, members of the "FNI/FPRI" regularly abducted, imprisoned in military camps, and subsequently raped and sexually enslaved women and girls predominantly of Hema ethnicity, as otherwise charged. In particular, there is insufficient evidence to establish beyond reasonable doubt that women and girls were sexually enslaved and raped during and in the aftermath of the attacks on Nyankunde, Kasenyi and other

¹⁸⁴⁶ EVD-OTP-00206/MONUC Special Report, paras 71-72, confirmed by EVD-OTP-00205/MONUC Final Report, paras 73-78.

¹⁸⁴⁷ EVD-OTP-00206/MONUC Special Report, paras 73-74, and EVD-OTP-00205/MONUC Final Report, paras 79-84.

¹⁸⁴⁸ EVD-OTP-00206/MONUC Special Report, paras 84-87.

¹⁸⁴⁹ EVD-OTP-00218, UN, MONUC Bunia, Military Daily Report 24 July 2003, para. 6.

¹⁸⁵⁰ EVD-OTP-00206/MONUC Special Report, paras 1, 35-36.

¹⁸⁵¹ EVD-OTP-00240, PUSIC, *Déclaration Politique sur la déconfiture de l'UPC et les interférences négatives du RCD-ML dans les événements de l'Ituri, 11 March 2003*, p.0041-0104.

¹⁸⁵² EVD-OTP-00195, *Rapport final de la Commission de pacification de l'Ituri*, pp 0238, 0262, 0278, 0285, 0308.

villages, or that sexual slavery was committed by the FNI/FRPI frequently and consistently throughout the region of Ituri at the relevant time.

(3) Lack of criminal responsibility of Mr Katanga regarding the charges of rape and sexual slavery

1002. Even if the Trial Chamber were to confirm that rapes and/or sexual slavery were committed before, during, and/or after the Bogoro attack by militia, the Defence submits that the Prosecution has failed to prove beyond reasonable doubt that Mr. Katanga committed such crimes, whether as an individual, jointly with another or through another person.

1003. At the pre-trial stage, in her partly dissenting opinion, Judge Anita Usacka refused to confirm the charges of rape and sexual slavery against Mr. Katanga and Mr. Ngudjolo, because she did not

“find that the evidence presented is sufficient to establish substantial grounds to believe that the suspects intended for rape and sexual slavery to be committed during the attack on Bogoro village, or even in the aftermath of the Bogoro attack, or to establish the suspects’ knowledge that rape and sexual slavery would be committed by the combatants in the ordinary course of events”,¹⁸⁵³

because

“the Prosecution did not provide any direct evidence that Germain Katanga and Mathieu Ngudjolo Chui intended the common plan to attack Bogoro village to include rape or sexual slavery. For example, the Prosecution did not present evidence that either Germain Katanga or Mathieu Ngudjolo Chui directly ordered, suggested or induced members of the FNI/FRPI to commit rape or sexual slavery. Neither did the Prosecution present evidence that the suspects expressly agreed that rape and sexual slavery would be committed during the attack on Bogoro village, or even that in the aftermath of the Bogoro attack, the suspects were present when the crimes of rape and/or sexual slavery were committed.”¹⁸⁵⁴

1004. In the present case, the Prosecution failed to prove that the Germain Katanga either: personally committed the crimes of rape or sexual slavery, was personally present when the alleged crimes of rape or sexual slavery occurred, intended for rape and sexual slavery to be committed during or in the aftermath of the Bogoro attack, issued a specific order, suggested or induced members of the FNI or FRPI to rape the Hema civilians at Bogoro or to take them as sexual slaves, or that he expressly agreed that rape and sexual slavery would be committed during or in the aftermath of the Bogoro attack.

1005. On the contrary, as noted above, a number of witnesses testified that rape was prohibited, including during the Bogoro attack, during which the combatants took fetishes.¹⁸⁵⁵

¹⁸⁵³ ICC-01/04-01/07-716-Conf, Partly Dissenting Opinion of Judge Anita Usacka, 26 September 2008, para. 14.

¹⁸⁵⁴ ICC-01/04-01/07-716-Conf, Partly Dissenting Opinion of Judge Anita Usacka, 26 September 2008, para. 19.

¹⁸⁵⁵ D2-300-T-316-pp.45-46 (FRA-pp.40-41); D2-300-T-318-p.4 (FRA-pp.3-4); D2-148-T-279-pp.29, 41 (FRA-pp.25-26, 36-37); D2-148-T-281-p.20 (FRA-p.17); P-28-T-218-p.65-l.18-p.67-l.6, p.70-l.18-p.71-l.3 (FRA-

Thus, the Prosecution did not provide any direct evidence that the Germain Katanga intended the “common plan” to attack Bogoro, to include rape or sexual slavery.

1006. Of note in this regard is that Jeannot Kagaba Malivo testified that he saw only two prisoners of war from Bogoro in Aveba, who had come from Kagaba, stayed in Katanga’s residence and were released in Aveba when they took a plane to Beni.¹⁸⁵⁶

1007. Furthermore, it is not possible based on the evidence, to infer that the Mr. Katanga either meant or knew or had reasons to know that rape or sexual slavery *will* be committed by members of the “FRPI or FNI” in the ordinary course of events, that it was a “virtually certain consequence”.¹⁸⁵⁷ On the contrary, in fact, the MONUC reports cited above show that it was not a common phenomenon at the time, which is also confirmed by P-12, who testified that the abduction of women was not a common practice.¹⁸⁵⁸

1008. The evidence therefore lacks direct evidence that Mr. Katanga intended that rape and sexual slavery be committed during the implementation of the common plan; nor can it be inferred that he possessed the requisite intent and knowledge that the said crimes *would* be committed. As noted by Judge Usacka, even if the Prosecution were to present evidence that the crimes of rape and sexual slavery were committed throughout the region of Ituri, “such a general allegation is insufficient for the Chamber to infer that the suspects were aware that rape and sexual slavery would occur in the ordinary course of events during or in the aftermath of the attack on Bogoro.”¹⁸⁵⁹ Indeed, nothing in the evidence suggests, even remotely, that Mr. Katanga was personally aware of the alleged widespread occurrence of these crimes.¹⁸⁶⁰

1009. Similarly, there is insufficient evidence to establish that if rape or sexual slavery were, in fact, committed in the aftermath of an attack allegedly perpetrated by the “FNI/FRPI,” that Mr Katanga had knowledge thereof. For example, even if P-250 testified that reports were allegedly given to superiors, he did not say if they included any occurrence of rape or sexual slavery.¹⁸⁶¹ And whilst written and signed reports did not exist, no evidence of the content of oral reports, if indeed, any, was provided.¹⁸⁶² That P-132’s story, if believed, of rape and

p.57-l.8-p.58-l.16); P-279-T-149-Red-p.14-l.2-14 (FRA-p.14-l.13-p.15-l.1); P-280-T-157-pp7-8, 17-19 (FRA-pp.7-8, 17-18).

¹⁸⁵⁶ D2-129-T-272-Red-pp.37-39, 45-46 (FRA-pp.33-35); see also D2-161-T-268, pp 23-25 (FRA-p.21-22).

¹⁸⁵⁷ ICC-01/09-02/11-382-Red, (PTCII) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 415.

¹⁸⁵⁸ P-12-T-196-p.80-l.10-20 (FRA-p.65-l.8-12).

¹⁸⁵⁹ ICC-01/04-01/07-716-Conf, Partly Dissenting Opinion of Judge Anita Usacka, 26 September 2008, para. 22.

¹⁸⁶⁰ See ICC-01/04-01/07-716-Conf, Partly Dissenting Opinion of Judge Anita Usacka, 26 September 2008, para. 23.

¹⁸⁶¹ P-250-T-92-Red-pp.27-32 (FRA-pp.29-34).

¹⁸⁶² See P-219-T-206-p28-l.12-18 (FRA-p.27-l.9-15).

sexual slavery following the Bogoro attack, was allegedly told to Mr. Katanga, is itself insufficient to prove beyond reasonable doubt that he was aware of the crimes, or that he knew that they would normally occur in the ordinary course of events.¹⁸⁶³ And even if it appears that some camps had radio communications,¹⁸⁶⁴ the prosecution has failed to establish beyond reasonable doubt that the crimes in question were reported through such means.¹⁸⁶⁵

1010. As noted by Judge Usacka in her partly dissenting opinion, the Prosecution has the substantial burden, under article 30 of the Statute, to prove that the accused either intended for rape and sexual slavery to occur, when it is not alleged that they were the direct perpetrators, or were aware that rape and sexual slavery would occur in the ordinary course of events, when the basis for criminal responsibility is that they jointly committed the crimes through other persons, within the meaning of article 25(3)(a) of the Statute. The Chamber must therefore assess the evidence and decide whether such evidence is sufficient to establish beyond reasonable doubt that each element of each of the crimes has been committed.¹⁸⁶⁶ The prosecution has simply failed to meet this burden.

1011. Finally, as with the other crimes, with respect to war crimes, it has not been proved that sexual crimes were associated with an international armed conflict.

F- Using Children to Participate Actively in Hostilities

(1) Child soldiers broadly defined

1012. Much attention has been paid to the concept of EAFGA (denoting children associated with armed groups) and child soldiers as defined in the Cape Town Principles. The international community defines these notions to give the greatest enhancement of child welfare. In terms of the Cape Town Principles¹⁸⁶⁷ a child soldier is any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes or forced marriage. As will be seen below in the discussion of the demobilisation process, this definition is also broader than the definition of a child soldier for the purpose of

¹⁸⁶³ See ICC-01/04-01/07-716-Conf, Partly Dissenting Opinion of Judge Anita Usacka, 26 September 2008, para. 24.

¹⁸⁶⁴ Cf. Testimony of Germain Katanga, T-317WT-p.44-l.23, to p.45-l.4 (FRA-p.39-l.24-p.40-l.2).

¹⁸⁶⁵ See ICC-01/04-01/07-716-Conf, Partly Dissenting Opinion of Judge Anita Usacka, 26 September 2008, para. 25.

¹⁸⁶⁶ ICC-01/04-01/07-716-Conf, Partly Dissenting Opinion of Judge Anita Usacka, 26 September 2008, para. 28.

¹⁸⁶⁷ Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa (Cape Town, 27-30 April 1997).

the crime. The evidence shows the inclusion of the family members of militia living in makeshift camps.

1013. The legal representative of child soldier victims argues that the Chamber ought to draw inspiration from these principles to define ‘hostilities’ and ‘active participation’. It is important to underline that the relevance of these principles, while laudable, lies not in the issue of guilt or innocence but in appreciating how individuals applied these concepts in the demobilisation process.

1014. The crime of using child soldiers in the Statute is not based on those principles, but on accepted state practice in relation to the criminalisation of violations of international humanitarian law.

(2) The charge

1015. Mr Katanga is charged under article 8(2)(b)(xxvi), relating to war crimes in international armed conflict, for using children under the age of 15 years to participate actively in hostilities. The prosecution alleges that this offence was ‘committed before, during and in the aftermath of the attack on the village of Bogoro on 24 February 2003’. It is asserted that Germain Katanga ‘used children for multiple purposes, including direct participation in the attack’. It is further alleged that ‘Germain Katanga consistently used children under the age of fifteen to take part in hostilities within the FRPI militia prior to, during and following the Bogoro attack.’¹⁸⁶⁸

1016. As a preliminary matter it is submitted that following the principle that the accused must benefit from the most favourable interpretation, the references to ‘before’ and ‘after’, not being otherwise defined must be interpreted as relating to the attack specified in the charge: i.e. ‘immediately before’ and ‘immediately after’ the attack on Bogoro.

1017. In order to be found guilty of this offence, the prosecution must prove that Katanga used one or more persons to participate actively in hostilities. The legal representative for child soldier victims claims that the terms ‘hostilities’ and ‘active participation’ are undefined and must be given the meaning that accords with the broadest possible protection of children. It is submitted that these terms reflect state practice on the crime and that if the parties to the Statute intended to give these expressions a meaning going beyond that in existing international humanitarian law, a more fluid formula would have been adopted. The word ‘hostilities’, it is submitted, has long use in humanitarian law and clearly denotes actual engagement with the enemy. The term ‘active participation’ is plainly meant to reflect the

¹⁸⁶⁸ See Confirmation Decision, para. 256.

idea that participation should be direct in line with Article 77, paragraph 2 of Protocol I to the Geneva Conventions. An ambiguity must be interpreted in favour of the accused.¹⁸⁶⁹ These questions of treaty interpretation are dealt with in greater detail below under ‘Legal Submissions on child soldiers.’

1018. It must further be proved that the child was under the age of 15. The Legal Representative for Child Soldier Victims suggests that it is not necessary to prove the exact age.¹⁸⁷⁰ Evidence might be reliable if a person appreciated a child’s age based on certain observable factors outlined by him or her. The evidence has mostly consisted of confirmation of age without any basis.

1019. The *mens rea* of this offence is that the perpetrator knew or should have known that such persons were under the age of 15 years, and was aware of the circumstances which gave rise to the existence of an armed conflict. In order to be found responsible for the use of child soldiers, in accordance with article 30 of the Statute, the prosecution must additionally demonstrate that Katanga acted with intent and knowledge in relation to each of the material elements of the offence. That is, he must mean the conduct to take place and must be aware of the material circumstances. Contrary to the assertion of the legal representative for child soldiers,¹⁸⁷¹ negligence or foreseeability is insufficient.

1020. In the alternative, the accused must mean to cause the commission of the crime or be aware that it will occur in the ordinary course of events.

1021. In order to be guilty under Article 8(2)(b)(xxvi), it would have to be established, and has not, that this conduct took place in the context of and was associated with an international armed conflict.¹⁸⁷²

(3) Breadth and nature of the evidence in relation to the charge

1022. The prosecution relied in particular on the testimony of 28, 250, 267, 373, 323, 268, 161, 12, 233, 219, 279, 280 and 132. They further now rely on the defence evidence of D02-136. It is noteworthy that the legal representative for victim child soldiers did not call or propose a single witness in support of the allegation, which one would expect if it were true. Exclusively P-28, the only alleged child soldier produced against Katanga, gave direct evidence about children under the authority of Katanga during the relevant period. P-219 fell

¹⁸⁶⁹ See Evaluation of Evidence: Evaluation of Items of Evidence.

¹⁸⁷⁰ Conclusions finales du Représentant légal des victimes enfants soldats, para 93.

¹⁸⁷¹ Conclusions Finales du Représentant Légal des Victimes Enfants Soldats, para 92.

¹⁸⁷² See Classification of the Conflict, *supra*.

short of this, confining his assertions to children in Aveba. This evidence was not credible, reliable, or satisfying the elements of the crime.

1023. In terms of contemporaneous evidence, the prosecution relies on witnesses such as P-250, P-279 and P-280 who, while not directly under Katanga, allegedly visited his area. P-279 and P-280, like P-28, claimed to be child soldiers. The prosecution also rely on witnesses, such as P-323, P-268, P-161, P-233 and P-132, having no connection with Katanga, but who were present at the Bogoro attack, in order to establish the presence of child soldiers at that attack. In so far as this evidence goes some way towards showing the presence of children, their role and line of command has not been sufficiently established.

1024. P-267 and P-12 gave evidence on child soldiers at a time outside the scope of the charge. P-12's spoke of children with Katanga of an undefined age.

1025. To counter this accusation and the material in support of it the defence relies specifically upon Germain Katanga (given under oath), Alain Mula Metu (D02-P-134), Christian Mbodjima Mbaraza (D02-P-160), David Adirodu, (D02-P-1), Léonard Katobe (D02-P-196), [REDACTED] (D02-P-148) and Bonheur (D02-P-259). In addition, the defence relies on the evidence of Jonathan Dubatso (D02-P-136), [REDACTED], [REDACTED], [REDACTED] (D02-P-161), Pastor Vicky (D02-P-501), Malivo Kagaba (D02-P-129), to undermine the credibility of prosecution witnesses 28, 279, 280, 219 and 12. Credibility is addressed elsewhere. In this section we focus on whether the evidence, taken at its highest, is sufficient to prove the elements of the crime.

(4) Situation in Aveba in February 2003:

Germain Katanga

1026. The prosecution contends that the fact that Katanga denied that there were child soldiers in the camp demonstrates his lack of credibility.¹⁸⁷³ Katanga did not refute that there were children around the camp, only that he used them to participate in hostilities.¹⁸⁷⁴ It is submitted that his evidence on this has not been undermined.

Prosecution witness 28

1027. P-28 was born on the [REDACTED].¹⁸⁷⁵ That, if true, would have made him [REDACTED] on the 24th February 2003. He fled to [REDACTED].

¹⁸⁷³ Prosecution brief, para 294.

¹⁸⁷⁴ D2-300-T-319-pp.42-43 (FRA-pp.46-48).

¹⁸⁷⁵ P-28-T-216-ENG-p.27-l.10-11 (FRA-pp.22-23).

1028. After experiencing difficulties with another group he fled to Aveba and chose to stay in the camp.¹⁸⁷⁶ He claims he was a soldier based in Aveba.¹⁸⁷⁷ P-28 states that the head of the camp in Aveba was Katanga.¹⁸⁷⁸ He earlier clarified that there was not really a camp, but that the soldiers lived in other people's houses.¹⁸⁷⁹ He stated that he was living [REDACTED].¹⁸⁸⁰ He claimed that Katanga's residence was the presidency and that he was known as Colonel Germain Katanga. The defence has called credible and reliable evidence to establish that Katanga was not president at the time.

1029. In terms of his duties, P-28 claimed that he was a soldier – ready to fight at any time. He claims that he would undertake other missions as well, giving the example of arresting someone.¹⁸⁸¹ When asked to provide examples of arrests, P-28 referred to the arrest of individuals who were in debt to other individuals.¹⁸⁸² The second example given was the arrest of individuals alleged by other individuals who came into the camp to be witches. It is submitted that neither of these tasks can reasonably be defined as active participation in hostilities. P-28 stated that it was Manono, Katanga's Secretary, who would draft the mission orders for such tasks, based upon visits from the complainants, but he did not know if Manono received orders from anyone. P-28 subsequently talked about the existence of a court and a judge by the name of Malongi.¹⁸⁸³ In such circumstances, it cannot in any event be said that Katanga used children to participate in these tasks. Since he is not charged with command responsibility, neither can these mission orders be imputed to him by implication.

1030. Most significant in the evidence of P-28 is his claim that he was [REDACTED].¹⁸⁸⁴ This is uncorroborated and has been widely refuted in the evidence. (see Credibility section *supra*) He claims that he would [REDACTED].¹⁸⁸⁵ According to P-28, at the time when they were at [REDACTED] in Aveba, before a proper camp had been formed, all those soldiers within the area were [REDACTED].¹⁸⁸⁶ He was also asked to [REDACTED].¹⁸⁸⁷ P-28 states that [REDACTED].¹⁸⁸⁸ According to P-28, Garimbaya was in charge of the bodyguards. There was also [REDACTED].¹⁸⁸⁹ He adds the names of Besto and Akenda amongst those in

¹⁸⁷⁶ P-28-T-216-p.67-l. 22, p.68-l.4 (FRA-pp.56-57).

¹⁸⁷⁷ P-28-T-216-p.69-l.10 and 13 (FRA-p.60).

¹⁸⁷⁸ P-28-T-216-p.69-l.16-18 (FRA-p.60).

¹⁸⁷⁹ P-28-T-216-p.69-l.11-13 (FRA-p.60).

¹⁸⁸⁰ P-28-T-216-p.71-l.22-23 (FRA-p.62).

¹⁸⁸¹ P-28-T-216-p.75-l.25 and p.76-l.1-3 (FRA-pp.66-67).

¹⁸⁸² P-28-T-216-p.77-l.1-6 (FRA-pp.67-68).

¹⁸⁸³ P-28-T-216-p.83-l.21-25 (FRA-pp.67-71).

¹⁸⁸⁴ P-28-T-216-p.76-l.5 (FRA-p.66).

¹⁸⁸⁵ P-28-T-217-p.16-l.8-9 (FRA-p.14).

¹⁸⁸⁶ P-28-T-217-p.21-l.21-23 (FRA-p.19).

¹⁸⁸⁷ P-28-T-217-p.21-l.24-25 (FRA-p.19).

¹⁸⁸⁸ P-28-T-217-p.22-l.7-11 (FRA-pp.19-20).

¹⁸⁸⁹ P-28-T-217-p.22-l.23-25 (FRA-p.20).

charge and states that there were others. The others were of the same age as P-28 by the look of them,¹⁸⁹⁰ including [REDACTED].¹⁸⁹¹ Given that P-28 would have been [REDACTED] in February, even if his evidence were credible, in the absence of other evidence of his knowledge of their age, it could not be concluded as a matter of proof beyond reasonable doubt that Katanga knew or should have known that P-28 or those who he describes as being his age were in fact below the age of 15. Germain Katanga had only two bodyguards in February 2003, both of whom were adults. And later, when he had six bodyguards, they were all married.¹⁸⁹²

1031. In terms of the specific tasks allegedly performed by P-28, he says he accompanied Katanga [REDACTED] whenever they travelled.¹⁸⁹³ This would not in itself amount to active participation in hostilities.

1032. He was also involved, he said, in unloading the ammunition that arrived in Aveba from Beni by plane.¹⁸⁹⁴ These were in bags in crates. There were also bags of beans and cans of sardines.¹⁸⁹⁵ P-28 saw one plane coming from Beni but does not know if there was one or several. The only other plane he knows about is one coming with medicine.¹⁸⁹⁶ Later he contradicted himself when he stated that ‘This plane did not come on just one occasion. It made many journeys, but I can’t give you specific information in this regard’.¹⁸⁹⁷ In the context of a later discussion about the Bogoro attack P-28 states that ammunition which arrived in Aveba was used in the Bogoro attack,¹⁸⁹⁸ although it is unclear here whether he is referring to the same ammunition which he unloaded. There may be circumstances where unloading ammunition amounts to active participation in hostilities. This would be the case where it is done at the battlefield or while in the process of launching an attack. In this instance, the ammunition is in boxes and is part of a larger consignment of food provisions. It is being unloaded off an aircraft into the village of habitation without a battle in progress. This may be nothing more than an incidental and once off act of assistance by a child in the unloading of boxes regardless of their content. In these circumstances, it is submitted that this is not a direct form of participation in actual hostilities and therefore cannot be considered as active participation in hostilities.

¹⁸⁹⁰ P-28-T-217-p.23-l.18-22 (FRA-pp.20-21).

¹⁸⁹¹ P-28-T-217-p.24, line 12 (FRA-p.21).

¹⁸⁹² Katanga, Germain, D2-300-T-319-pp.43-49 (FRA-pp.48-54) ; EVD-OTP-00228 ; EVD-OTP-00096.

¹⁸⁹³ P-28-T-217-p.22-l.1-4 (FRA-p.19).

¹⁸⁹⁴ P-28-T-217-p.32-l.3-5 (FRA-pp.27-28).

¹⁸⁹⁵ P-28-T-217-p.33-l.7-8 (FRA-p.29).

¹⁸⁹⁶ P-28-T-217-p.32-l.1-4 (FRA-pp.32-33).

¹⁸⁹⁷ P-28-T-217-p.38-l.15-16 (FRA-p.33).

¹⁸⁹⁸ P-28-T-217-p.40-l.10-12 (FRA-pp.33-34).

1033. P-28 claims to have personally participated in the Bogoro attack. He states that he, among others, received items of fetishism and made incisions in his body.¹⁸⁹⁹ He describes his movements towards Bogoro.¹⁹⁰⁰ With reference to his movements, he states that his chief did not give him orders to go to Kagaba, but the chief walked with him. His chief was [REDACTED].¹⁹⁰¹ He states that he had a firearm and that he moved along with other combatants who had come from Kagaba to go to Bogoro. He adds: 'I was very close to the road, and we were moving forward, and we got to the camp, and that was after the battle, after the battle.'¹⁹⁰² At another point he says: 'I fought along the side of the road that comes from Kagaba and goes towards Bogoro. And at the end of the attack we moved towards the camp.'¹⁹⁰³ This suggests that if Katanga was at the battle he was not with him, since according to P-28, 'Germain was there. He was part of the group that launched the attack on Bogoro.'¹⁹⁰⁴ P-28 confirms that Katanga and his companions were in charge of the combatants attacking Bogoro,¹⁹⁰⁵ but this does not in itself establish Katanga's knowledge of children moving within the group; nor Katanga's knowledge of the presence of P-28, even if he was [REDACTED]. P-28 states that the battle starts, that they were short on ammunition and that reinforcements came from Zumbe.¹⁹⁰⁶ This supports the position that children seen could have come from different groups.

1034. When asked about child soldiers, P-28 stated:

There were children amongst all the camps, be it the UPC camp. We even saw bodies of child combatants. There were children amongst the FRPI ranks and also children amongst the ranks of the Zumbe fighters. I couldn't say whether there were just combatants from the UPC or just from the FRPI or from the FNI. There were children amongst all the groups.¹⁹⁰⁷

This general assertion is insufficient to establish that Katanga used persons under 15 to directly participate in hostilities, knowing their age.

Prosecution witness 219: [REDACTED]

1035. This witness claims he was a resident civilian of Aveba, and [REDACTED]. He says the youngest soldier leaving for Bogoro was 15 but then says there were others who were under 15.¹⁹⁰⁸ He does not clarify the basis of this knowledge. Perhaps he knew; maybe he was guessing. So this aspect of the evidence is unreliable. It is also unclear whether they were

¹⁸⁹⁹ P-28-T-217-p.42-l.5-6 (FRA-p.36).

¹⁹⁰⁰ P-28-T-217-p.42-l.13-16 (FRA-pp.36-37).

¹⁹⁰¹ P-28-T-217-p.50-l.15-18 (FRA-pp.43-44).

¹⁹⁰² P-28-T-217-p.59-l.21-24 (FRA-pp.52-53).

¹⁹⁰³ P-28-T-217-p.60-l.22-64 (FRA-p.53).

¹⁹⁰⁴ P-28-T-217-p.60-l.6-7 (FRA-p.53).

¹⁹⁰⁵ P-28-T-217-p.58-l.23-24 (FRA-p.53).

¹⁹⁰⁶ P-28-T-217-p.42-l.20-25 (FRA-pp.36-37).

¹⁹⁰⁷ P-28-T-218-ENG-p.24-l.11-16 (FRA-p.21).

¹⁹⁰⁸ P-219-T-205-ENG-p.53-l.1-4 (FRA-p.52).

going on anyone's orders. The witness's evidence that they seized the opportunity to go and loot,¹⁹⁰⁹ and followed after the fighters,¹⁹¹⁰ suggests otherwise.

1036. He claims that all commanders appreciated the Kadogo activity.¹⁹¹¹ He does not explain how he knows this with respect to each commander. It could just be an assumption. He does not clarify which types of activities he is suggesting they all knew about, so it is not established on his evidence that any particular commander appreciated that there was active participation in hostilities.

1037. Even if it is suggested that Katanga appreciated Kadogo activity, this does not establish his knowledge of their ages or that he used ones under 15 himself.

Defence witness 136: Jonathan Dubatso

1038. The prosecution rely on the brother of Katanga, Jonathan's answers to the legal representative for child soldiers as a basis for establishing the practice of child soldiers in Aveba from 2002. However, he does not specify whether he is referring to children under 18 or under 15. Also, he explains the militia activities of children within the context of being attacked by Ugandans and everyone being constrained by the circumstances to participate in the defence of the village of Aveba as well as exacting revenge for being orphaned.¹⁹¹² This suggests not use of child soldiers but the actions of self-motivated children. Also, he states that the children resumed normal life once attacks ended, suggesting that there was no recruitment into the militia for future use.

(5) Observations on Aveba from the outsiders

Prosecution witness 250: [REDACTED]

1039. P-250 said he was a fighter in Zumbe, trained there in a camp. On his evidence he would have had the opportunity to observe child soldiers with Katanga or in combat, had they been there, but unwittingly provides exculpatory evidence. He speaks of a delegation going to Aveba and states that [REDACTED]. He claims to have spent [REDACTED].¹⁹¹³ [REDACTED].¹⁹¹⁴ [REDACTED].¹⁹¹⁵ P-250 claims also to have seen Katanga at Bogoro after the battle.¹⁹¹⁶

1040. In terms of 250's knowledge of child soldiers in other groups he said:

¹⁹⁰⁹ P-219-T-207-ENG-p.6-l.15-17 (FRA-p.7).

¹⁹¹⁰ P-219-T-206-ENG-p.20-l.18-20 (FRA-p.20).

¹⁹¹¹ P-219-T-207-ENG-p.7-l.15-16 (FRA-p.8).

¹⁹¹² D2-136-T-241-FRA-p.56-l.22-p.58-l.21.

¹⁹¹³ P-250-T-93-p.16-l.7-8 (FRA-p.16).

¹⁹¹⁴ P-250-T-93-p.16-l.17-18 (FRA-p.16).

¹⁹¹⁵ P-250-T-93-p.16-l.20-21 (FRA-p.17).

¹⁹¹⁶ P-250-T-94-p.51-l.2-3 (FRA-p.52).

It would be difficult to tell the age of the person. It would be better for that person, himself or herself, to tell you their age. You may meet someone and think he is younger than what he looks like.

He repeated this to the bench responding to the Judge President:

In the Democratic Republic of Congo, it would be difficult for me estimate someone's age. In any case, there are even the members of the pygmy population. It is very difficult to estimate the age of someone except his or her parents tell you.¹⁹¹⁷

1041. The defence does not accord with the idea that one can never tell the age of a person who is under 15 as there are cases which are plain, such as when a child is 8 or 9. Observation becomes a lot more subjective however when one is at the margins of say between 12 and 15. The same can be said on the issue of whether someone is a child or an adult. P-249, an alleged abductee, observed that there were no children in the camp where she was kept. She said: 'I would say that there were people of small stature, but they were adults'.¹⁹¹⁸

1042. P-250's own actions in battle sheds light on the children who decide to follow the fighters to seize the opportunity to loot as described by P-219. He explained that he would pick up the weapons of those who could no longer fight and that when someone would run and drop weapons he would pick them up.¹⁹¹⁹ He also states that they would pick up the uniforms from dead bodies and wear them.¹⁹²⁰ This opens the reasonable possibility that children seen armed or uniformed at Bogoro could also have done this of their own initiative and without instruction.

1043. The witness finally drives a nail through his ability to incriminate the accused and a coach and horses through the prosecution case on use of children when he responds to the Judges:

Amongst the combatants there were soldiers. There were no children.¹⁹²¹

Prosecution witness 280: [REDACTED]

1044. Another prosecution witness who claimed to have been a child soldier was P-280, but the prosecution accepts that he was not a child soldier. According to him when he left Germain Katanga's camp he found soldiers of his age. It is submitted that this evidence is inadequate to hold Germain Katanga responsible for the use of child soldiers. The mere statement that he saw soldiers of his age does not establish whether he is talking in approximate or exact terms. It does not reveal how sure he was about the age or what led him

¹⁹¹⁷ P-250-T-100-p.6-l.7-10 (FRA-pp.5-6).

¹⁹¹⁸ P-249-T-135-p.74-l.8-9 (FRA-p.74).

¹⁹¹⁹ P-250-T-93, p.69-l.18-19; and p.70-l.2-4 (FRA-pp.71, 72).

¹⁹²⁰ P-250-T-94, p.71-l.14-16 (FRA-p.74).

¹⁹²¹ P-250-T-100, p.6-l.21-22 (FRA-p.6).

to that conclusion. Nor does it explain what led him to the conclusion that they were soldiers. Accordingly, this evidence is unreliable as a basis for making a finding about the soldiers that this witness saw. Moreover, according to the witness, he only saw Katanga once from a distance in the camp. It is unclear where these young soldiers were coming from or under whose command they were. There is no evidence here of the state of knowledge of Katanga of these individuals, or of whether he was in any way making use of them.

Prosecution witness 279: [REDACTED]

1045. Witness 279 claimed to have been a child soldier based in Zombe. He made the general observation that based on what he could observe, the youngest of the FRPI fighters were less than 15 years old.¹⁹²² This is insufficient to establish that this child was under the control of Katanga, that he was in fact less than 15 or that Katanga was aware of the age.

(6) Perceptions about the attackers at Bogoro

Prosecution witness 323: [REDACTED]

1046. Witness 323, [REDACTED], was a UPC soldier living in Bogoro.¹⁹²³ He gave evidence about the Bogoro attack. He was present in the military camp at the time of the attack.¹⁹²⁴ He testified that there were a lot of *Kadogos* who participated in the war but he did not know their exact age.¹⁹²⁵ His general references fail to identify the age of the youngsters or which, if any, group they belonged to. In fact in the light of his later testimony it seems unlikely that this witness would be in a position to comment on age. He highlighted the distance and circumstances in which he saw them saying:

We saw it with distance. You can't evaluate the number of people who are scattered throughout Bogoro. All I saw was what happened in front of me. I'm not able to give an estimation with regards to the number of these kadogo. It would be difficult for me to do that.¹⁹²⁶

He could not even confirm whether the Kadogo he saw were male or female.¹⁹²⁷

1047. With regard to the issue of which groups they belonged to, they could have come from any of the armed groups which participated in the attack, whether APC, Ngiti militia or Lendu militia. His statement to the legal representative that 'Everything that you have said, arrows, machetes, and the kadogos, yes. These are things that I saw among the Lendu and Ngiti fighters'¹⁹²⁸ does not clarify the situation any further as to which group controlled by which

¹⁹²² P-279-T-145-ENG-p.51 (FRA-p.54).

¹⁹²³ P-323-T-116-ENG-p.71-l.1-4 (FRA-p.70).

¹⁹²⁴ P-323-T-117-ENG-p.23-l.21-22 (FRA-p.23).

¹⁹²⁵ P-323-T-117-ENG-p.35-l.2-4 (FRA-p.33).

¹⁹²⁶ P-323-T-117-ENG-p.57-l.23-25; and p.58-l.1 (FRA-p.56).

¹⁹²⁷ P-323-T-117-ENG-p.58-l.7-10 (FRA-p.56).

¹⁹²⁸ P-323-T-117-ENG-p.57-l.8-9 (FRA-p.55).

individual was employing children under 15. These young people could also have simply followed the attackers from neighbouring villages. This is not clarified in this evidence. Since the evidence supports the presence of groups under different commanders, while it can corroborate other evidence indicating the presence of children, it is submitted that it cannot reasonably corroborate P-28's claim that he fought in Bogoro under Germain Katanga.

1048. The legal representative for child soldiers led: 'if I understand what you said correctly, you saw this young fighter in the group of Lendu, as well as in the group of Ngiti' – with the witness responding 'yes'. It is submitted that caution must be applied when the words come from counsel's mouth and not from that of the witness. We cannot be sure exactly how the question was translated or how it was perceived by the witness. In this leading question, young fighter is not defined and Ngiti group is not defined.

Prosecution witness 268: [REDACTED]

1049. This witness was an inhabitant of Bogoro before and during an attack on the village, but places the attack on the 9th February.¹⁹²⁹ His evidence relating to child soldiers is first of all weakened by the difficulty of pinning his observations to the specific day of the 24th February as opposed to generally. With respect to his knowledge on the identity of the attackers, he simply states that 'We knew it was a group of Lendu people and Ngiti people, the FNI and the FRPI who attacked Bogoro.'¹⁹³⁰ He does not adequately clarify how he knew this at this particular time. He later states that 'They were Balendus and Ngitis. Those were the people who caused us suffering in Bogoro':¹⁹³¹ again more in the nature of a general assumption about these groups than a firm statement of knowledge about their specific role on the 24th. When asked how he was able to tell he stated that 'they *could* be recognised by the language they used',¹⁹³²

1050. Witness 268 similarly to 323 saw attackers who included children.¹⁹³³ He states that the children had spears and arrows,¹⁹³⁴ but he did not see them with any other types of weapons. He claims to have heard the voices of children saying 'we are going to capture them'. He also heard the voices of children who were pillaging. He stated that children helped to transport objects pillaged. Contrary to the evidence of 323 he did see children as UPC soldiers but said they were wearing civilian uniforms. He did not know their ages. With regard to the ages of the child attackers, he stated that 'I can say that they were between 10 to

¹⁹²⁹ P-268-T-107-ENG-p.5-l.11 (FRA-pp.4-5).

¹⁹³⁰ P-268-T-107-ENG-p.5-l.16-17 (FRA-p.5).

¹⁹³¹ P-268-T-107-ENG-p.26-l.21-22 (FRA-p.27).

¹⁹³² P-268-T-107-ENG-p.26-l.25 (FRA-p.27)..

¹⁹³³ P-268-T-107-ENG-p.26-l.17 (FRA-pp.26-27).

¹⁹³⁴ P-268-T-107-ENG-p.38-l.10-11 (FRA-pp.37-38).

15 or 16 years old. That's approximately.'¹⁹³⁵ As with witness 323, therefore, this evidence does not determine the children's age nor which specific groups or under which actual command if any they were.

Prosecution witness 161: [REDACTED]

1051. Witness 161 also gave evidence that he had witnessed the Bogoro attack. He testified that there were several children including young girls. He states that the children were between 8 and 10 years of age. He stated that these children were armed, participated in the fighting and looted. They were, according to him in front of and at the rear of the attackers.

1052. It is unclear to which groups or under which command the children that he saw belonged to. The attackers, according to 161, came from Zumbe, Gety, Nombe, Soke and Bavi. They included not only Lendu and Ngiti but also Bira coming from Lengabo. It is submitted that it is not reasonable to draw any conclusions regarding Germain's use of child soldiers or his knowledge of their age.

Prosecution witness 233: [REDACTED]

1053. Witness 233 corroborates the fact that there were children among the Bira present at Bogoro. Indeed this witness thought that the women and children were from this group. In response to a question from Defence counsel he confirmed the content of his statement,¹⁹³⁶ read into the record by counsel:

My view, the attackers, who consisted of many women and children, were Bira. I say that because they came from that direction and also because, from the place I was hiding, I heard them speak the Bira language. Other survivors also told me they had seen Bira attackers.¹⁹³⁷

He reinforces this later in his evidence:

Yes. During the war, there were people who pillaged property, and those were the Biras. I heard gunshots, and some of the houses had been destroyed. Women and children were carrying away property.¹⁹³⁸

Defence witness 148: [REDACTED]

1054. [REDACTED] was among the combatants at Bogoro. He did not see any Kadogo participating in the battle.¹⁹³⁹ This is not necessarily inconsistent with for example 323 or 233. Unlike 323 a lot of the attackers would have been to his side and behind him, rather than in front of him, so he would not have had the same range of vision of the attackers and if there were children in other groups such as the Bira or others, he would not necessarily have seen

¹⁹³⁵ P-268-T-107-ENG-p.38-l.14-15 (FRA-p.38).

¹⁹³⁶ Paragraph 74.

¹⁹³⁷ P-233-T-88-ENG-p.23-l.6-9 (FRA-pp.27-28).

¹⁹³⁸ P-233-T-88-ENG-p.27-l.17-19 (FRA-p.28).

¹⁹³⁹ D-148-T-279-p.23-l.9 (FRA-p.20).

this. His evidence does however support that there were not children in his group, thus undermining the suggestion that there were child soldiers in the Ngiti ranks. It is submitted that this witness's credibility was unsuccessfully challenged.

Prosecution witness 132: [REDACTED]

1055. Witness 132 gave evidence that she was in Bogoro at the time of the attack and that she was taken hostage and taken to [REDACTED]. She does not state the age of the children she saw or provide any further details as to which group they belonged to, or as to how old they were. Again, there is insufficient evidence in this account to establish that Katanga was using child soldiers to participate.

1056. The witness also claimed that there were children in the [REDACTED] camp and that some had weapons. She states that they participated in parades and guarding the camp. It is submitted that this evidence may show indirect participation in hostilities but not active participation.

1057. The witness does say that Katanga came to the camp. She observes that the soldiers, which included children of 13 or 14, welcomed him to the camp. However, this does not establish that Katanga was using these children or that he was even aware of their presence or age. [REDACTED] was in charge of the camp, not Katanga. Even if Katanga was [REDACTED]'s superior, which is not clearly established from this evidence, he is not charged with command responsibility.

(7) Evidence of child soldiers outside the timeframe of the charge

Prosecution witness 12: [REDACTED]

1058. According to P-12, all the leaders at the time did it, including Ngudjolo and Katanga; the witness believes that it was because of circumstances.¹⁹⁴⁰ However, this witness had no contact with Katanga in 2003 and his comment could have no probative value with respect to the use of child soldiers before, during and after the Bogoro attack. There is also no detail given to provide the basis for his inclusion of Katanga other than his comment that he 'had an escort, had children escorting him. And when drinking a Coca-Cola, there were children in the area. I could see that they were children. He would call them. As to their precise age, I cannot tell you.'¹⁹⁴¹ The time frame aside, not being able to give precision as to age makes it impossible to rely on this evidence as a basis for confirming that Katanga used children under 15 as escorts or that they were used to participate directly in hostilities.

¹⁹⁴⁰ P-12-T-197-ENG-p.42-43 (FRA-pp.47-48).

¹⁹⁴¹ P-12-T-196-ENG-pp 67-68 (FRA-p.55).

Defence witness 134: Alain Metu

1059. Alain (witness 0134) stayed in Aveba from May 2003 until October 2005,¹⁹⁴² so pertinently during the period closely following the charge and for a long time thereafter. This makes his evidence of particular and greater relevance than the evidence of P-12 or P-267, whose evidence relates to 2004, P-373, who was not in Aveba, or P-250 and P-280 who had limited contact with Aveba.

1060. Alain did not see any children in Aveba bearing arms.¹⁹⁴³ The children that he saw in the BCA camp were the family members of militia.¹⁹⁴⁴ He heard that children were demobilised because of the incentive of the kits.¹⁹⁴⁵ What makes this hearsay statement credible is that he, of his own initiative, qualifies his statement by saying that he was travelling a lot during that period and he was working for another organisation having nothing to do with demobilisation.¹⁹⁴⁶

Prosecution witness 373: Renaud Jean Claude

1061. P-373, a journalist gave evidence, supported by photographs, which addressed the issue of child soldiers but which did not directly touch upon Katanga's involvement in this crime. He testified in relation to 5 trips to Zumbe and Nyakunde, undertaken between the 2 July 2003 and the 16th August 2003. Interestingly, he notes that he was in the field at a time when militia groups had an interest in inflating their numbers so that they appeared more important, so as to have a chance at a seat or a bigger seat for the pacification process.

Prosecution witness 267 and the register: EVD-OTP-00120

1062. In the absence of sufficient direct evidence of Germain's alleged use of child soldiers, the Prosecution relied on the evidence of P-267, [REDACTED] in the demobilisation process, taking place in late 2004, well over a year after the events at Bogoro. This witness described the demobilisation process in which 952 children were demobilised. Children were interviewed and questions put to determine whether a child was genuinely a child soldier. A register was kept containing a record of the children who passed through the site (EVD-OTP-00120). The prosecution relies on this document as evidence, but even on its face it does not establish the use of child soldiers by Katanga, let alone their use prior to, during or the period immediately following the attack on Bogoro. Firstly, the document is clearly marked as recording EAFGAs, not child soldiers as defined for the purposes of Katanga's trial.

¹⁹⁴² D2-134-T-257-ENG-p.4-l.2-6; p.48-l.20-21 (FRA-pp. 40, 43).

¹⁹⁴³ D2-134-T-257-ENG-p.54-l.1-3 (FRA-p.48).

¹⁹⁴⁴ D2-134-T-257-ENG- p.54-l.5-8 (FRA-pp.48-49).

¹⁹⁴⁵ D2-134-T-257-ENG- p.54-l.15-17; l.22-24 (FRA-p.49).

¹⁹⁴⁶ D2-134-T-257-ENG- p.54-l.13-15 (FRA-p.49).

Therefore, it included children who did not participate actively in hostilities. Second, the document provides no detail but simply records the name, sex and age of the child. There was a column for observations, but this is empty in the vast majority of cases and where not empty, does not give any information relevant to understanding the experience or status of the child.

1063. The inherent reliability of the document is also questionable. At certain points in the document, for example on the entries under 24th December 2004 and 15th April 2005, one notes that the ages of a batch of children are not recorded. P-267 provides the explanation that sometimes the children could not provide their age.¹⁹⁴⁷ This must logically be correct, but one would expect to see instances of this dotted around the document and not whole sequences of children who had been interviewed one after the other. The lack of isolated instances suggests that the ages were sometimes guessed and the complete absence of ages for whole groups of children suggests that the age entries may have been entered subsequently. This is supported by the strange consistency of the ink and handwriting, which tends to indicate that the document was not compiled on a daily basis but perhaps after over a period of a few days.

1064. The reliability of EVD-OTP-00120 has been clearly undermined by the evidence of Christian, D2-160, and in particular the document which he produced to show that there were false child soldiers on the register: EVD-D02-00141 (see analysis of Christian's evidence below).

1065. In any event, it is submitted that in the light of the defence evidence, the evidence of P-267 is not reliable in relation to the process for identifying child soldiers. According to Katobe, P-267 was aware of everything and instructions relating to sensitisation came from him. This included the use of kits to lure children to the site.¹⁹⁴⁸ He demonstrated clear motive to go the extra mile to ensure that the site did not close down. According to Katobe in discussions around sensitization P-267 said:

if no children came into the transit site, we would pack up our things and go, as I said earlier, and so we had to continue doing this awareness-raising, so to speak, so that we would not be obliged to leave.¹⁹⁴⁹

Defence witness 160: Christian Mbomba

1066. Mbomba worked for AJEDEC during the demobilization process. According to the witness, Save the Children UK was in charge of the process but relied on local organizations including [REDACTED]. AJEDEC was to raise awareness. [REDACTED] would identify the

¹⁹⁴⁷ P-267-T-173-ENG-p.44-l.18-24 (FRA-pp.43-44).

¹⁹⁴⁸ D2-196-T-282-ENG-p.57-l.10-25 (FRA-pp.50-51).

¹⁹⁴⁹ D2-196-T-282-ENG-p.59-l.25; p.60-l.3 (FRA-pp.52-53).

children and determine who was a child soldier and [REDACTED] cared for the children while going through the demobilization process.

1067. Mbomba confirms that the practice was different from the theory. Save the Children broadened the criteria from that of child soldiers to that of EAGA (children associated with armed conflict).¹⁹⁵⁰ AJEDEC did not go to the camps to raise awareness as envisaged. In reality, a child did not have to carry an arm or be in a camp to be demobilized.¹⁹⁵¹

1068. Looking at the register produced [REDACTED], EVD-OTP-120, Mbomba clarified that he knew the document and had worked with it.¹⁹⁵² In his opinion, only 30 percent of the names mentioned could be considered as real child soldiers.¹⁹⁵³ He defined child soldiers as persons under the age of 18 who carried a weapon or were in the service of a military commander.¹⁹⁵⁴

1069. The witness had also drawn up a list of those who he knew were demobilized but in respect of whom he was sure were not child soldiers:¹⁹⁵⁵ EVD-D02-00141.

Defence witness 1: David Adirodu

1070. Adirodu has no family ties with Katanga. He was demobilised in Aveba and subsequently worked within that process. He was at the entrance of the demobilisation site, he believes from 2004 to 2005, to check if a person had come to demobilise and whether he was really a militia.¹⁹⁵⁶ He undertook this verification through questions for children and adults¹⁹⁵⁷

1071. He states that a lot of resources were placed into the demobilisation process, as evidenced by the number of those involved. Among the organisations involved in the demobilisation process were UNDP, ADS, CONADER, [REDACTED].¹⁹⁵⁸

1072. The process for children was as follows: The first port of call for the child was the entrance to the demobilisation site, where David Adirodu and persons from CONADER stood. The child would be asked preliminary questions there before proceeding to [REDACTED].¹⁹⁵⁹ He would be asked where he came from, which group he belonged to and who was the leader of the group. If he satisfied the criteria he was given a piece of paper and

¹⁹⁵⁰ D2-160-T-273-p.22-l.1-3 (FRA-pp.19-20).

¹⁹⁵¹ D2-160-T-273-p.22-l.9-14 (FRA-p.20).

¹⁹⁵² D2-160-T-273-p.26-l.21 (FRA-pp.21-22).

¹⁹⁵³ D2-160-T-273-p.32-l.17-18 (FRA-pp.23-25).

¹⁹⁵⁴ D2-160-T-273-p.33-l.5-12 (FRA-p.25).

¹⁹⁵⁵ D2-160-T-273-p.37-l.5-14 (FRA-pp.33-34).

¹⁹⁵⁶ D2-1-T-276-p.18-l.4-6 (FRA-p.15).

¹⁹⁵⁷ D2-1-T-276-p.18-l.21-24 FRA-p.15).

¹⁹⁵⁸ D2-1-T-277-p.4-l.21-22 FRA-p.4).

¹⁹⁵⁹ D2-1-T-277-p.5-l.10-15 FRA-p.4).

asked to proceed to [REDACTED]. They would spend two days there and then proceed to [REDACTED] to collect a kit. The children would spend about 5 days with [REDACTED].¹⁹⁶⁰

1073. Adirodu notes that when the demobilisation process started it was only the adults coming. The child who came which was well known was Karido. He was seen by Adirodu and spent 2 to 3 weeks in the transit camp, illustrating that there was some variation in the practice of how long a child would stay. After that children came from Boga but Adirodu had sent them away. [REDACTED] [P-267], challenged him on this.

1074. Karido had become an orphan. Adirodu noticed that he was a child of about 13 in the camp and suggested he be demobilised. When Adirodu met him he had not been fighting and Adirodu could not say what battles he had fought in.¹⁹⁶¹

1075. After Karido children from Boga came. Adirodu said that:

[REDACTED] called me one day and asked me why I had sent the children away. He asked me, he pleaded with me to let the children go into the site. He said, 'Look, if these children can't go into the site, then we're going to lose children. Leave the children from the community, enjoy the fact -- take advantage of the fact that we have this site here.'¹⁹⁶²

Defence witness 196: Leonard Katobe Adizo

1076. Mr Katobe was working as an 'encadreur' with the NGO [REDACTED], *Terres des Enfants*. His job was to search for unaccompanied children and reunite them with their families. He gave evidence about the demobilization site in Aveba, which he said started in November 2004.

1077. According to Katobe, the objective was to demobilize child soldiers but when they arrived 'there were really no child soldiers'.¹⁹⁶³ He stated that they only found one case of a child soldier that this was on the first day. This was Karido. With regard to Karido, the witness later confirmed that he had no information about any battles in which Karido participated. So even with respect to this child it provides no evidence of his use to participate directly in hostilities, certainly not with respect to Bogoro. After that children were not coming. In order to get more children and not to have to go home they started an awareness raising campaign, which included the promise of kits.¹⁹⁶⁴ According to Katobe, there were three categories of children covered by the demobilization process. First there were child soldiers, like Karido. Then there were EAFGAs, who were children associated with armed

¹⁹⁶⁰ D2-1-T-277-p.8, line 10 (FRA-p.7).

¹⁹⁶¹ D2-1-T-277-p.9-l.5-6 (FRA-pp.7-8).

¹⁹⁶² D2-1-T-277-p.9-l.13-20 (FRA-p.8).

¹⁹⁶³ D2-196-T-282-ENG-p.26-l.7-9 (FRA-p.23).

¹⁹⁶⁴ D2-196-T-282-ENG-p.27-l.4-9 (FRA-pp.24-25).

groups. These included family of militia and those running errands. Finally, there were the poor children who were considered as war traumatised children.¹⁹⁶⁵ Even this third category was encouraged to demobilize with a view to receiving kits.¹⁹⁶⁶ With respect to the children which came after Karido, the witness stated:

When the children started coming, instead of doing things meticulously, they were not asked many questions. We would simply ask them whether they had been in one group or another. The whole idea was just to increase the number of children, that's it.¹⁹⁶⁷

1078. He adds later that that in the process there were three forms, the identification form, the verification form and the reintegration form. It was the verification form, which contained the information relevant to what the child was doing. According to the witness, this form was in the hands of [REDACTED] but was not taken into consideration.¹⁹⁶⁸ In commenting on EVD-OTP-00120, the register of child soldiers, of the 952 children mentioned he could only confirm one to be a genuine child soldier.¹⁹⁶⁹ Of the remaining children he thought that only 1/10th were EAFGA and the remaining children were traumatized children taking advantage of the kits due to poverty.¹⁹⁷⁰ Katobe produced a document in support of this proposition, admitted as EVD-D02-00145. He included in this document a number of references to students who went through the site.¹⁹⁷¹

1079. On the basis of this evidence, it is plain that the demobilization process cannot provide any real indication of the situation with respect to child soldiers in the armed forces of Katanga in late 2004, let alone in February 2003. The evidence given by Katobe on the other hand suggests that there was a difficulty identifying child soldiers in Aveba in 2004.

Defence witnesses 134: Alain Metu; and 259: Mugangu Awenya Bonheur

1080. Alain Metu heard that children who were not militia were demobilised due to the incentive of the kits.¹⁹⁷² What makes this credible is that he qualifies his statement by saying that he was travelling a lot during that period and working for another organisation, unrelated to demobilisation.¹⁹⁷³

1081. Bonheur is a Ngiti who was 15 in February 2003.¹⁹⁷⁴ In 2002 and 2003 he was living with his parents in Aveba. His father was a pastor in the church of *Communauté Emmanuel*

¹⁹⁶⁵ D2-196-T-282-ENG-p.27-l.17-25; p28-l.1-7 (FRA-p.25).

¹⁹⁶⁶ D2-196-T-282-ENG-p.56-l.10-14 (FRA-p.54).

¹⁹⁶⁷ D2-196-T-282-ENG-p.27-l.10-13 (FRA-pp.24-25).

¹⁹⁶⁸ D2-196-T-282-ENG-p.45-l.20-24 (FRA-pp.40-41).

¹⁹⁶⁹ D2-196-T-282-ENG-p.61-l.13-16 (FRA-p.54).

¹⁹⁷⁰ D2-196-T-282-ENG-p.61-l.18-22 (FRA-p.54).

¹⁹⁷¹ D2-196-T-283-ENG-p.15-l.4-7; The document is discussed from page 10, line 10 (FRA-pp.10-14).

¹⁹⁷² D2-134-T-257-ENG- p.54-l.15-17; l.22-24 (FRA-p.49).

¹⁹⁷³ D2-134-T-257-ENG- p.54-l.13-15 (FRA-p.49).

¹⁹⁷⁴ D2-259-T-284-p.28-l.15 (FRA-p.26-l.5).

39th. His mother was not working but assisted in church duties.¹⁹⁷⁵ They were therefore not militia. Bonheur was himself in the church choir during this time. He never had any association with militia.¹⁹⁷⁶

1082. He had friends who went to the demobilization site. He learnt from these friends that they had been questioned to determine if they were really militia and that they had been given kits, which included blankets, towels, bags and clothes. He met friends in these circumstances in December 2004, January and March 2005. He knew that these children were living with their parents. They were going to school. Some of them were in the choir. However, they had no other occupation or connection to the militia.¹⁹⁷⁷ Neither did he know of any of these children being connected to the BCA.¹⁹⁷⁸

1083. Bonheur spoke of the fact that organisations came to the school and the playgrounds to sensitize people into coming to demobilize. They would tell the children that if they were in the militia they should come to be demobilized and that they would get kits, the nature of the kits being explained.¹⁹⁷⁹ This evidence plainly undermines the weight which can be attached to the Register: EVD-OTP-00120 as in any way probative of the existence of child soldiers.

(8) Legal Submissions on child soldiers

Introduction

1084. That the Rome Statute is a treaty requires that it be interpreted in accordance with international law rules of treaty interpretation, which dictates that the meaning to be given to the terms in the Statute is their ordinary meaning, in their context and in the light of a treaty's object and purpose. An examination of the established principles of the law of armed conflict reveals that active participation in hostilities and direct participation therein are, in fact, synonymous. This ordinary meaning of the term and how direct participation is defined, is then to be applied to articles 8(2)(b)(xxvi) and 8(2)(e)(vii). Notwithstanding that direct participation and active participation in hostilities are synonymous, an expanded definition of participation "actively" finds no support in the Statute, or indeed, in any of the applicable sources of law under article 21 of the Statute.

¹⁹⁷⁵ D2-259-T-284-p.34-l.1-30 (FRA-p.31).

¹⁹⁷⁶ D2-259-T-284-p.35-l.18-19 (FRA-pp.31-32).

¹⁹⁷⁷ D2-259-T-284-p.39-l.14-19 (FRA-p.35).

¹⁹⁷⁸ D2-259-T-284-p.40-l.6 (FRA-p.35).

¹⁹⁷⁹ D2-259-T-284-p.42-l.6 (FRA-pp.36-37).

The Court's relevant texts are subject to international law rules of treaty interpretation

1085. The Rome Statute is first and foremost a treaty, and as such, is to be interpreted in accordance with international law, namely articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention), in relevant part:

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
3. There shall be taken into account, together with the context:
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

1086. In accordance with article 31 of the Vienna Convention, the application pursuant to article 21 of the Statute “in the first place”, *inter alia*, of the Statute and its Elements of Crimes – and interpretation thereof, must be in accordance with their “ordinary meaning”.¹⁹⁸⁰ Recourse to the preparatory works is a measure that is to be taken as a last resort, according to article 32 of the Vienna Convention, and if relied upon, is subject to “applicable treaties” (*in casu* Additional Protocol I for international armed conflict, or Additional Protocol II for non-international armed conflict), as well as to “the established principles of the international law of armed conflict” (article 21 (1)(b) of the Statute). Such recourse is also consistent with article 31(3)(c) of the Vienna Convention.

1087. The contextual elements of articles 8(2)(b) and 8(2)(e) state similarly in the Statute (and again, as per articles 31(1) and 31(3) of the Vienna Convention), that violations listed under the war crimes are “within the *established* framework of international law [of armed

¹⁹⁸⁰ This general rule of interpretation in the Vienna Convention is adopted by and large in article 21 at sub-paragraph 1(b). The Appeals Chamber has held that the Statute is to be applied in conformity with article 31(1) of the Vienna Convention. See *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-522, Judgment on the Appeal of Mr. Germain Katanga against the Decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, paras 38-39. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford, 14 March 2012, paras 13-18 (referring to the said Appeals Chamber Judgment and stating with regard to article 31(1) of the Vienna Convention and to article 25(3)(a) of the Statute, that “[i]n line with these [Vienna Convention] principles, I have sought to give the relevant terms their plain meaning, and it has been unnecessary to read in additional terms in order to give effect to the express words of the Statute”).

conflict].”¹⁹⁸¹ Such construction indicates that the drafters had no intention at the time of the adoption of the Statute, of expanding the existing law. Under the treaty and customary law, as well as positive law that existed at the time that the Statute was passed, direct participation was equivalent to active participation, and as such, is binding on the application of articles 8(2)(b)(xxvi) and 8(2)(e)(vii).

Direct participation and active participation in hostilities are synonymous

1088. Contrary to the finding by the trial chamber in *Lubanga*,¹⁹⁸² the use of the expression “to participate actively in hostilities” under the Statute, as opposed to that of “direct participation” as found in the relevant law of armed conflict provision, was not intended to import a wide interpretation to the activities and to the roles that are covered by the war crime of using children under the age of 15 to participate actively in hostilities.

1089. The *Lubanga* trial chamber notes in its finding otherwise, that article 4(3)(c) of Additional Protocol II does not include the term “direct”, in support of the wider interpretation that the bench imputes to active participation.¹⁹⁸³ However, sub-paragraph (4)(d) of same dictates that the protection afforded to children by this article “to children who have not attained the age of fifteen years shall remain applicable to them if they take a *direct* part in hostilities despite the provisions of sub-paragraph (c) and are captured.”¹⁹⁸⁴ Also in this regard, article 4 (fundamental guarantees) of Additional Protocol II defines at sub-paragraph (1), that protected persons are “[a]ll those who do not take a direct part or who have ceased to take part in hostilities [...]” and consequently, cannot legally be targeted. It would be incongruous with the purpose of international humanitarian law (IHL) to limit the suffering of warfare, to diminish the degree of protection to which civilians not participating in hostilities are entitled, by broadening the level of participation to include that which is not direct (as defined by the ICRC), thereby subjecting them to being ‘legitimate’ targets.

1090. Indeed, the ICRC study on direct participation in hostilities states unequivocally that the notion of direct participation has evolved from, and is used interchangeably with, that of active participation:

The notion of direct participation in hostilities has evolved from the phrase “taking no active part in hostilities” used in Article 3 [of Geneva

¹⁹⁸¹ Emphasis added. See also Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 543 (“The Chamber notes the reference in article 8(2)(b) to ‘the established framework of international law’, which applies equally to the crimes set out in article 8(2)(b)”).

¹⁹⁸² *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 627.

¹⁹⁸³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 627.

¹⁹⁸⁴ Emphasis added.

Conventions I through IV]. Although the English texts of the Geneva Conventions and Additional Protocols use the words “active”¹⁹⁸⁵ and “direct”¹⁹⁸⁶, respectively, the consistent use of the phrase “*participent directement*” in the equally authentic French texts demonstrate that the terms “direct” and “active” refer to the same quality and degree of individual participation in hostilities.¹⁹⁸⁷

Contrary, then, to the finding by the trial chamber in *Lubanga*¹⁹⁸⁸, in addition to the specific prohibition of using children to participate directly in hostilities pursuant article 77(2) of Additional Protocol I (API), article 4 of Additional Protocol II also prohibits the direct participation of children in hostilities.¹⁹⁸⁹

1091. Of note in particular, is that the scope of direct participation is narrow, means “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy forces”,¹⁹⁹⁰ and comprises the following three cumulative criteria:

1. The act must be likely to adversely affect the military operation or military capacity of a party to an armed conflict, or alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).¹⁹⁹¹

¹⁹⁸⁵ Article 3 of Geneva Conventions I through IV (footnote in original).

¹⁹⁸⁶ Articles 51(3), 43(2), 67(1)(e) of Additional Protocol I and Article 13(3) of Additional Protocol II (footnote in original).

¹⁹⁸⁷ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC (2009), p. 43. See also Commentary on Additional Protocol II, article 13, para. 4785 (“The term ‘direct part in hostilities’ is taken from common Article 3, where it was used for the first time. It implies that there is a sufficient causal relationship between the act of participation and its immediate consequence”).

¹⁹⁸⁸ Cf. *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 627.

¹⁹⁸⁹ That no difference in prohibition exists between article 77(2) of API and article 4(3)(c) of APII is also confirmed by the following, footnoted after the explanation that children below the lawful age of recruitment may lose protection against attack: “Therefore, all parties to an armed conflict are obliged to do everything feasible to ensure that children below the age of 15 years do not directly participate in hostilities, and, in particular, to refrain from recruiting them into their armed forces or organised armed groups (Arts 77(2) API; 4(3)(c) APII [...]).” See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC (2009), p. 60 & fn. 154; ICRC, “XXVth International Conference of the Red Cross, Geneva (1986), Resolution IX (Protection of children in armed conflicts)”, *International Review of the Red Cross*, No. 256, December 1986 (“3. recalls also that, according to the Geneva Conventions and the two Additional Protocols, children under the age of 15 years who have taken *direct part* in hostilities and fall into the power of an adverse Party continue to benefit from special protection, whether or not they are prisoners of war [...])” (second emphasis added).

¹⁹⁹⁰ Commentary to article 51(3). The ICRC explains, “The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target.”

¹⁹⁹¹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC (2009), pp 46-64.

The constitutive element of direct causation underscores the essential distinction between participation in the war effort and participation in hostilities, the absence of which renders the principle of distinction meaningless. Active participation in the war effort (e.g., civilians who supply food to the army or other such war sustaining activities), does not itself constitute participation in hostilities. In order for preparatory activities to fall within the scope of direct participation, such activities must be of a “specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.” Preparatory activities that are merely designed to “establish the general capacity to carry out unspecified hostile acts”, including general training, for example, do not fall within the scope of direct participation in hostilities.¹⁹⁹²

1092. The ICRC has accordingly recognised with regard to article 77(2) of API, that there is no absolute legal prohibition on indirect acts of participation, such as “gathering and transmission of military information, transportation of arms and munitions, provisions of supplies, etc.” Also, it recognises that children under the age of 15 may “spontaneously or on request perform such tasks”, and simply directs States parties to take precautions should such a situation arise.¹⁹⁹³

1093. That direct participation and active participation are to be treated as synonymous before the Court, at least insofar as article 8(2)(b)(i) is concerned, has also been confirmed by the *Katanga and Ngudjolo* Pre-Trial Chamber.¹⁹⁹⁴ The ICTY Appeals Chamber has also confirmed that these terms are synonymous.¹⁹⁹⁵ As noted above, it would be discordant with IHL that a lower threshold of protection be afforded to persons on account of their having participated actively (i.e., participated indirectly), as opposed to having directly participated in hostilities. Doing so risks victimising children twofold: firstly, by their very use in hostilities

¹⁹⁹² ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC (2009), pp 53, 65-66 (“Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act, and, therefore, as direct participation in hostilities. [...] [T]he preparation of a general campaign of unspecified operations would not qualify as direct participation in hostilities. In line with the distinction between direct and indirect participation in hostilities, it could be said that preparatory measures aiming to carry out a specific hostile act qualify as direct participation in hostilities, whereas preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts do not”) (emphasis in original).

¹⁹⁹³ Yves Sandoz, Christoph Swinarski, Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p. 901, para. 3187.

¹⁹⁹⁴ DCC, para.266 & fn. 367 (“The expression ‘direct part in hostilities’ and ‘active part in hostilities’ are to be treated as synonymous”).

¹⁹⁹⁵ The Appeals Chamber in *Strugar* quoted as authority, in addition to the *Akayesu* Judgment, the following General Assembly Resolution of 1970, for treating the terms active participation in common article 3 and direct participation in API, as synonymous: Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 9 December 1970, UNGA Resolution 2675 (XXV) (“distinguishing between ‘persons actively taking part in the hostilities and civilian populations’). *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008, para. 173 & fn.430.

and secondly, by removing their protective status against attack¹⁹⁹⁶ when engaging in what otherwise constitutes mere participation in the war effort.¹⁹⁹⁷

An expanded definition of “to participate actively in hostilities” is not supported by either the Statute, or by the relevant established framework of international law

1094. Notwithstanding the above, and with regard to the Court having to exercise jurisdiction over the statutory acts delineated under article 8(b) “within the established framework of international law”, Dörmann has explained that this phrase “may have been added to underline that the offenses under article 8 paragraph 2(b) must be interpreted in line with ‘established’ international humanitarian law, possibly to exclude an all too progressive interpretation of, for instance, offences derived from Additional Protocol I.”¹⁹⁹⁸

1095. This interpretation is supported by article 10 of the Statute,¹⁹⁹⁹ as well as by article 22(3) of same, which provides that this latter article (*nullum crimen sine lege*) “shall not affect the characterisation of any conduct as criminal under international law independently of the Statute.” The drafters thus clearly contemplated the possibility that the law set out in the Statute and applied by the Court, would eventually depart from evolving corpus of international law. The Statute nevertheless obliges application of the law as defined in 1998, and not any new developments thereof.

1096. As noted above, the definition of active participation in hostilities within the established framework of IHL in 1998 was the same as that of direct participation. In addition to the interpretation in the first place, of the established rules of IHL, in accordance with the ordinary meaning of articles 8(2)(b) and 8(2)(e), applicable treaties and rules of the international law of armed conflict also proscribe at the relevant time, against an expanded definition of “active” participation in hostilities.

¹⁹⁹⁶ The ICRC has noted in this regard that even civilians forced to participate directly in hostilities and children under the lawful recruitment age may lose their protection against direct attack, but regain it once they no longer so participate. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC (2009), p. 60 & fn. 154.

¹⁹⁹⁷ See Commentary on Additional Protocol I, article 51 (protection of the civilian population), para. 1945 (“There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context”).

¹⁹⁹⁸ Knut Dörmann, “War Crimes”, in: *Commentary on the Rome Statute of the International Criminal Court*, Triffterer (ed.) (2008), p. 323. Arguably, the same is true too, for the inclusion “within the established framework of international law” under article 8(2)(e) with respect to progressive interpretation of offences derived from APII.

¹⁹⁹⁹ Article 10 reads as follows: “Nothing in this Part [Part II Jurisdiction, admissibility and applicable law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for the purposes *other than this Statute*.” (Emphasis added).

1097. That other relevant international law provisions militate against broadening the scope of “active” participation is confirmed by that in the Convention on the Rights of the Child²⁰⁰⁰, which entered into force in 1990, and provides that persons who have not attained the age of fifteen years “do not take a direct part in hostilities” (article 38(2)).²⁰⁰¹ Of note also, is that a proposition was put forward during the drafting of this Convention, to delete the word “direct.” This was met with opposition, however, because it would improve on the standard contained in API: it was stressed in particular, that a working group for the drafting of the Convention was not an appropriate venue to revise already existing international law. The text was therefore adopted based on article 77(2) of API.²⁰⁰² Similarly, the African Charter on the Rights and Welfare of the Child, which entered into force in 1999, prohibits the use of children in “direct part in hostilities.”²⁰⁰³

1098. And with regard to the definition of “active” participation within the established framework of the law in 1998, the ICTR trial chamber in *Akayesu* opined that year, that active participation in hostilities and direct participation in hostilities, as set out in common article 3 of the Geneva Conventions and in article 4 of Additional Protocol II, respectively “[...] are so similar that [...] they may be treated as synonymous.”²⁰⁰⁴ This was confirmed verbatim in 1999, in *Rutaganda*.²⁰⁰⁵

1099. It would then exceed the existing framework of international law, as referred to by articles 8(2)(b) and 8(2)(e) of the Statute, to impose a broader definition of criminal responsibility on individuals, than that which applied to States at the time of the adoption of the Statute. This is particularly the so, as the *ad hoc* Tribunals have explicitly recognized that individual criminal responsibility must be defined more restrictively than the obligations

²⁰⁰⁰ The Convention on the Rights of the Child is, of course, a human rights treaty. Nevertheless, its provision relating to the law of armed conflict helps to illustrate the point at hand.

²⁰⁰¹ Convention of the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, Registration No. 27531, Adopted and open for signature, ratification, and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

²⁰⁰² Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers (1999), p. 653. Suppression of the word “direct” would have broadened the protective scope of article 38 to prohibit *any* part in hostilities. Improvement of the standard contained in API would have been the result of prohibiting *all* participation in hostilities, rather than as a result of reference to “active” participation. The text of the Optional Protocol to the Convention on the Rights of the Child, which was finalised after the Rome Statute, also uses the terminology direct rather than “active”. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Registration No. 27531, United Nations, Treaty Series, vol. 2173, p. 222; Doc.A/RES/54/263; and C.N.1031.2000, entry into force 12 February 2002, article 1).

²⁰⁰³ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB./LEG/24.9/49 (1990), entry into force 29 November 1999, article 22(2). The said Charter is, of course, a human rights treaty. Nevertheless, its provision relating to the law of armed conflict helps to illustrate the point at hand.

²⁰⁰⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 629 (*Akeyesu*). See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press (2002), p. 135 (citing to *Akeyesu*).

²⁰⁰⁵ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999, para. 98.

under IHL or human rights law that apply to States, since individuals face the prospect of penal sanctions.²⁰⁰⁶ Adopting a broader interpretation would indeed be problematic, in that it would create a wider offence for individuals than for states, even when the individual is acting as an agent of the state.²⁰⁰⁷ Article 22(3) confirms as much.²⁰⁰⁸

Other sources in supporting an expanded definition are not applicable

1100. The trial chamber in *Lubanga* relies on human rights principles to expand the notion of “active” participation, to include activities not otherwise covered by direct participation. Such reliance is misplaced, however, for neither the application of the established principles of IHL, nor these rules themselves are *subject to* internationally recognised human rights. Article 21(3) of the Statute dictates instead that article 21 be applied and interpreted consistent with internationally recognised human rights *in the context of persons being investigated, tried, and convicted*, and does not define the crimes and Elements thereof over which the Court exercises jurisdiction.

1101. A closer reading of the Appeals Chamber Judgment on which the *Lubanga* trial chamber relies confirms this latter application and interpretation of article 21(3), for its findings were made specifically with regard to the abuse of process of Mr. Lubanga.²⁰⁰⁹ Other sources in *Lubanga*²⁰¹⁰ and in the current case²⁰¹¹ in supporting an expanded definition are also not applicable.²⁰¹²

²⁰⁰⁶ See e.g., *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion on Interlocutory Appeal on Jurisdiction, October 1995, para. 94; *Prosecutor v. Vasiljević*, Case No. IT-98-32, Judgement, 29 November 2002, paras 201, 202; *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, paras 470, 471.

²⁰⁰⁷ Matthew Happold, “Child Recruitment as a Crime under the Rome Statute of the International Criminal Court”, in: *The Legal Regime of the International Criminal Court: Essays in Memory of Igor Blishenko*, Doria, Gasser, and Bassiouni (eds.) Brill (2009), p. 15.

²⁰⁰⁸ Article 22 (*nullem crimen sine lege*), sub-paragraph 3 reads as follows: “This article shall not affect the characterisation of any conduct as criminal under international law independently of the Statute.”

²⁰⁰⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, para. 36.

²⁰¹⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 606.

²⁰¹¹ See PFB, para. 695 (referring to the Cape Town Principles); CSFB, paras 29-30, 33 (Referring to the Cape Town Principles and to the Paris Principles).

²⁰¹² P-267-T-172-pp 69-74; EVD-D02-00048. The Cape Town Principles define a child soldier as follows: “any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms”. The Cape Town Principles were adopted in 1997 as a result of a symposium by the NGO Working Group on the Convention on the Rights of the Child and UNICEF that brought together partners to develop strategies, *inter alia*, for the demobilisation of children. As such, the said Principles have no formal legal status, and cannot be considered as established rules of international law, much less as examined above, established principles of the international law of armed conflict. The same is true too, of the Paris Principles, which were promulgated in 2007, nine years after the

1102. Furthermore, *lex specialis* determines that the rule of direct participation in hostilities, as narrowly defined, prevails over more general human rights rules in a situation of armed conflict. Reliance on human rights rules should occur only in the absence of definition under the laws of armed conflict, of the rule in question.²⁰¹³ As demonstrated above, no such *lacuna* exists with regard to direct participation under the established principles (and indeed rules) of the international law of armed conflict. Accordingly, recourse to general human rights rules in defining the relevant offence under articles 8(2)(b)(xxvi) or 8(2)(e)(vii), is misguided.

Recourse to the *travaux préparatoires* as a last resort

1103. Recourse by the trial chamber in *Lubanga* to the preparatory work²⁰¹⁴ before having examined the definition of participation “actively” in a successive manner pursuant to articles 31 and 32 of the Vienna Convention, and of article 21 of the Statute, is also misplaced. As noted above, the *travaux préparatoires* are to be relied upon only where the ordinary meaning under the established law of armed conflict left the meaning of participation “actively” ambiguous or obscure. Such is not the case, of course, as demonstrated above. Yet, even if the trial chamber in the present case were to nevertheless rely on the preparatory work, the defence emphasises the following intention of the drafters to utilise the term “active” rather than “direct”, as explained by the ICRC:

At first sight, it may appear that the Preparatory Committee for the Establishment of an International Criminal Court implied a distinction between the terms ‘active’ and ‘direct’ in the context of the recruitment of children when it explained that: ‘The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat’ (emphases added). Strictly speaking, however, the Committee made a distinction between ‘combat’ and ‘military activities linked to combat’, not between ‘active’ and ‘direct’ participation.²⁰¹⁵

adoption of the Rome Statute. See The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles).

²⁰¹³ See, e.g., *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, paras 159, 162 (The trial chamber turned to human rights law to determine the definition of torture under customary law, because whilst international law prohibited torture in armed conflict, it did not provide a definition thereof. However, it emphasised that it should “identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts”). See also *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, paras 469-471 (The trial chamber relied on human rights law to define the crime of torture, absent definition thereof under international humanitarian law, but exercised caution in embracing “[...] too quickly and too easily concepts and notions developed in different legal context”).

²⁰¹⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paras 620-621. See also *ibidem*, paras 622-623 (referencing the pre-trial chamber in *Lubanga* having resorted to the preparatory work).

²⁰¹⁵ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC (2009), p. 43, fn. 84.

The defence submits that only when military activities linked to combat, if the threshold of direct participation as defined above is met, satisfy the relevant offence under article 8(2)(b)(xxvi) or 8(2)(e)(vii).²⁰¹⁶

Use of children as alleged²⁰¹⁷ does not meet the threshold of direct participation²⁰¹⁸

1104. The mere presence of children in camps – and at the BCA in particular – is not, on the basis of the evidence, the only reasonable conclusion that these children were used to participate directly in hostilities, or that Mr. Katanga had the knowledge or intent thereof. As so held by the SCSL, children that accompany militia members who moved around with their families, are not beyond reasonable doubt, used to participate directly in hostilities.²⁰¹⁹ The defence examines in further detail above the evidence of the presence of children with their families and of orphaned children at the BCA.

1105. Turning next to the issue of training, the defence recalls that training other than for the execution of a predetermined hostile act (and for the purposes of the present case, for the 24 February 2003 Bogoro attack), does not entail direct participation, as otherwise required under articles 8(2)(b)(xxvi) or 8(2)(e)(vii). With respect to parades, they do not constitute military training, and even less so direct participation in hostilities, and thus cannot be relied upon to infer Germain Katanga's intent to, or knowledge of, using children to directly participate at Bogoro.

1106. The same is true too, of the use, if any, of children as escorts, bodyguards, or otherwise by commanders not under the effective control of Mr. Katanga, including by Bahati de Zombe and by Garimbaya.²⁰²⁰ With respect to Germain Katanga's own escorts, the defence

²⁰¹⁶ See also in this regard CD, para. 250.

²⁰¹⁷ For the specific allegations by the prosecution of children participating in hostilities establishing the intent or knowledge of Germain Katanga, see PFB paras 55, 691-704, 721-726, 732-733, 735. See also CD 38, 39, 67 and DSC, paras 254, 255 (use for "multiple purposes", for training) Also, the offence in question, if any, is to be examined with respect to children "undoubtedly" under the age of 15 and "undoubtedly over it. See *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paras 643-644. The participation of children not directly participating in hostilities and that carried out opportunistic pillaging, does not constitute direct participation in hostilities.

²⁰¹⁸ Even if the trial chamber were to adopt a standard for direct participation that goes far beyond the one advocated by the ICRC (such as that of the continuous combat function as is mainly proposed by States such as the United States and Israel in order to fight terrorism), this function would still require a link to combat, i.e., to hostilities. The activities as listed by the prosecution and in the relevant circumstances of the case, do not have this link. Also, the continuous combat function would lead to a diminished protection for civilians in times of armed conflict.

²⁰¹⁹ See *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, para. 1740 ("Although the Chamber has found that there was a widespread practice of child recruitment by the RUF and AFRC, it has also heard evidence that the rebel forces, and in particular, the AFRC forces, moved around with their families at this particular time. The children who accompanied the rebels might therefore have been the family members of the fighters within that group, as acknowledged by TF1-215 himself. The Chamber therefore finds that, on the basis of the evidence, it is not the only reasonable conclusion that these children were used to actively participate in hostilities").

²⁰²⁰ See PFB, para. 724.

examines the relevant evidence as to their age over that of 15 years, above. And where “policing” duties do not meet the threshold of direct participation (and notwithstanding the credibility submissions with regard to this evidence), they cannot then be relied upon for intent and knowledge of Germain Katanga for the offence as alleged, and at Bogoro in particular.

1107. Finally, with regard to the alleged “use” of children to participate in defensive operations, and at Aveba in particular, it is important to remember that in all situations, even in times of peace, any person has an inherent right to self-defence: the execution of this personal self-defence does not constitute direct participation for the purposes of IHL.²⁰²¹ For its part, the use for “all other militia-related activities”, without more, cannot beyond reasonable doubt, be relied upon for intent or knowledge, or indeed use at Bogoro, for direct participation in hostilities.²⁰²²

The definition of the crime is to be interpreted in favour of Mr. Katanga

1108. In addition or in the alternative to the submissions made thus far, article 22(3) (*nullum crimen sine lege*) of the Statute requires of the offence in question, that it be interpreted in his favour.

1109. Failing that the crime by the present trial chamber is construed strictly, the defence relies additionally or alternatively, on article 22(1), namely that the broader definition of the crime was not for the reasons set forth above, criminalised at the time that the conduct took place. Only direct participation, as defined above, was clearly prohibited at the time in question. Mistake of law as to whether the type of conduct – as so broadly defined – is a crime within the jurisdiction of the Court, is a ground for excluding criminal liability, if indeed any. As Germain Katanga explained, “[...] in our minds, a child soldier meant someone who had had training, had a weapon and had fought,”²⁰²³ as per at least in part, the relevant established law of armed conflict at the time in question. Mistake of fact also is a ground for excluding criminal responsibility, if any, insofar as those “undoubtedly” under the age of 15 and those “undoubtedly” over the said age.²⁰²⁴ Contrary to the submission of the

²⁰²¹ See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, ICRC (2009), p. 61 (“Individual self-defence [...] cannot be regarded as direct participation in hostilities”). See also Baguma, Jonathan, D02-135-T-241-p. 63 (There was a general mobilisation when the Ugandans attacked Aveba: when the Ugandans stopped attacking, the children all returned to their normal life).

²⁰²² With respect to use as alleged at Singo, Nyankunde, Mandro (PFB, para. 725), the defence relies on its submissions made elsewhere.

²⁰²³ Katanga, Germain, D02-P-300-T-321-p.8.

²⁰²⁴ See *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, paras 643-644.

prosecution, Mr. Katanga in his evidence was not definitive in his ability to identify those having attained conclusively the age in question.²⁰²⁵

Conclusion

1110. The defence submits for the reasons set forth above, that liability, if any, under the relevant offence in 8(2)(b)(xxvi) or 8(2)(e)(vii), is to be attributed only on the basis of the activities in question meeting the threshold of direct participation in hostilities, as defined hitherto. It is the level of participation as so defined that is required for conviction, if any, to ensue. In other words, and contrary to the finding by the trial chamber in *Lubanga*,²⁰²⁶ it is the act itself of participating directly in hostilities that determines existence or not of the offence, and not the consequence of that participation, be it indirect, or any combination thereof (the person's "support and level of consequential risk"). Defining the crime otherwise by broadening its scope to include activities not prohibited by a plain and ordinary reading of the term, by the relevant treaties, by the established principles of the international law of armed conflict, by the Statute itself, or indeed, by a correct reading of the intention of the drafters, will necessarily lead on the basis, *inter alia*, of article 22, in the acquittal of Germain Katanga.

VI- LEGAL AND FACTUAL SUBMISSIONS ON THE INDIVIDUAL CRIMINAL LIABILITY

VI- LEGAL AND FACTUAL SUBMISSIONS ON THE INDIVIDUAL CRIMINAL LIABILITY

Common Plan - Liability as Indirect Co-perpetrator under Article 25(3)(a)

1111. Germain Katanga is charged together with Mathieu Ngudjolo as an indirect co-perpetrator under article 25(3)(a) of the ICC Statute.²⁰²⁷ The defence challenged the existence of this mode of liability at the confirmation hearing. It argued that this mode does not exist under the Statute, under customary international law or under the legal provisions of any domestic jurisdiction.²⁰²⁸ The Pre-Trial Chamber rejected these arguments.²⁰²⁹ On the request

²⁰²⁵ Katanga, Germain, D02-0300-T-321-pp.26-27; EVD-OTP-00092; EVD-OTP-00094 (The witness testified that those pictured, respectively, *could* be 13 or 14; the person without the bandana *could* be aged 11 or 12) (emphasis added). Cf. PFB, para. 68.

²⁰²⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 628.

²⁰²⁷ Katanga Confirmation Decision, paras. 487-539.

²⁰²⁸ ICC-01/04-01/07-T-46- p.28-l.11 et seq.

²⁰²⁹ Katanga Confirmation Decision, paras. 502-510

of the Trial Chamber, the defence submitted observations in support of its outstanding challenge of this mode of liability.²⁰³⁰ The Trial Chamber in *Lubanga* has now ruled on it.²⁰³¹ This Chamber is naturally at liberty to depart from the *Lubanga* Trial Chamber's findings on the common plan liability mode.

1112. The defence reiterates that indirect co-perpetration is a non-existing mode of liability. The defence submits that the Pre-Trial Chamber erroneously merged indirect perpetration with co-perpetration. It relies on the arguments raised in earlier filings.

1113. The defence submits that Mr. Katanga cannot be held liable for the acts of Ngudjolo's alleged subordinates or their co-perpetrators. He can only be held liable for the acts of his own subordinates, if any, and over whom he exercised effective control. Mr. Katanga could be held liable for Mr. Ngudjolo's personal acts if established that they acted jointly in those acts carried out personally by them.

1114. Mr. Katanga had no connection to the subordinates of Mr Ngudjolo; nor does he share their culture, ethnicity or language. It makes him potentially liable for the conduct of thousands of individuals for crimes committed over a wide geographical area. Even the Pre-Trial Chamber stated that the indirect co-perpetrator must have control over the crime,²⁰³² but by definition he does not.

1115. At this stage, after completion of the presentation of all the evidence, a change of modes of liabilities would create unfairness to the accused. In this respect, the defence respectfully agrees with Judge Adrian Fulford's opinion attached to the *Lubanga* Judgement that "as a matter of fairness it would be wrong at this stage to modify the legal framework of the case."²⁰³³

1116. This Trial Chamber held that "the decision on the confirmation of the charges is the only document which can serve as a reference during Trial Chamber proceedings."²⁰³⁴ The defendants have a legitimate reason to believe that both the legal and factual analysis of the Pre-Trial Chamber form the basis of the charges against them unless an appropriate warning is given pursuant to Regulation 55 of the Regulations of the Court. No such warning has been given. The accused has not been given an opportunity to present a defence in answer to any

²⁰³⁰ Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, ICC-01/04-01/07-1578-Corr, 2 November 2009 (original filing on 30 October 2009).

²⁰³¹ *Lubanga* Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012. See also the Separate Opinion of Judge Adrian Fulford.

²⁰³² Katanga Confirmation Decision, paras. 480-488.

²⁰³³ Separate Opinion of Judge Adrian Fulford, attached to *Lubanga* Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 2.

²⁰³⁴ *Prosecutor v. Katanga and Ngudjolo*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, paras. 16-17.

amended mode of liability. It is submitted that if the case of common plan fails, acquittal is the only fair result.

1117. In the alternative, the defence requests that the Chamber defines clear boundaries to the mode of indirect co-perpetration, and that the subjective and objective elements be strictly construed, in line with Article 22(2) of the Statute.

Subjective and Objective Elements of Indirect Co-perpetration

1118. In merging the theories of co-perpetration and indirect perpetration, the Pre-Trial Chamber has adopted the following objective and subjective elements:²⁰³⁵

- (i) the accused must be part of a common plan or an agreement with one or more persons;
- (ii) the accused and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime;
- (iii) the accused must have control over the organisation;
- (iv) the organisation must consist of an organized and hierarchical apparatus of power;
- (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the accused;
- (vi) the accused must satisfy the subjective elements of the crimes;
- (vii) the accused and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and
- (viii) the accused must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s)

1119. The prosecution must establish each of these elements beyond a reasonable doubt, but has failed to do so.

- (i) **The Prosecution failed to establish beyond reasonable doubt that Germain Katanga was part of a common plan or an agreement with one or more persons**

Legal Requirements

1120. The Pre-Trial Chamber held that the common plan “must include the commission of a crime”.²⁰³⁶ The Trial Chamber in *Lubanga* held that “it is necessary, as a minimum, for the prosecution to establish the common plan included a critical element of criminality, namely that, its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed.”²⁰³⁷ In the view of the Majority, a combined reading of Articles

²⁰³⁵ Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, 26-09-2008, paras. 495-593.

²⁰³⁶ Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, 26-09-2008, para. 523; ICC-01/04-01/06-803-tEN, para. 344.

²⁰³⁷ *Lubanga* Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, paras. 984, 987, 1021.

25(3)(a) and 30 “leads to the conclusion that committing the crime in question does not need to be the overarching goal of the co-perpetrators”.²⁰³⁸ The defence submits that the plan itself must be criminal; otherwise, the stringent requirements under article 30 of the Statute requiring knowledge and intent are not complied with. Also, absent criminality of the plan itself would render criminal any waging of war, including a war of liberation. It blurs the fundamental distinction between *jus in bello* (the rules governing the conduct of hostilities) and *jus ad belum* (the rules governing the right to resort to armed force). The Court is mandated only to determine whether an individual’s conduct is carried out in violation of applicable international humanitarian law.²⁰³⁹

1121. Also, the adoption of a “sufficient risk” standard comes dangerously close to accepting *dolus eventualis*, excluded from the Statute.²⁰⁴⁰ The Pre-Trial Chamber in *Bemba* held that “the words “will occur”, read together with the phrase “in the ordinary course of events”, clearly indicate that the required standard of occurrence is close to certainty. In this regard, the said *Bemba* Chamber defines this standard as “virtual certainty” or “practical certainty”, namely that “the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence.”²⁰⁴¹

1122. In the view of the Pre-Trial Chamber in *Bemba*, which the defence fully endorses, ‘had the drafters of the Statute intended to include *dolus eventualis* in the text of article 30, they could have used the words “may occur” or “might occur in the ordinary course of events” to convey mere eventuality or possibility, rather than near inevitability or virtual certainty.’²⁰⁴² This view also finds support in the *travaux préparatoires* in respect of article 30 of the Statute. Whilst notions such as recklessness and *dolus eventualis* have been discussed and considered, they were omitted in the Rome Statute.²⁰⁴³ Given that their inclusion has been explicitly considered, this omission was clearly deliberate, indicating that Article 30 was not intended to capture *dolus eventualis* or indeed, recklessness.²⁰⁴⁴ This also reflects the general

²⁰³⁸ Lubanga Judgment, para. 985.

²⁰³⁹ In NIAC, the distinction between *jus ad bellum* and *jus in bello* is not applicable, of course.

²⁰⁴⁰ Bemba Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, No. ICC-01/05-01/08 123/186 15 June 2009, paras 357-359.

²⁰⁴¹ Ibid, para. 362 (footnotes omitted).

²⁰⁴² Ibid, para. 363 (footnotes omitted).

²⁰⁴³ For an in-depth discussion on these concepts and their differences, see, for instance: Ambos, General Principles of Criminal Law in the Rome Statute, at 21-22; John D. Van der Vyver, The International Criminal Court and the Concept of Mens Rea in International Criminal Law, 12 U. Miami Int’l & Comp. L. Rev. 57, 63-64 (2004); Antonio Cassese, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, 5 J. Int’l Crim. Just. 109, 111 (March 2007).

²⁰⁴⁴ See Bemba Decision on Charges, para. 366 ; ref. to Decisions Taken By the Preparatory Committee At Its Session Held in New York 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5(1997), Annex II, Report of the Working Group on General Principles of Criminal Law and Penalties, Article H, para. 4, pp. 27-28; Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc.

view of academics and commentators, including those who participated in the drafting of article 30 of the Statute.²⁰⁴⁵

1123. Article 30 cannot be circumvented in applying a notion of indirect perpetration. Given the remoteness often of an indirect co-perpetrator to the execution of his common plan, both geographically and hierarchically, it is a real possibility that crimes will be committed outside the scope of the plan with which he had agreed with his co-perpetrators. Even if foreseeable, the indirect co-perpetrator cannot be held liable for such crimes.

1124. Respect for article 30 requires that in all circumstances, the minimum that is required for intent is that the accused knows that the results of the crime would occur in the normal course of events. Article 30 goes further because it distinguishes between conduct and consequences for the purposes of intent. It is submitted that whatever view is taken with regard to the theory of common plan, the basic requirements of article 30 with respect to the intent of the accused cannot be avoided save where the definition of a specific element of a crime provides for a different mental element.

1125. Thus, when considering liability for each offence, it is to be noted that according to the ordinary meaning of article 30 it is necessary to determine the appropriate intent in relation to each material element of the offence. Thus, if an element of the offence is a form of conduct then in terms of article 30 the accused must mean that conduct to take place, while with respect to a consequence it is only necessary that the accused knows that it will occur in the ordinary course of events. It follows that it is insufficient to determine that a crime committed by another would occur in the ordinary course of events or even that the accused knows this. For a conviction for personal conduct whether by oneself or through another under article 25, it is necessary to demonstrate that the accused meant the conduct to take place, even if the conduct is through another, and knew that the consequences would occur in the ordinary course of events.

A/AC.249/1998/L.13 (1998), Article 23[H], para. 4, p. 60; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Criminal Law and Penalties, Article H, para. 4, pp. 27-28; Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc. A/AC.249/1998/L.13 (1998), Article 23[H], para. 4, p. 60; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN Doc. A/Conf.183/2/Add.1 (1998), Article 29, para. 4, p. 66; Summary Records of the Meetings of the Committee of the Whole, 1st meeting, UN Doc. A/CONF.183/C.1/SR.1, para. 24.

²⁰⁴⁵ Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, at 154; Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 64-65; Piragoff & Robinson, at 850; Werle & Jessberger, *supra* n. 3, at 41; Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 *Crim. L. Forum* 1, 21-22 (1999); Eser, at 915.

1126. In the alternative, if the Chamber is not minded to accept this argument then it is submitted that the accused when acting through another must know that the constituent elements of the crime would occur in the ordinary course of events.

Pre-Trial Chamber's preliminary factual finding on common plan

1127. The Pre-Trial Chamber in the case against *Katanga and Ngudjolo* found that there was “sufficient evidence to establish substantial grounds to believe that there was a plan to “wipe out” Bogoro village by directing the attack against the civilian population, killing and murdering the predominantly Hema population and destroying their properties”.²⁰⁴⁶

1128. The defence submits that, in light of article 61(7)(a) and Regulation 55, it cannot depart from this preliminary finding or any of the facts and circumstances underlying them.²⁰⁴⁷ No alternative theory of the case has been charged. It is therefore too late at this stage to change the nature of the allegations. In any event, the prosecution has not departed from the Pre-Trial Chamber’s legal and factual analysis. The defence thus requests the Trial Chamber to consider strictly whether the factual allegations, as confirmed by the Pre-Trial Chamber, have been established beyond reasonable doubt.

1129. The defence submits that, having heard all the evidence, it has become clear that the prosecution has failed to establish beyond reasonable doubt that Germain Katanga and Mathieu Ngudjolo entered into an agreement to wipe out Bogoro.

Prosecution's Alleged Common Plan

1130. The prosecution alleges that “Katanga and Ngudjolo, who were respectively the head of the Ngiti and Lendu militia, formed an alliance in order to destroy Bogoro, eliminate the UPC and any Hema presence in the village. They planned, ordered and directed the attack on Bogoro, and their acts led to the commission of the crimes charged.”²⁰⁴⁸ Allegedly, the capture of Bogoro was “a vital objective for the Ngiti and the Lendu of Bedu-Ezekere, whose survival was threatened because they had been surrounded and were being massacred by the UPC”.²⁰⁴⁹ Approaching Bogoro was life-threatening, thus blocking the road and cutting off trade roads.²⁰⁵⁰ The Prosecution alleges that, to remedy this situation and seek revenge, “Katanga and Ngudjolo devised a plan of attack intended to eliminate any UPC and Hema presence in Bogoro and destroy and loot the village”.²⁰⁵¹ The prosecution alleges that, given that the

²⁰⁴⁶ Katanga Confirmation Decision, paras. 549, 565.

²⁰⁴⁷ See also: *Prosecutor v. Katanga and Ngudjolo*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, paras. 16-17.

²⁰⁴⁸ Prosecution Brief, para. 500.

²⁰⁴⁹ Prosecution Brief, para. 504.

²⁰⁵⁰ Prosecution Brief, paras. 508, 510.

²⁰⁵¹ Prosecution Brief, para. 504, 514.

Lendu and Ngiti considered all Hema to be enemies, “the decision to attack the enemy meant that all would be targeted without regard for age or status”.²⁰⁵²

Position of the Defence

1131. The defence contests these allegations on the following grounds:

- (1) There were no strong ties between Bedu-Ezekere and Aveba and particularly not between Katanga and Ngudjolo;
- (2) There was no radio network or other form of communication between Zumbe and Aveba;
- (3) The prosecution failed to produce credible evidence in support of its allegation of the visit to Aveba by a Zumbe delegation to plan the attack on Bogoro;
- (4) The Lendu combatants only joined in the battle towards the end when they heard the gunfire, which demonstrates there was no common plan, but that it was instead, an opportunistic attack by Zumbe;
- (5) The defence submits that the plan to dislodge the UPC from Bogoro came from Beni (RCD-K/ML and EMOI);
- (6) The crimes allegedly committed at Bogoro were not intended, nor the virtual certain consequences of the implementation of the plan;
- (7) In executing the plan, the EMOI and RCD-K/ML relied on its own army the APC as well as Ngiti, but not Lendu combatants; this is evidenced by the fact that the Lendu combatants arrived at the war front of Bogoro with significant delay (i.e., of their opportunistic attack).

Insignificant Relationship between Bedu-Ezekere and Aveba

1132. There was barely any contact between Aveba and Zumbe before the CPI negotiations in Bunia in April and May 2003. The defence points out that there is a long undefined distance between Zumbe and Aveba and many hills separating them. The Lendu North and Ngiti in the South do not speak the same language or share a same heritage.²⁰⁵³ Thus, there are no obvious ties, save the common threat caused by the UPC.

1133. Germain Katanga did not live in Bunia and arrived in Aveba only in 1998. He does not speak Kingiti, let alone Kilendu. He has never been to Zumbe.²⁰⁵⁴

²⁰⁵² Prosecution Brief, para. 527.

²⁰⁵³ CHM-002-T-159-p.20-21 (FRA-p.21-22] ; D02-P-0300-T-314-p. 54 (FRA-p.47).

²⁰⁵⁴ D2-300-T-317-p.37-l.9-12 (FRA-p.33-l.5-9); D2-300-T-314-p.50-l.22-24 (FRA-p.44-l.12-14).

1134. The defence submits that Mr. Katanga and Mr. Ngudjolo met in Dele on 8th March 2003 for the first time.²⁰⁵⁵ Before then, they had never met or spoken to one another.²⁰⁵⁶

1135. After 8th March 2003, they met again in April 2003 in Bunia, in the context of the CPI negotiations. The relationship was tense, and continues to be tense until today. Katanga and Ngudjolo have never been friends.²⁰⁵⁷

1136. Katanga met Boba Boba, otherwise known as Ngabu, in Bunia for the first time when he was there in the context of the CPI negotiations. He saw Lone Nyunye in Yambi-Yaya, where Nyunye had a small position opposite the Amuda hotel. Mr. Katanga saw Lobo Justin for the first time on 22 March 2003 at the Bunia airport. He never met Kpadhole.²⁰⁵⁸

No Radio Network or other Form of Communication

1137. There was no radio network or other communication equipment between Aveba and Zumbe. There was no communication between the two places. Even today, there is no direct communication between the two places. Mobile phones have been introduced in Ituri. However, Aveba continues to have network difficulties, and thus communication by phone from Aveba to anywhere is difficult.

1138. In asserting that there was radio communication between Aveba and Zumbe, the prosecution relies on unreliable and uncorroborated evidence. For example, according to P-219, in the period leading up to the 24 February 2003 attack, radio communications took place between Aveba and Zumbe in order to plan and prepare the attack.²⁰⁵⁹ P-219 particularly refers to a message that was allegedly sent by phonie on the Sunday before the Bogoro attack from Aveba to Zumbe, saying "Attack on Bogoro tomorrow".²⁰⁶⁰ However, P-219 contradicts himself by testifying that Chef Manu informed him that the combatants from the hill joined

²⁰⁵⁵ D2-300-T-317-p.37-l.9-13 (FRA-p.33-l.5-10): Q. We dealt with this last week, but just in its context here, have you ever been to Zumbe? When did you first meet Mathieu Ngudjolo? A. Mr. David, I was never in Zumbe. I have never been to Zumbe. I did not even know that there was a village known as Zumbe. I met Mathieu Ngudjolo for the first time on the 8th of March, 2003, in Dele.

²⁰⁵⁶ D2-300-T-318-p.42-l.19-21 (FRA-p.37-l.3-4); D2-300-T-314-p.50-l.22-24 (FRA-p.44-l.12-14).

²⁰⁵⁷ D2-300-T-319-p.12-13 (FRA-p.14-l.10-18): Q. And after the events of May, what was your relationship with Ngudjolo? A. My answer is that to be a combatant is not an easy thing. You see, we did not agree among ourselves. We did not agree among ourselves, so no one was going to be anybody else's leader. It was impossible. Even if Mathieu claims that he wanted to come to my place and I didn't want him, well, I would not receive him. And, you know, combatants with a very low level could simply stop him and say "No, which don't want you in our area." So it was a strange kind of tension, each party rejecting the other because the impression was given that any one coming in was likely to take away from the from the area under your control.

²⁰⁵⁸ D2-300-T-319-p.55 (FRA-p.61); T-325-p.70 (FRA-p.62).

²⁰⁵⁹ P-219-T-208-FRA-p.62-l.21, to p.63-l.1; P-219-T-205-FRA-p.48-l.23-28, to p.49-l.7.

²⁰⁶⁰ P-0219-T-209-p.22 (FRA-pp.21-22).

the attack later, around nine o'clock.²⁰⁶¹ If the Zombe combatants were informed in advance, why would they then only arrive towards the end of the battle?

1139. The defence also submits that it is unlikely for P-219, [REDACTED] when such a significant message was allegedly sent out. In addition, P-219 is uncorroborated on this issue and, the defence submits, has lied in respect to other significant issues.²⁰⁶² He should therefore not be relied upon for any findings against Katanga.

1140. The Prosecution also refers to the radio messages allegedly intercepted by the UPC in Bogoro, indicating that an attack was imminent.²⁰⁶³ About these messages, P-323 heard from Hema combatants who understood Kingiti that one side asked "Where should we work our fields, at the beginning or in the middle?" To which the Lendu allegedly answered: "We should begin at the beginning... that is, in the middle."²⁰⁶⁴ This evidence is based on hearsay. P-323 did not listen to the message himself, which was also transmitted in a language he did not know, that is Kingiti.²⁰⁶⁵ D02-176 also reported that the messages that were intercepted were spoken in Kingiti.²⁰⁶⁶

1141. The fact that the message was transmitted in Kingiti suggests it is a message among the Ngiti combatants, which does not at all indicate that the Lendu were involved in any plan to attack Bogoro. People in Zombe do not speak Kingiti. The defence reiterates that it is not in dispute that there was a plan to attack Bogoro. It is then not impossible that messages from one Ngiti camp to another close-by Bogoro were transmitted. These combatants were indeed involved in the Bogoro attack. This, however, does not at all go to proof of a common plan between the Ngiti and Lendu.

Insufficient Evidence Relating to the Bedu-Ezekere delegation in Aveba

1142. The defence disputes the prosecution's evidence that Ngudjolo sent a delegation of 24 people headed by Boba Boba to Aveba from Bedu-Ezekere around late December 2002, to meet with Katanga and discuss the strategy of attacking Bogoro.²⁰⁶⁷ The evidence relating to

²⁰⁶¹ P-0219-T-209-pp.21-22 (FRA-pp.19-21).

²⁰⁶² See section II 'A- Review of the credibility of Prosecution witnesses'.

²⁰⁶³ P-161-T-111-FRA-p.21-l.12-25; p. 22-l.1-23.

²⁰⁶⁴ Prosecution Brief, para. 551; section 9.3; reliance on: [P-323-T-FRA-117-p.23-l.20-25, and p.24-l.1-12] [P-323-T-ENG-117-p.24-l.12-25, and p. 25-l.1-7].

²⁰⁶⁵ P-323-T-117-pp.24-25 (FRA-p.24): It was the Ngitis, and they were communicating with the Lendus; see also P-323-T-117-pp.24-25 (FRA-p.24): A. You see, I do not know their languages. Amongst the Hemas who were in my group who had been born in the Ngiti villages, they were the ones who knew the language. See also P-161-T-111-p.24-l.7-8 (FRA-p.23-l.9): A. It was in Ngiti. They were speaking with people from Zombe in Ngiti.

²⁰⁶⁶ D02-176-T-255-p.26-l.19-25 (FRA-p.26-l.19-28).

²⁰⁶⁷ Prosecution Brief para. 525; reliance on: [P-250-T-92-p.57-59; p.65-66, p.71-73; P-250-T-93-FRA,-p.24-l.19 to p.25-l.6, p.29-l.3-6, p.30-l.8-18; P-250-T-101-p.73-l.2-8; T-104-FRA-p.63-l.8-16]; [P-28-T-217-FRA-p.36-l.18-25, p.38-l.24-28; p.39-l.18-25, p.41-l.4-6].

this mission essentially stems from one unreliable witness, P-250. The lack of credibility of this witness is addressed elsewhere.²⁰⁶⁸

1143. Without radio connection between Aveba and Zumbe, it would have been impossible for Boba Boba to be in contact with Zumbe via phonie while in Aveba to plan the attack on Bogoro, as is claimed by P-250.²⁰⁶⁹

1144. P-250 alleges that, following an interview with Boba Boba, Katanga arranged for the Zumbe delegation to be led to Bavi Olongba to speak to Cobra, and then to Oudo in Medhu. The Prosecution asserts that the purpose of this was to increase cooperation between the Lendu and Ngiti forces.²⁰⁷⁰ The prosecution also asserts that the letter of 4 January 2003 entitled “Request for help”²⁰⁷¹ confirms the presence in Aveba of a delegation from Zumbe.²⁰⁷² The prosecution also submits that it could be inferred that the delegation arrived in the latter part of December 2002.²⁰⁷³ They further use the letter to support the fact that P-250 was part of a delegation to Aveba.²⁰⁷⁴ However, it is not been established on the face of the letter that the delegation referred to in the letter is the same delegation that P-250 spoke about, or that P-250 was part of the delegation referred to in the letter. P-250 states that he has never seen the letter before so he cannot be in a position to confirm this. The fact that he says that the letter was in the hands of the high authorities but that he was aware of the letter simply is not a credible statement.²⁰⁷⁵ He had no reason to know of it.

1145. P-250 alleges that the mission lasted a little over a month, and that the delegation departed in three separate groups. The first group allegedly left early because of an attack on Zumbe. The second group left with food and the third with ammunition.²⁰⁷⁶ They arrived in Zumbe about a week before the Bogoro attack.²⁰⁷⁷

1146. This witness is inherently unreliable.²⁰⁷⁸ It is clear from Chef Manu’s evidence that there were no more attacks on Zumbe after the attack he witnesses from the plane from Beni to Aveba.²⁰⁷⁹ There is no other evidence suggesting that Zumbe was attacked in January or

²⁰⁶⁸ See section II ‘A- Review of the credibility of Prosecution witnesses’.

²⁰⁶⁹ Prosecution Brief, para. 525; Section 8.1.2.7, reliance on: [P-250-T-104-FRA-p.58-l.22, to p.59-l.3].

²⁰⁷⁰ P-250-T-93-FRA-p.18-l.7, to p.20-l.15; T-102-FRA-p.19-l.2-9; T-96-FRA-p.25-l.1-12.

²⁰⁷¹ EVD-OTP-00025.

²⁰⁷² P-250-T-95-FRA-p.12-l.25, to p.13-l.15; P-28-T-217-FRA-p.39-l.26, to p.40-l.3.

²⁰⁷³ Prosecution Brief, p.67

²⁰⁷⁴ Prosecution Brief, p.85, para 195

²⁰⁷⁵ P-250-T-97-p.3 (FRA-p.3); P-250-T-96-p.24 (FRA-p.25).

²⁰⁷⁶ Prosecution Brief, para. 535; reliance on: [P-250-T-92-FRA-p.68-l.20-21; T-102-FRA-p.14-l.25, to p.15-l.7]; [P-250-T-95-FRA-p.24-l.1, to p.30-l.5].

²⁰⁷⁷ P-250-T-95-FRA-p.36-l.3-20.

²⁰⁷⁸ See further section II A ‘Review of the credibility of Prosecution witnesses’.

²⁰⁷⁹ P-0088-T-305-p.34-l.11-14 (FRA-p.30-l.23-26).

February 2003, as is alleged by P-250. P-250's assertion that one group left Aveba earlier because of an attack on Zumbe is baseless.

1147. Germain Katanga was aware of only one visit to Aveba from a group from Bedu-Ezekere, that is the visit of Chef Manu, in November 2002. They then left for Beni together. Nobody else from Zumbe visited Aveba, and *vice versa*.²⁰⁸⁰

1148. The prosecution has failed to prove that, during this mission, a plan was formulated between Aveba and Bedu-Ezekere to attack Bogoro. Chef Manu denied having been involved in any preparation of an attack on Bogoro. He testified that "if in fact it was planned then I am not aware of that".²⁰⁸¹ Both Chef Manu and Katanga have stated that they were unaware of any other visits to Aveba by Boba Boba, [REDACTED] (D03-P-0066) and Martin Banga before Bogoro.²⁰⁸²

The Combatants from the Hills Arrived Late at the Battlefield of Bogoro

1149. The prosecution relies on Dark's explanation to the RTNC in March 2003 in Bunia that they had waged war on Bogoro to "break down the curtain", which the Prosecution submits means the taking of Bogoro.²⁰⁸³ Dark, who is presently in the FARDC and clearly traceable, has, however, not been called as a witness to explain what he meant to say. Thus, the Chamber has been deprived of an opportunity to hear from Dark directly and to assess his demeanour. The defence has been deprived of an opportunity to cross-examine him. Any statements made by Dark should therefore be accorded very little weight, if indeed any.²⁰⁸⁴

1150. The prosecution also relies on Katanga's and Ngudjolo's alleged confessions of having acted in a concerted manner in planning and implementing the attack on Bogoro.²⁰⁸⁵ Mr. Katanga allegedly told P-160 and P-12 that his group had attacked Bogoro with the assistance of Ngudjolo's troops.²⁰⁸⁶ There are significant discrepancies between P-160's and P-12's accounts on this issue.²⁰⁸⁷

²⁰⁸⁰ D2-300-T-318-pp.17-18 (FRA-pp.15-16); D3-88-T-301-pp.22-23 (FRA-p.20).

²⁰⁸¹ P-0088-T-301-p.22-l.16-17 (FRA-p.20-l.7-8).

²⁰⁸² D2-300-T-318-pp.17-18 (FRA-pp.15-16); [REDACTED].

²⁰⁸³ Prosecution Brief, para. 528; reliance on: [EVD-OTP-00173 (from 1:04 to 1:43), transcript DRC-OTP-1019-0237, l.605-616].

²⁰⁸⁴ *Prosecutor v. Martić*, IT-95-11-AR-73.2, Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic, 14 September 2006, para. 14.

²⁰⁸⁵ Prosecution Brief, para. 632.

²⁰⁸⁶ Prosecution Brief, para. 632, reliance on: [P-160-T-210-p.63-l.7-27; T-212-FRA-p.57-l.17, to p.58-l.20]; [P-12-T-197-FRA-p.23-l.20, to p. 24-l.14; p.26-l.4-7; p.27-l.2-26].

²⁰⁸⁷ See section II A 'Review of the credibility of Prosecution witnesses'.

1151. The defence submits a strong indication that Katanga and Ngudjolo did not have a common plan to attack Bogoro is that the combatants from the other side of the hill from the direction of Bedu-Ezekere did not reach the battlefield at Bogoro before nine o'clock, when the battle had been going on for several hours. Their late arrival has been confirmed both by defence and prosecution witnesses.

1152. Both D-148 and David Adirodu testified that the Zombe combatants came to Bogoro later on.²⁰⁸⁸ Adirodu was not present but received this information from other sources. D-148, on the other hand, was present at the battlefield and saw with his own eyes that troops from the direction of Zombe, including Bahati de Zombe and Kute arrived at Bogoro after Yuda was injured. This was around nine o'clock.²⁰⁸⁹

1153. Most notably, this has also been confirmed by P-28 and P-219, the main witnesses relied on by the prosecution to prove that Germain Katanga is liable as an indirect co-perpetrator in a common plan with Ngudjolo.²⁰⁹⁰ Indeed, P-28 testified that, from his location at the crossroads of Kasenyi and Kagaba, he saw the Zombe combatants descend from the hill between 09.00 and 10.00 hours, a few minutes before the battle was won.²⁰⁹¹ P-28 stated that their first reaction was to flee but then they realized that they came to fight on the Ngiti side.²⁰⁹²

1154. P-219 who claims to have come after the attack "out of curiosity",²⁰⁹³ testified that Chef Manu had informed him that the forces from Mont Bleu, Lagura and Zombe came down the hill to Bogoro at 09.00 hours after they heard gunfire and understood that Bogoro was being attacked. Bogoro fell after their arrival.²⁰⁹⁴

1155. Their assertions of presence at the Bogoro attack are not credible. Much of their narrative is based on what they heard from others. Thus, at least their evidence confirms that the general perception was that the Zombe combatants arrived later. They are remarkably consistent in their time estimation, suggesting accuracy.

1156. In conclusion, the defence submits that the prosecution failed to establish on the basis of credible evidence that there was a joint plan between Katanga and Ngudjolo to wipe out Bogoro. The prosecution's common plan theory is mainly based on the often uncorroborated testimonies of P-250, P-28 and P-219, whose credibility is so significantly undermined that no

²⁰⁸⁸ D2-001-T-277-pp.70-71 (FRA-p.62).

²⁰⁸⁹ D2-148-T-281-p.23 (FRA-p.19); pp.30-31 (FRA-pp.25-26).

²⁰⁹⁰ P-28-T-218-p.19 (FRA-p.17).

²⁰⁹¹ P-28-T-217-p.42 (FRA-p.37); P-28-T-222-pp.48-49 (FRA-p.43).

²⁰⁹² P-28-T-222-p.49 (FRA-p.43).

²⁰⁹³ P-219-T-209-p.10-l.20-21 (FRA-p.10-l.14).

²⁰⁹⁴ P-0219-T-209-pp.21-22 (FRA-pp.19-21).

reasonable Chamber can rely on them. The prosecution case must be proved, not merely plausible.²⁰⁹⁵

Plan formulated in Beni

1157. In alleging that Katanga and Ngudjolo formulated a plan together to attack Bogoro, the Prosecution ignores the role EMOI, the APC, and RCD-K/ML played in the plan to attack Bogoro. The defence submits that the plan to attack Bogoro was formulated and orchestrated by EMOI, together with the RCD-K/ML.²⁰⁹⁶ In brief, the RCD-K/ML had a clear motive to attack Bogoro as it blocked the road to Bunia. The RCD-K/ML used to have the Ituri region under its control. Since the Sun City Agreement did not give Bunia and Bogoro back to the RCD-K/ML, it intended to re-conquer Ituri from the UPC by force.²⁰⁹⁷ EMOI assisted in organising and planning this military operation by providing all the logistical resources from Kinshasa.²⁰⁹⁸

1158. Germain Katanga testified that Bogoro was also an important strategic location for military purposes, because it allowed access to the road from the lake (towards Uganda) to Bogoro on to Bunia. Thus, it allowed the UPC to get ammunition from Uganda even after the split UPC - UPDF.²⁰⁹⁹ The objective of attacking the UPC at Bogoro was first of all political, and secondly, military.²¹⁰⁰ In addition, as conceded by the prosecution,²¹⁰¹ the Ngiti had difficult access to Bunia an important town for business or trading purposes.²¹⁰² Thus, the Ngiti community had an interest in dislodging the UPC from Bogoro.

1159. For the implementation of the plan to launch an attack against the UPC based at Bogoro, EMOI and RCD-K/ML used the APC as well as the Ngiti combatants. Reinforcement by the Ngiti combatants was necessary, because the APC was significantly weakened after the UPC split from it and launched attacks on the APC.²¹⁰³ Therefore, relations had been created with the Ngiti community and weapons and ammunition were being delivered by plane to Aveba and Rethy²¹⁰⁴ with the purpose of fighting the UPC everywhere in Ituri.²¹⁰⁵

²⁰⁹⁵ *Prosecutor v. Delalic et al*, IT-96-21-T, TC Judgement of 16 Nov 1998, para. 601.

²⁰⁹⁶ D2-228-T-249-pp.65-67, 72-73 (FRA-pp.60-62 + 66-68); T-250-p.10 (FRA-p.9); T-252-p.49; D2-300-T-325-pp.16-18, 20-22 (FRA-pp.15-19).

²⁰⁹⁷ D2-228-T-252-p.27 (FRA-p.29).

²⁰⁹⁸ See section IV-A 'Context in Ituri before the Bogoro Attack of 24 February 2003': EMOI.

²⁰⁹⁹ D2-300-T-317-pp.7-9 (FRA-p.6-8); T-318-FRA-pp.33-34.

²¹⁰⁰ D2-300-T-322-p.63 (FRA-p.64).

²¹⁰¹ Prosecution Brief, paras. 508, 510.

²¹⁰² D2-300-T-320-pp.33-34 (FRA-pp.34-35); D2-161-T-270-pp.29-30 (FRA-p.26).

²¹⁰³ D2-228-T-249-p.66 (FRA-p.61).

²¹⁰⁴ D2-236-T-242-pp.56-l.6-12 (FRA-p.48-l.2-7); T-244-p.44-l.8-9 (FRA-p.38-l.23-24).

²¹⁰⁵ D2-236-T-247-p.82-l.17-19 (FRA-p.77-l.11-12); T-244-p.44-l.12-14 (FRA-p.38-l.27-28 + p.39-l.1).

1160. The defence submits that this politico-military plan to re-conquer Ituri, which encompassed the Bogoro attack, was a legitimate plan. Fighting a war is not illegal, particularly when conducted in self-defence to re-gain power in occupied territories; and even more so when the occupying forces form a danger to the surrounding communities and an obstacle to their economic survival.²¹⁰⁶

1161. The purpose of attacking Bogoro was not to “erase” the civilians, but rather, to chase out the UPC soldiers who were blocking the road to Bunia and provided a security problem for the Ngiti and Lendu populations in the region.²¹⁰⁷ Indeed, instructions were given so as to not attack civilians.²¹⁰⁸ The defence concedes that there were excesses. However, the defence submits that these excesses were committed by uncontrollable combatants or civilians who were not part of the original politico-military plan. Indeed, Pichou testified that many uninvited combatants and civilians had the habit of turning up at battles like Bogoro.²¹⁰⁹ The plan cannot be inferred only from the consequences. The plan to dislodge the UPC, a force that attacked everywhere and blocked the road, from Bogoro is, wholly legitimate, and not prohibited by *jus im bello*, the body of law about which the Court is to adjudicate.

1162. That the intention was not to target civilians is corroborated by the testimony of P-161, who confirmed his previous statement to the prosecution, in which he said: “I would like to point out that while I was with my wife in my hiding-place not far away from the UPC camp, I saw a man in a white shirt, and I was able to hear that he was using a whistle. He was drawing the attention of the fighters to himself and then addressed them in Congolese Swahili. Based on his manner of speaking, I would say that he was neither a Lendu nor an Ngiti. Unfortunately, I have no idea where he could have come from. Whatever the case, I am convinced that he was a Congolese. He was shouting to the combatants, telling them not to kill civilians, but only the UPC soldiers *as previously agreed*.”²¹¹⁰ The witness allowed for the possibility that this man was an APC combatant because there were APC soldiers amongst the Lendu and Ngiti attackers.²¹¹¹

1163. The combatants from Zombe were not involved in this plan. It was a plan exclusively between RCD-K/ML and the Ngiti combatants. This is evidenced by the fact that the Zombe

²¹⁰⁶ See section IV-A ‘Context in Ituri before the Bogoro Attack of 24 February 2003’.

²¹⁰⁷ D2-228-T-249-pp.72-73 (FRA-pp.67-68); T-252-p.27 (FRA-p.29). See also D2-350-T-253-pp.41-43 (FRA-pp.44-46); T-254-pp.7-14, 26-29 (FRA-pp.6-12 + 23-24); D2-148-T-279-pp.18-19, 36 (FRA-pp. 16, 32) ; T-280-pp.19-21, 60-61 (FRA-pp.16-18, 53); T-281-pp.21-22, 35 (FRA-pp.17-18, 30); D2-300-T-325-pp.16-18, 22-23 (FRA-pp.15-19).

²¹⁰⁸ See section V1-B: ‘Facts Relevant to Article 7 Chapeau Elements – Crime against Humanity’: Attack Directed Against a Civilian Population.

²¹⁰⁹ D02-228-T-250-pp.10-11 (FRA-pp.9-10).

²¹¹⁰ P-161-T-114-pp.25-26. Emphasis added (FRA-pp.25-26).

²¹¹¹ P-161-T-114-p.26 (FRA-p.26).

fighters arrived at nine o'clock only, as indicated above. They joined in, having heard the detonations and gunshots, and participated in an opportunistic manner, rather than in manner having been conceived of previously.

Prosecution's Position on Defence Common Plan Theory

1164. The Prosecution submits that “[i]t is difficult to understand how the APC could have wielded any control over Katanga during that period. The APC had been weakened since August 2002, and its troops had returned to North Kivu.”²¹¹² Therefore, the Prosecution submits that “[b]y all indications, in early January 2003, the APC could not have been in a position of strength in relation to the Ngiti combatants; there were few if any APC combatants in Walendu-Bindi, and the Prosecution maintains that those who had deserted had no interest in re-joining the APC.”²¹¹³

1165. In light of the ongoing conflict and the threats on Beni, the Prosecution does not believe that Koka arrived in February 2003 with approximately 150 soldiers.²¹¹⁴ Furthermore, the Prosecution argues that “there was absolutely no need to despatch a large number of soldiers because there were already enough combatants within the FRPI, and their primary need was for weapons and ammunition.”²¹¹⁵

1166. The Prosecution also submits that the APC did not lead the attack on Bogoro on 24 February 2003. The Prosecution does not accept Germain Katanga's evidence that Koka was the operations commander and had control over Yuda's and Garimbaya's men, as well as over the group of soldiers from Gety.²¹¹⁶ The Prosecution submits that the evidence demonstrates that the APC only played a secondary role and never led the attack on Bogoro; that only a small number of APC soldiers were present in Aveba at the time of the Bogoro attack, and even less accompanied the Ngiti troops on their expedition to attack Bogoro.²¹¹⁷ According to the Prosecution, their main task was to provide logistical support to the combatants.²¹¹⁸

1167. The Defence agrees that the primary need given the circumstances in Walendu-Bindi at the relevant time, is always weapons and ammunition – if not no battle can be fought. Particularly for the Ngiti fighters, who had few means to acquire weapons, the delivery of logistical support was very significant in defeating the UPC at Bogoro; thus the role of Kinshasa, the RCD-K/ML and APC in providing logistical support.

²¹¹² Prosecution Brief, para. 588; reliance on: [P-250-T-104-FRA-p.43-l.14-25, p.44-l.1-3]; [P-28-T-219-p.3-l.25-28, p.4-l.1-10].

²¹¹³ Prosecution Brief, para. 588.

²¹¹⁴ Prosecution Brief, para. 590, 593.

²¹¹⁵ Prosecution Brief, para. 593.

²¹¹⁶ Prosecution Brief, reference to: [D2-300-T-325-FRA-p.22-l.6-19].

²¹¹⁷ P-28-T-218-FRA-p.5-l.21, p.6-l.2.

²¹¹⁸ Prosecution Brief, para. 599.

1168. For instance, P-28 testified that the APC government had attempted to fight against the UPC forces but had not succeeded. Thus, they called upon the combatants for assistance and provided them with the fresh supplies of weapons and ammunition.²¹¹⁹ The relationship with the APC allowed the combatants to have any ammunition at all.²¹²⁰ P-28 stated that preparations for the attack on Bogoro took place in Beni, where the APC was based, and from where ammunition was sent.²¹²¹

1169. Various APC officers were clearly in Aveba during the period of the Bogoro attack. Indeed, both prosecution and defence witnesses testified that they had seen APC officers arrive in Aveba prior to the Bogoro attack.²¹²² Particularly well known among the population and combatants were Blaise Koka, who P-28 claims had the command over the APC soldiers in Aveba, and Mike-4, the radio operator.²¹²³ It was these two who coordinated and communicated directly with Beni.²¹²⁴

1170. The defence submits that Mike-4 arrived in January 2003; and Blaise Koka in February 2003, with 150 men.²¹²⁵ The prosecution does not accept this submission based on P-28's account that only 20-25 APC soldiers arrived in Aveba with Koka.²¹²⁶ However, apart from his lack of credibility, P-28's account cannot be relied on because he was not based at camp BCA. He was a student at the time of the Bogoro attack.²¹²⁷ Thus, whilst he may have seen 20-25 APC soldiers, this does not mean that there were not additional APC soldiers he had simply not seen. Even if P-28's assertion that only 20-25 APC soldiers arrived in Aveba is correct,²¹²⁸ their role was clearly significant. P-28 states that they began training the soldiers and taught them how to behave with their commanders.²¹²⁹

1171. The prosecution states that the evidence does not establish that Koka "had any authority at all over Katanga and/or his combatants prior to the attack". In concluding this, the prosecution relies on the evidence of P-28, even though P-28 testified that the combatants had been manipulated by the APC into attacking the UPC in Bogoro.²¹³⁰ P-28 also stated that the

²¹¹⁹ P-28-T-217-p.27 (FRA-p.24); P-28-T-223-p.32 (FRA-pp.29-30).

²¹²⁰ P-28-T-217-pp.27-28 (FRA-p.24).

²¹²¹ P-28-T-217-pp.27, 28 (FRA-p.24).

²¹²² D2-161-T-268-p.65 (FRA-p.58); P-161-T-270-p.50 (FRA-p.44). See also sections 'Weapons Deliveries, Late 2002, Early 2003, from the RCD-K/ML / APC' and: 'Involvement of the APC'.

²¹²³ P-28-T-219-p.22 (FRA-p.19).

²¹²⁴ P-28-T-219-p.22-l.13-17 (FRA-p.19-l.1-4).

²¹²⁵ D2-300-T-317-p.55-l.23-25 (FRA-p.48-l.24-27).

²¹²⁶ P-28-T-218-p.6-l.6-8 (FRA-p.5-l.23).

²¹²⁷ P0161-T-268-p.54-l.9.14 (FRA-p.48-l.13-15).

²¹²⁸ P-28-T-218-p.6 (FRA-p.5).

²¹²⁹ P-28-T-218-p.5 (FRA-p.4).

²¹³⁰ P-28-T-217-FRA-p.34-l.4-28.

APC took orders from Koka,²¹³¹ and that the combatants also followed his orders. At that time, there was no one leading them, so they obeyed any order given to them in general.²¹³²

1172. Sharif Ndadza testified that Mbusa sent Commanders Mutombo, Kasereka, Demuto, and Koka as well as soldiers to go to the sites in Kagaba and Gety. Others were to train the fighters and conduct the operations.²¹³³

1173. As acknowledged in the initial amended charging document, the APC trained many Ngiti and Lendu men in Nyaleke.²¹³⁴ When the APC was dislodged from Bunia, many of the Lendu/Ngiti soldiers remained in the Walendu-Bindi community. The Nande were more inclined to leave for Beni, which is Nande territory. Contrary to the prosecution's assertion,²¹³⁵ Yuda, Garimbaya, Kisoro, Kandro, Bebi and others belonged to this group that was trained as APC soldiers. Even if one refers to them as 'deserters', they have a previous connection with each other, one that Germain Katanga was missing. They are used to work and fight together. Thus, Koka had a natural tendency to liaise with Yuda rather than with Mr. Katanga.

1174. This is corroborated by P-166 who testified that, among the fighters from the Walendu-Bindi collectivity, there were Congolese army deserters who had returned home amongst the Ngiti. These deserters wore FAC uniforms.²¹³⁶

1175. It is further the Prosecution's position that Germain Katanga did not take part in an operation in Bogoro on 10 February.²¹³⁷ However, contrary to the Prosecution's submission, the fact of a significant attack on Bogoro at or about that time is corroborated both by prosecution and by defence witnesses.²¹³⁸

1176. Initially, the prosecution explicitly acknowledged the role of Kinshasa, the RCD-K/ML and APC in "the shipment of arms from Kinshasa to Beni" and then, as of late 2002, "to Lendu and Ngiti military camps in the Djugu and Irumu territories".²¹³⁹ "The source of the

²¹³¹ P-28-T-219-FRA-p.19-l.4-7.

²¹³² P-28-T-219-FRA-p.19-l.19-27.

²¹³³ Sharif, Manda Ndadza Dz'Na : D2-350-T-253-pp.41-42 (FRA-pp.44-45). See further IV-A 'Involvement of the APC'.

²¹³⁴ ICC-01/04-01/07-649-Anx1A, 26-06-2008 – Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute: Para. 20: "The APC, the army of the RCD-K/ML, for its part, continued to integrate and train Lendu and Ngiti fighters".

²¹³⁵ Prosecution Brief, paras 594, 596.

²¹³⁶ P-166-T-226-p.12 (FRA-p.10).

²¹³⁷ Prosecution Brief, para. 597; reliance on: [D2-300-T-317-FRA-p.53-l.12-13]; [D2-300-T-318-FRA-p.2-l.14, 16].

²¹³⁸ See section IV-A 'Katanga's Decision to Stay in Aveba'.

²¹³⁹ ICC-01/04-01/07-649-Anx1A, 26-06-2008 – Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, para. 28.

shipments of arms was the Kinshasa government, directly or indirectly through the APC”.²¹⁴⁰ These references were incorporated in the prosecution’s amended document containing the charges of 2008, but omitted from the document summarising the charges confirmed by the Pre-Trial Chamber.²¹⁴¹

1177. The prosecution acknowledges that it was in the interests of the APC and EMOI, as well as of the Lendu/Ngiti, for the UPC to be expelled from Ituri. The prosecution further acknowledges that “there could have been discussions between Katanga and the leaders of the RCD-K/ML-APC or EMOI in Beni in relation to logistical assistance and the supply of weapons and ammunition for the attack on Bogoro”. The prosecution considers it “equally possible that those same leaders could have encouraged the Ngiti and Lendu to attack Bogoro”. However, the prosecution maintains that “the credible evidence in the record of the case does not establish that the APC or EMOI had effective control over the Ngiti and Lendu combatants, or that they planned, ordered or even directed the attack on Bogoro”.²¹⁴² The prosecution submits that the accused did not need to be led by the APC in attacking Bogoro: “They had the necessary troops under their control, an intimate knowledge of the terrain, and the motivation to break down the barriers that were hemming them in”.²¹⁴³

1178. The prosecution is very unspecific as to whether it even accepts that Blaise Koka, Mike-4 and other APC soldiers installed themselves in Aveba and Kagaba in the period prior to the Bogoro attack. The defence notes that the prosecution did not call any evidence to rebut this assertion, which finds support in the testimonies of its own as well as defence witnesses.

1179. Of course the combatants needed the assistance of the APC. Who else could manipulate the heavy weapons? And how else could the combatants defeat such a highly organised, well-trained army as the UPC? Thus, contrary to the prosecution’s assertions, the role of EMOI, the RCD-K/ML and APC was not limited to the provision of weapons, ammunition, and other logistical support. The skills, expertise of a trained army were essential to win the war at Bogoro; hence the plan having originated from Beni. It is what distinguished the final battle from any earlier attacks from camps in the surrounding environment of Bogoro. The combatants were highly unstructured and locally organised, if at all. In order to defeat the UPC, the APC guidance, military strategy planning and participation was essential.

²¹⁴⁰ *Ibid*, para. 44.

²¹⁴¹ Document Summarising the Charges Confirmed by the Pre-Trial Chamber, ICC-01/04-01/07-1588-Anx1, 03-11-2009.

²¹⁴² Prosecution Brief, para. 585.

²¹⁴³ Prosecution Brief, para. 586.

1180. Indeed, D-176 claims that the UPC had a pre-warning about the attack.²¹⁴⁴ However, this did not worry them at all; based on previous attempts from Ngiti combatants to attack the UPC base at Bogoro, the UPC soldiers were sure they were going to defeat them without any difficulty.²¹⁴⁵ It was only in the course of the fighting that the UPC soldiers realised that in fact a very big attack was going on.²¹⁴⁶

1181. D-176 testified that the attackers were better armed than in previous attacks and were in larger number. They used superior weapons that had never before been used, they appeared to have a lot of ammunition and they were better organised than before.²¹⁴⁷

1182. P-166 confirmed this and stated in court that survivors told him that the attack was bigger than expected.²¹⁴⁸ He also allowed for the possibility that those attacking Bogoro had heavy weapons.²¹⁴⁹

1183. While D-176 does not explicitly refer to APC soldiers participating in the battle of Bogoro, he also does not say they were not present. He simply did not mention them. That is not to say, however, that APC soldiers did not participate, as the prosecution seems to suggest.²¹⁵⁰ It was impossible for D-176 to see all the attackers as the UPC was being attacked. When being attacked, one does not have time to clearly identify who is among the attacking enemy fighters. It is also a fact that the APC soldiers were clearly outnumbered by the participating combatants.

1184. The APC soldiers, being of a superior position, may also not have been the first at the war front. This corresponds with Sharif Ndadza's evidence that the RCD-K/ML adopted a strategy to keep the APC away from the forefront, so as not to make their involvement apparent.²¹⁵¹ Ndadza testified that one of the purposes of the FRPI was to hide the APC participation behind the FRPI combatants. The prosecution submits that Sharif's evidence in this regard is not credible and uncorroborated.²¹⁵² However, in light of the criticism received

²¹⁴⁴ D2-176-T-255-pp.26-27 (FRA-pp.26-27).

²¹⁴⁵ D2-176-T-255-p.27 (FRA-p.27).

²¹⁴⁶ D2-176-T-255-p.35 (FRA-p.35).

²¹⁴⁷ D2-176-T-256-pp.56-58 (FRA-pp.47-49).

²¹⁴⁸ P-166-T-227-p.11 (FRA-p.10).

²¹⁴⁹ P-166-T-227-p.11 (FRA-p.10).

²¹⁵⁰ See Prosecution Brief, section 9.1.7.7.

²¹⁵¹ P-350-T-254-pp.32-33 (FRA-p.28): After Christmas of 2002, did the APC, that is, the military wing of the RCD-K/ML, did the APC participate in combat, in battles, in Ituri; and if so, in what form? And by 'form,' if that's the word that may be a trouble to you, I mean is did they fight as APC? Did they fight in uniforms? Or did they fight as something else? And if so, what was that? A. After the meeting of Mbusa and after the name of the APC had been changed to the FRPI, all writing mentioning APC was removed from everything. The same fighters continued, however, and they still fought until the fall of Bunia and the new commander arrived. We were still with the people of the APC and the government when the Commander Kisempia he came to organise the people in Bunia.

²¹⁵² Prosecution Brief, para. 614.

by Mbusa Nyamisi after the Nyakunde attack launched by the APC and Ngiti combatants jointly, it is not surprising he is seeking to avoid repetition of the same, and conceal the APC involvement.²¹⁵³

1185. In general, both PUSIC and the UPC took the firm position that the RCD-K/ML and APC were involved in the Bogoro attack.²¹⁵⁴ Kahwa told Ndjabu that the attack came from Beni; that it was Mbusa's people from Kinshasa.²¹⁵⁵ Ndjabu further testified that, on the Voice of America radio channel, he heard Thomas Lubanga blame Mbusa Nyamwisa and the Kinshasa government for the lost battle at Bogoro.²¹⁵⁶ Lubanga complained about this because they had already discussed in September of 2002 that the troops would be withdrawing, but they attacked Bogoro nonetheless.²¹⁵⁷

1186. In addition, contrary to the prosecution's assertion, many prosecution and defence witnesses confirm that APC soldiers participated in the Bogoro attack. Even witness P-28, who the prosecution so heavily relies on to contradict the defence theory, confirms that APC soldiers from Beni participated in the attack.²¹⁵⁸ P-28 testified that these APC soldiers were in the Walendu-Bindi collectivity.²¹⁵⁹

1187. P-28 also confirms that some APC soldiers who fled Bunia when Lopondo was chased out went to Songolo, then Avenyuma and some eventually fled to the Kagaba camp, together with the combatants who were attacked by Cobra's group.²¹⁶⁰ P-28 also testified that there was an APC camp in Singo, on a hill.²¹⁶¹

1188. Many of the inhabitants of Bogoro, including P-323, and P-287 have testified that they saw APC and even FAC soldiers amongst the attackers.²¹⁶² Witness D-161 stated that Mbale, one of the APC soldiers, was present during the attack.²¹⁶³ She saw him in Aveba when Yuda came to the hospital.²¹⁶⁴

²¹⁵³ See, for instance, EVD-OTP-00240 (Déclaration Politique sur la déconfiture de l'UPC et les interférences négatives du RCD-K/ML dans les événements de l'Ituri, du commissaire politique du PUSIC, chef KISEMBO BITAMARA (Augustin KISEMBO BITAMARA (DRC-D02-P-0029) adressée aux Présidents de la RCD, l'Ouganda et à un responsable de la MONUC.

²¹⁵⁴ See *ibid.*

²¹⁵⁵ D2-236-T-243-p.29 (FRA-p.25); T-244-p.57 (FRA-p.50).

²¹⁵⁶ Ndjabu, Ngabu Floribert : D2-236-T-244-pp.55-57 (FRA-pp.48-50).

²¹⁵⁷ Ndjabu, Ngabu Floribert : D2-236-T-244-p.56 (FRA-pp.48-49).

²¹⁵⁸ P-28-T-217-p.39 (FRA-p.34). At pp.43-44 (FRA-p.38), P-28 states that "the fighting was supported by the APC soldiers, only the APC soldiers".

²¹⁵⁹ P-28-T-219-pp.22-23 (FRA-p.19).

²¹⁶⁰ P-28-T-218-pp.6-7 (FRA-pp.5-6).

²¹⁶¹ P-28-T-218- p.7 (FRA-p.6).

²¹⁶² P-323-T-118-pp.24, 25 ; P-287-T-130-p.62 (FRA-pp.63-64).

²¹⁶³ D2-161-T-268-p.65 (FRA-p.58).

²¹⁶⁴ D2-161-T-270-p.52 (FRA-p.46).

1189. D-148 testified that he saw APC soldiers at the battlefield because they had experience in heavy weaponry. He remembered, for instance, Commander Isa, who used a 60-millimetre mortar.²¹⁶⁵ However, D-148 testified that it was Yuda and Dark who planned the attack.²¹⁶⁶ The prosecution has used the fact that D-148 was unaware that the plan had in fact been formulated in Beni and had not heard about Blaise Koka to suggest that the plan did not come from Beni.²¹⁶⁷

1190. It is normal that D-148 is not aware of the significant role played by Beni and the APC: he is a simple combatant without any personal connections with anyone in Beni. For him, there is only one chief and that is Yuda, who may not have emphasised the significance of Beni's assistance in the attack, because he may have wanted to personally claim victory. Given the high number of fighters who participated, there may have been a much more significant number of APC soldiers present without D-148 knowing it, particularly because he did not know the APC soldiers personally. Finally, the events took place nearly a decade ago. Everyone has his own recollection of events. D-148 may simply have forgotten the scale of the role of the APC.

1191. The Prosecution points out that P-317 did not mention the APC at all even though she visited Bogoro, one month after the attack. The defence accepts that the APC was not present at Bogoro after the attack. It was rather Dark who stayed at Bogoro as the commander.²¹⁶⁸ In light of the above submission that the APC sought to keep a low profile in terms of its involvement in battles jointly with Ngiti and Lendu fighters, it is not surprising at all that the APC did not stay at Bogoro. This does not suggest that the APC was not involved in the attack.

1192. Notwithstanding that P-317 did not mention any APC presence at Bogoro during her visit there, in her testimony she referred to the alleged APC involvement in the Bogoro attack. She testified that survivors told her that some wore banana leaves on their heads, whilst others wore APC or Ugandan uniforms, and "they heard the people speaking Ugandan Swahili."²¹⁶⁹ The report EVD-OTP-00206 states that "[a]bout 20 of the victims interviewed mentioned that they saw amongst the attackers Ugandans and APC soldiers. Others said that some of the attackers were wearing APC uniforms, as well as Ugandan uniforms."²¹⁷⁰ P-317 further stated that it was very difficult to have names because survivors did not necessarily know the

²¹⁶⁵ D2-148-T-279-p.37 (FRA-p.32).

²¹⁶⁶ D02-148-T-279-ENG-p. 36-l.21-25 (FRA-p.32-l.5-7 + l.13-16).

²¹⁶⁷ Prosecution Brief, para. 600; [D02-148-T-279-FRA-p.16-l.23-27].

²¹⁶⁸ P-317-T-228-FRA-p.31-l.9-11.

²¹⁶⁹ P-317-T-228-pp.37-38 (FRA-p.32-l.10-11).

²¹⁷⁰ P-317-T-230-p.44 (FRA-p.38); EVD-OTP-00206.

commanders of the various parties in the conflict.²¹⁷¹ The survivors were able to give basic descriptions only, both of the Ugandan and APC soldiers, and the Lendu militias.²¹⁷²

1193. P-317 also stated that more than one survivor told her that the aggressors had to withdraw from the town, but stated they would return with reinforcement from the government and APC forces. They reportedly returned around 10.30, at which time Bogoro fell.²¹⁷³ She also testified that she was told by a number of victims that APC fought side by side with the Lendus.²¹⁷⁴ She found this information, which was confirmed by a significant number of persons, to be more reliable than if only a few people would speak about it.²¹⁷⁵

1194. The Prosecution further makes the point that Germain Katanga or other witnesses do not allege that the APC was involved in the Bunia attack of 6 March 2003, notwithstanding that the re-conquest of Bunia was the alleged ultimate goal of the APC involvement. The prosecution asserts that this is further evidence that “[t]he APC was not involved in the fall of Bunia on 6 March 2003 because there was never any plan implemented and led by Blaise Koka and the APC/EMOI to re-take Bunia, in spite of Katanga’s claims to that effect”.²¹⁷⁶

1195. The defence submits that the prosecution’s conclusion is not supported by the factual circumstances in which Bunia was taken. The battle at Bunia was not the result of the implementation of the plan to re-take Bunia. Rather, it was an unplanned reaction of the UPDF to an attack on its bases at the Bunia airport and Dele launched by the UPC. In defeating the UPC, the UPDF mainly relied on Lendu fighters. Some Ngiti fighters came later.²¹⁷⁷ Accordingly, this battle was not the battle planned for by the RCD-K/ML and Kinshasa, nor was it planned by the UPDF. Events took a different turn. Having been attacked, the UPDF simply reacted.

1196. The prosecution dismisses the defence common plan theory and states that none of the evidence submitted in support of this allegation is credible. The defence called three direct witnesses who spent significant time in Beni and who have inside information as to what went down in Beni during the period prior to the Bogoro attack: Pitchu Iribi, Ndjabu Ngabu and Sharif Ndadza. Whilst the prosecution and the legal representative of the victims of Bogoro submit that these witnesses are not credible, it failed to produce a convincing ground to discredit them. The mere fact that they accepted to testify for Katanga is not a reason *per se* to

²¹⁷¹ P-317-T-230-p.45 (FRA-pp.38-39); EVD-OTP-00206.

²¹⁷² P-317-T-230-p.45, p.49 (FRA-pp.38-39, 42); EVD-OTP-00206.

²¹⁷³ P-317-T-229-pp.72-73 (FRA-p.63).

²¹⁷⁴ P-317-T-229-p.37 (FRA-p.32).

²¹⁷⁵ P-317-T-229-p.37 (FRA-p.32).

²¹⁷⁶ Prosecution Brief, para. 606.

²¹⁷⁷ See further section V1-B: ‘Facts Relevant to Article 7 Chapeau Elements – Crime against Humanity’: Widespread or Systematic – Bunia 6 March 2003.

dismiss their evidence. The defence submits that each of them gave evidence independent of Katanga's defence and each other. Their testimonies were intrinsically coherent and public which increases their reliability as evidence. The prosecution questions Pichou's claim to have been present at meetings of a military nature.²¹⁷⁸ However, given his position as an intelligence officer of the RCD-K/ML, his presence at such meetings is not surprising at all. In any event, the defence theory of planning relies on a range of defence and prosecution witnesses, as well as documentary evidence.

1197. In addition, the prosecution submits that the probative value of documents EVD-D02-00149 and EVD-D02-00147 is limited because of the unknown provenance. It also states that these documents add little to the defence theory that the RCD-K/ML and EMOI planned the attack on Bogoro.²¹⁷⁹ The mere fact that the source of documents EVD-D02-00149 and EVD-D02-00147 has not been revealed to the Prosecution does not mean that they do not have probative value. Given that the Government makes all efforts to keep its role hidden, it is no wonder that the sources of the information insisted that their identity not be revealed to the Court. The defence submits that these documents are highly probative. Though they do not refer to the specific plan to attack Bogoro – they demonstrate the close cooperation between EMOI, RCD-K/ML and APC in planning the re-conquest of Ituri. In that sense they are corroborative of the testimonies of Ndjabu, Pichou, and Sharif.²¹⁸⁰

1198. The prosecution has therefore failed to overcome the reasonable explanation of a plan formulated by the RCD-K/ML and EMOI.

- (ii) **The Prosecution failed to establish beyond reasonable doubt that Katanga and the other co-perpetrator(s) carried out essential contributions in a coordinated manner resulting in the fulfillment of the material elements of the crime**

Legal Requirements

1199. The Pre-Trial Chamber considered that the second objective requirement of co-perpetration based on joint control over the crime is “the coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.”²¹⁸¹

1200. Thus, the Pre-Trial Chamber explicitly requires that the contribution of each co-perpetrator is essential. This does not allow for the prosecution's proposed wider

²¹⁷⁸ Prosecution Brief, paras 583-584, 608-610.

²¹⁷⁹ Prosecution Brief, paras. 617-618.

²¹⁸⁰ See also IV-A EMOI: Documentary Evidence.

²¹⁸¹ *The Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 524.

interpretation that it is sufficient that the contribution is substantial, provided that the role assigned to the accused is essential.²¹⁸² The defence submits that it would be unfair to the accused if the Trial Chamber at this stage adopts a definition requiring a lower level of contribution than that adopted by the Pre-Trial Chamber in this case.²¹⁸³

1201. An “essential contribution” has been defined as essential tasks that are the *sine qua non* for the commission of the crime such that the commission of the crime would be frustrated if the defendant decided not to perform them.²¹⁸⁴ Further, the essential contribution must “result in the fulfillment of the material elements of the crime”.²¹⁸⁵ Thus, the defendant’s essential contribution must be directed not just to the common plan itself, but also, to the material elements of the alleged crimes.

1202. The *Lubanga* Pre-Trial Chamber held that “only those to whom essential tasks have been assigned – and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks – can be said to have joint control over the crime”.²¹⁸⁶ Therefore, according to the Majority of the *Lubanga* Trial Chamber, the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan.”²¹⁸⁷

Position of the Prosecution

1203. The prosecution submits that “the evidence examined here relative to the manner in which the common plan was devised and executed should be seen as additional material for the purposes of establishing the essential contribution of Katanga and Ngudjolo, in addition to

²¹⁸² Prosecution Brief, para. 112.

²¹⁸³ See also Separate Opinion of Judge Adrian Fulford, attached to *Lubanga* Judgement pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 2.

²¹⁸⁴ *Lubanga* Judgement, para. 951; *The Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 525; ICC-01/04-01/06-2773-Red-tENG, para. 64, footnote 59.

²¹⁸⁵ *Lubanga* Confirmation Decision, ICC-01/04-01/06-803-tEN, para 347.

²¹⁸⁶ *Lubanga* Confirmation Decision, ICC-01/04-01/06-803-tEN, para. 347; cited in the *Lubanga* Judgement, paras. 925, 989, 994.

²¹⁸⁷ *Lubanga* Judgement, para. 994. See also: *Lubanga* Judgement, para. 1000; reliance on: Thomas Weigend, “Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges”, *Journal of International Criminal Justice* 6 (2008), page 480; Stratenwerth/Kuhlen Allgemeiner Teil I, *Die Straftat* (2011), 12/83. See also Gerhard Werle, “Individual Criminal Responsibility in Article 25 ICC Statute”, *Journal of International Criminal Justice* 5 (2007), page 962; Gerhard Werle, *Principles of International Criminal Law* (2009), paras 466 to 468 and 472; Roger S. Clark, “Drafting a general part to a penal code: some thoughts inspired by the negotiations on the Rome Statute of the International Criminal Court and by the Court’s first substantive law discussion in the *Lubanga* Dyilo confirmation proceedings”, *Criminal law forum* (2008), pages 545 *et seq*; William A. Schabas, *The International Criminal Court - A Commentary on the Rome Statute* (2010), page 429; Kai Ambos, *La parte general del derecho penal internacional* (2005), page 189. See also: Prosecution Brief, para. 500.

the body of evidence examined throughout this final brief, notably: evidence of control exerted by the Accused over their troops, their role in obtaining and distributing weapons, orders given by them and their role in their execution.”²¹⁸⁸

1204. The prosecution alleges that the crimes charged “would never have been committed without their essential and coordinated contribution to the common plan”.²¹⁸⁹ The prosecution takes the position that Katanga “participated at every stage of the attack on Bogoro, from the departure from Aveba with his troops until the end of the attack, including the trip from Kagaba to Bogoro, where he led his troops.”²¹⁹⁰ According to the prosecution, “Katanga fought alongside his combatants. He was with Yuda’s group and attacked from the Kagaba road.”²¹⁹¹

Position of the Defence

1205. The defence accepts that Mr. Katanga played a role in maintaining relations with the RCD-K/ML, APC and EMOI, in hosting APC commanders including Koka and Mike-4 in Aveba. The defence accepts too, that, in doing so, Mr. Katanga played a role in implementing the plan to dislodge the UPC from Bogoro. However, none of his tasks were carried out in a concerted manner with Mathieu Ngudjolo, who played no role whatsoever in this plan. The defence submits that any contribution that Katanga made was in respect to the legitimate military plan formulated in Beni, to attack the UPC base at Bogoro, rather than with Ngudjolo to “wipe out Bogoro”.

1206. The defence further submits that Katanga’s contribution to this plan, though significant, was not essential, as otherwise required. The plan would be carried out even without his contribution. Kagaba had its own radio network and communication with Beni. There were many APC soldiers at Kagaba.²¹⁹² Yuda had his own independent relationship with Beni, which he visited independently of Mr. Katanga,²¹⁹³ and they could have bypassed Katanga completely. This is what happened in the end anyway, when Germain Katanga could not leave Aveba for reasons of security (Kisoro) and because Kasaki told him not to leave. The plan was then implemented without his participation.²¹⁹⁴ Katanga could not have stopped it.²¹⁹⁵

²¹⁸⁸ Prosecution Brief, para. 503.

²¹⁸⁹ Prosecution Brief, para. 500.

²¹⁹⁰ Prosecution Brief, para. 568; sections 9.1.3-9.1.5.

²¹⁹¹ Prosecution Brief, para. 569.

²¹⁹² See section IV-A ‘EMOI: EMOI/APC troops deployed in Ituri’.

²¹⁹³ P-161-T-268-pp.28-29 (FRA-pp.25-26).

²¹⁹⁴ See also P-0148-T-279-p.36 (FRA-p.32).

²¹⁹⁵ D2-001-T-277-p.15-l.4-11 (FRA-p.13-l.15-23): A delegation came from Beni. I had news from Commander Move. And this delegation came from Beni. It arrived in Aveba. They came to see Mr. Germain Katanga, and

1207. The defence also accepts that ammunition came from Beni to Aveba, and that it was distributed amongst the various camps concerned, notably Olongba, Kagaba and Aveba.²¹⁹⁶ The defence also accepts that commanders Cobra Matata, Oudo, Anguluma, Beby and others, and various combatants, came to pick up their share.²¹⁹⁷

1208. However, P-28 and P-219, relied upon heavily by the Prosecution, have exaggerated the importance of Mr. Katanga in carrying out this task.²¹⁹⁸ The only reason that Germain Katanga played a role in the distribution of weapons was that Aveba had an airstrip where planes carrying weapons, ammunition and other supplies could land.²¹⁹⁹ He carried out all his tasks under the supervision of Blaise Koka, who had moved to Aveba with the specific purpose of supervising the delivery and distribution of weapons and ammunition with the purpose of fighting the UPC in Ituri. Koka was in charge, not Katanga.²²⁰⁰

1209. Contrary to the evidence of witnesses 28 and 219,²²⁰¹ the weapons were stored at camp BCA, rather than at Mr. Katanga's residence. After Koka's arrival, they were stored at Koka's residence.

1210. The defence further submits that, apart from a handful of ammunition received by Chef Manu on their return from Beni in December 2002,²²⁰² no other delegations arrived from Zumbe or its surroundings to pick up weapons or ammunition.²²⁰³ In suggesting otherwise, the prosecution relies on the evidence of P-280, whose evidence the defence submits is unreliable.²²⁰⁴ In any event, P-280 testifies that he and others from Zumbe and Lagura collected weapons and ammunition from the bottom of the hill near Nyakeru,²²⁰⁵ which is very far from Aveba. This then does not contradict Germain Katanga's testimony that nobody from the Zumbe direction turned up at Aveba for weapons and ammunition.

they said they wanted to attack Bogoro, and they asked him if he could help them. Mr. Germain Katanga said the following: He said that Bogoro was not a zone under his control. He suggested that they should go and see Yuda at Kagaba because Bogoro was part of his territory, and these people then went to see him.

²¹⁹⁶ Prosecution Brief, para.522.

²¹⁹⁷ Prosecution Brief, para. 522.

²¹⁹⁸ See for instance Prosecution Brief paras 529-530.

²¹⁹⁹ P-28-T-217-FRA-p.33-l.1-22; T-219-T-205-FRA-p.42-l.11-23; D2-300-T-324-FRA-p.71-l.2-3.

²²⁰⁰ D2-300-T-317-pp.52-53 (FRA-p.46): what weapons should go to then? Who made that decision, the distribution amongst combatants? A. Here we're talking about before Blaise Koka arrived, are we, or afterwards, because when Blaise Koka arrived, he was the major leader of the APC directly there. See also: 'Weapons Deliveries, Late 2002, Early 2003, from the RCD-K/ML / APC'; and 'Involvement of the APC'.

²²⁰¹ Prosecution Brief, para. 521.

²²⁰² See section IV-A 'Arrival of Chef Manu and Others from Zumbe in Aveba, around November 2002'.

²²⁰³ D2-300-T-318-pp.18-19 (FRA-pp.15-16): Q. Aside from Chef Manu's visit in November 2002, was there ever a so-called delegation sent from Zumbe to -- to Aveba, and in particular, was there any liaison between Aveba and Zumbe? I say Zumbe, the people on Monts Bleus, les Monts Bleus, in relation to the attack on Bogoro? [...] THE WITNESS: (Interpretation) The answer is no. PRESIDING JUDGE COTTE: (Interpretation) No, without any comment? THE WITNESS: (Interpretation) No. Categorically, no.

²²⁰⁴ See section II A: 'Review of the credibility of Prosecution witnesses'.

²²⁰⁵ P-280-T-162-FRA-p.17-l.3-15.

1211. In addition, the defence accepts that Katanga participated in a ‘reconnaissance in force’ expedition to Bogoro with Blaise Koka. Germain Katanga stated that the purpose of this operation was to evaluate the forces in Bogoro and if the opportunity arose, to take over Bogoro.²²⁰⁶ However, the defence emphasises that Katanga did not leave Aveba either to join the meeting held at Kagaba on the eve of the Bogoro attack, or to join the battle at Bogoro on 24 February 2003.

1212. Various defence witnesses, including P-148,²²⁰⁷ Sharif Ndadza,²²⁰⁸ Pitchou Iribi,²²⁰⁹ David Adirodu,²²¹⁰ D-161,²²¹¹ Malivo Kagaba²²¹² confirmed that Germain Katanga stayed in Aveba on the day of the Bogoro attack; and that it was rather Yuda and Dark, based in Kagaba near Bogoro, who were the main combatants responsible for the resistance efforts at Bogoro. Bogoro was in Yuda’s area of command and he was in charge of the *garrison mobile*. Combatants tended to be in charge in their own local areas.²²¹³ People in the immediate surroundings of Bogoro suffered most from the presence of the UPC force that caused a security problem and came to Lakpa and Nombe to set houses on fire.²²¹⁴ Given his APC background and training, Yuda was well connected with the APC soldiers many of whom stayed at his camp at Kagaba.

1213. The prosecution relies on P-219, P-28 and P-12 for asserting that Germain Katanga fought at Bogoro. Of these three, only P-28 claims to have been present.²²¹⁵ P-12 testified that Mr. Katanga admitted to him having taken part in the attack.²²¹⁶ This is contradicted by [REDACTED] [P-160], who testified about the same conversation stating that Mr. Katanga told her that he did not personally participate.²²¹⁷ The credibility of these witnesses particularly relating to this conversation is contested.²²¹⁸

1214. P-219 claims to have been told by Mr. Katanga how he had spent the night before the attack near to the UPC camp.²²¹⁹ P-28 claims that, about two days before the Bogoro attack,

²²⁰⁶ D2-300-T-325-p.17 (FRA-pp.15-16).

²²⁰⁷ D2-148-T-279-p.18 (FRA-p.16).

²²⁰⁸ D2-350-T-253-p.43 (FRA-p.46).

²²⁰⁹ D2-228-T-250-pp.10-12 (FRA-pp.9-11).

²²¹⁰ D2-001-T-277-p.15 (FRA-p.14); T-277-pp.70-71 (FRA-p.62-63).

²²¹¹ DRC-D2-161-T-268-p.28 (FRA-p.25).

²²¹² D02-P-0129-T-271-pp.29-31 (FRA-pp.26-28). Malivo testified that he saw Katanga on that day in Aveba: D02-P-0129-T-271-p.31 (FRA-p.27). See further IV-B : ‘Bogoro attack of 24 February 2003’.

²²¹³ D2-350-T-253-p.43 (FRA-p.46); D2-228-T-250-pp.10-13 (FRA-pp.9-12).

²²¹⁴ D2-148-T-279-pp.18-19 (FRA-p.16).

²²¹⁵ P-28-T-217-FRA-p.53-l.6-9, P-219-T-205-FRA-p.62-l.21-28.

²²¹⁶ P-12-T-201-FRA-p.30-l.22-28, and p.31-l.1-28.

²²¹⁷ Section II A: ‘Review of the credibility of Prosecution witnesses’.

²²¹⁸ Section II A: ‘Review of the credibility of Prosecution witnesses’.

²²¹⁹ P-219-T-205-FRA-p.62, l.19-23.

the troops from Aveba, including Mr. Katanga, moved to Kagaba, as planned.²²²⁰ However, P-219 also testified that there were a number of formal and informal meetings in Aveba, including one on 23 February 2003 led by Mr. Katanga.²²²¹ Mr. Katanga denies that such meetings occurred.²²²² In any event, Germain Katanga cannot have been at Aveba and in Kagaba at the same time; P-219's evidence is thus inconsistent with P-28's testimony in this regard.

1215. The defence submits that neither P-28 nor P-219 were present at Kagaba for the preparative meeting, or at Bogoro during the battle.²²²³ D-148, on the other hand, was present at this meeting and confirms that many people from different camps attended. However, he did not see Katanga there.²²²⁴ P-148 confirms P-28's testimony that it was Yuda who addressed the combatants,²²²⁵ suggesting Yuda was in charge, not Katanga.

1216. The prosecution has therefore failed to establish that Mr. Katanga and Mr. Ngudjolo coordinated their essential contributions to the plan to "wipe out" Bogoro. There is no evidence of any coordination between the two or any, let alone essential, contribution made by Mr. Ngudjolo. Germain Katanga's contribution to the legitimate plan formulated and orchestrated by Beni was marked, but not essential.

(iii) The Prosecutor failed to establish beyond reasonable doubt that the accused had control over the organisation

Legal Requirements

1217. In order to demonstrate that Germain Katanga exercised control over the FRPI combatants, the Prosecution must produce evidence showing that he was the 'mastermind' of the criminal plan.²²²⁶ This requires more than inducing or soliciting a person to commit a crime, and involves any means of causing another person to commit a crime, be it the use of force, or the exploitation of an error, or any other handicap on the tool's side, provided that it is the exertion of some controlling predominance on the indirect perpetrator's side.²²²⁷

²²²⁰ P-28-T-217-FRA-p.36-l.8-10; p.43-l.18, to p.44-l.17-23; T-221-FRA-p.66-l.20, to p.67-l.15.

²²²¹ Prosecution Brief, para. 539, reliance on: [P-219-T-205-FRA-p.43-l.19, to p.44-l.14; P-219-T-208-FRA-p.58-l.18, to p.59-l.5; p.60-l.11-19; T-209-FRA-p.74-l.23, to p.75-l.18].

²²²² D02-T-300-T-318-pp.16-17 (FRA-p.15).

²²²³ See section II-A: 'Review of the credibility of Prosecution witnesses'.

²²²⁴ D2-148-T-279-p.18 (FRA-p.16): Do you know, was Germain Katanga there? A. I did not see him on that day.

²²²⁵ P-28-T-217-FRA-p.36-l.23-25; p.40-l.13-15; p.48-l.19-23, p.49-l.27, to p.50-l.8.

²²²⁶ K. Ambos 'Article 25 Individual Criminal Responsibility', in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes Article by Article* (Hart Publishers, Oxford 2008 at p. 750; Ambos, Kai. 'Article 25' In Otto Triffterer (ed) 1999. *Commentary on the Rome Statute of the International Criminal Court*. Baden-Baden: Nomos Verlagsgesellschaft, p. 479.

²²²⁷ Cassese, Antonio, Paola Gaeta and John R.W.D. Jones (eds). 2002. *The Rome Statute of the International Criminal Court: A Commentary, Vol. I*. Oxford University Press, p.794.

1218. The defence submits that, in order to do justice to the rationale behind adopting the notion of indirect co-perpetration, the control aspect must be fully complied with. In particular, the defence requests that the Chamber uphold stringent conditions on the hierarchical relation that needs to be established between the principal perpetrator under article 25(3)(a) and the perpetrator(s) who directly committed the crimes charged. In the defence's submission, which finds support in the writings of distinguished scholars, this needs to be a relationship of effective control similar to the relationship between a superior and subordinate in the case of command responsibility under article 28 of the Statute.²²²⁸ Indeed, the defence submits that the common plan liability should not be used to circumvent the more stringent requirements that need to be established if a person is charged under command responsibility.

1219. In order to have effective control, the indirect perpetrator must have the material ability to prevent the crimes or punish the perpetrators subsequently, even if not in a strictly legal or formal capacity.²²²⁹ Substantial influence or persuasive ability as a form of control is insufficient.²²³⁰

1220. The defence submits that the Prosecutor must have demonstrated beyond reasonable doubt that Katanga exercised effective control over the physical perpetrators, and that their actions were causally linked to the common plan, as opposed to triggered by independent events or through the individual volition of the physical perpetrators, through personal antipathy towards the victims or desire for personal economic gain.

1221. The prosecution acknowledges that "the crimes committed by the subordinates under the immediate orders of one of the two Accused may be ascribed to the other, since they were perpetrated in furtherance of a common plan agreed by both Accused."²²³¹ As the Prosecutor

²²²⁸ Albin Eser: Individual Criminal Responsibility, in : Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds): The Rome Statute of the International Criminal Court: A Commentary, Vol. I, Oxford University Press 2002, page 795. See further: Kai Ambos: Joint Criminal Enterprise and Command Responsibility, 5 Journal of International Criminal Justice, March 2007, 159 at page 180. See also : K. Ambos, Triffterer, Commentary on the Rome Statute of the International Criminal Court, (1999), pp.479-80.

²²²⁹ *Prosecutor v. Brima et al*, Appeal Judgement, February 22, 2008, para. 257; also see: *Prosecutor v. Semanza*, Trial Judgement, May 15, 2003, para. 402; *Prosecutor v. Kajelijeli*, Judgment and Sentence, December 1, 2003, para. 774.

²²³⁰ See, for instance : *Prosecutor v. Delalic et al.*, Appeal Judgment, paras 258-266; also see, *Prosecutor v. Kordic*, Trial Judgment, February 26, 2001, para. 415; *Prosecutor v. Brima et al*, Trial Judgment, June 20, 2007, para. 784; *Prosecutor v. Fofana & Kondewa*, Trial Judgment, August 2, 2007, para. 238; *Prosecutor v. Brima et al*, Appeal Judgment, February 22, 2008, para. 289 ; *Prosecutor v. Ntagerura et al*, Trial Judgement, February 25, 2004, para. 628; *Prosecutor v. Nahimana et al*, Appeal Judgment, November 28, 2007, para. 882; *Prosecutor v. Karera*, Judgement and Sentence, December 7, 2007, paras. 564, 567-568; *Prosecutor v Oric*, Trial Judgement, June 30, 2006, para. 311; *Prosecutor v Hadzihasanovic & Kubura*, Trial Judgement, March 15, 2006, para. 80.

²²³¹ Prosecution Brief, para. 115.

submits,²²³² to prove that Katanga exerted control over the FRPI, it must be shown that he was “vested with the authority and power to secure the execution of the orders he issued”²²³³ and “the capacity to hire, train, impose discipline on and provide resources to his subordinates.”²²³⁴

Prosecution’s Position

1222. The Prosecution alleges that, before, during, and after the time of the attack on Bogoro, Germain Katanga was the commander-in-chief and President of the FRPI.²²³⁵ The allegation is that Mr. Katanga replaced Kandro as the leader of the Ngiti combatants of Walendu-Bindi.²²³⁶ Then, when the combatants took the name FRPI, Katanga allegedly retained his functions as military leader of all the FRPI combatants’ camps in Walendu-Bindi and took the title of President of the FRPI.²²³⁷ The prosecution alleges that Germain Katanga was nominated as the commander-in-chief and President of the FRPI because he had been trained in Mobutu’s army in 1996; was educated; had shown courage and wisdom; was respected by his fellow combatants and had all the qualities of a leader.²²³⁸

1223. The prosecution also maintains that Germain Katanga had effective control over all the Ngiti combatants in the various camps in Walendu-Bindi.²²³⁹

Defence Position

1224. The defence submits that, contrary to the prosecution’s position, on 24 February 2003, Katanga had a position of neither a *de jure* nor a *de facto* command.

1225. The defence submits that the prosecution’s allegation in respect to Katanga’s position ignores the reality on the ground on 24 February 2003. It is submitted that, at the time of the Bogoro attack, Katanga had no position of leadership outside Aveba. He was one of the commanders in Aveba, but had no control – let alone effective control – over people outside Aveba. Everyone was a leader in his own fief.²²⁴⁰ Even in Aveba, there were different camps. Katanga had no control over Garimbaya and his men based at the camp near the airport.²²⁴¹

²²³² Prosecution Brief, para. 116.

²²³³ *Katanga and Ngudjolo, Decision on the confirmation of charges*, para. 514.

²²³⁴ *Katanga and Ngudjolo, Decision on the confirmation of charges*, paras. 497-498, 500-510, 513; for the jurisprudence cited in support of this concept, see for example Pre-Trial Chamber III, *Prosecutor v. Bemba*, ICC-01/05-01/08-14-tENG, para. 78; See also Roxin, C., *Straftaten im Rahmen organisatorischer Machtapparate*, *Goltdammer’s Archiv für Strafrecht* (1963), pp. 193-207; Ambos, K., *La parte general del derecho penal internacional*, Montevideo, Temis, 2005, p.240.

²²³⁵ Prosecution Brief, para. 177.

²²³⁶ Prosecution Brief, para. 132.

²²³⁷ Prosecution Brief, para.194.

²²³⁸ Prosecution Brief, para. 182-183.

²²³⁹ Prosecution Brief, para. 188.

²²⁴⁰ D2-350-T-253-p.41 (FRA-p.43-44); D2-129-T-271-pp.32-33, 64 (FRA-p.29, 58); D2-228-T-250-pp.12-13 (FRA-pp.11-12).

²²⁴¹ D2-300-T-317-p.35 (FRA-p.31); D2-300-T-322-p.2-l.19-21 (FRA-p.2-l.24-27); see also D2-300-T-324-p.81 (FRA-p.74).

Katanga only had limited control over 60 men at Atele 2/Atelemba.²²⁴² However, at the time of the Bogoro attack, he had started to gain limited control over the combatants at the BCA under Mbadu,²²⁴³ but he had still no control over Garimbaya,²²⁴⁴ Yuda,²²⁴⁵ Mutombo,²²⁴⁶ Move,²²⁴⁷ Cobra,²²⁴⁸ etc, and in no way exercised effective control over them.

De jure position

1226. The defence does not deny that Katanga underwent training as a *garde civil* in Mobutu's army in 1996 and that his uncle was in the military.²²⁴⁹ Katanga's courage, wisdom, and education is accepted. These are precisely the reasons that Bayonga appointed Katanga President of the Ngiti fighters, despite his young age.²²⁵⁰ However, contrary to the prosecution's assertion that this occurred shortly after Kandro's death, this was after Bogoro, on 3 March 2003. Earlier would have been impossible due to the internal conflicts and chaos among the autonomous groups of combatants following Kandro's death, and continuing thereafter for several months.²²⁵¹

1227. In alleging that Germain Katanga was the nominated leader of the Ngiti combatants following Kandro's death, the prosecution essentially relies on discredited witnesses only (P-28, P-219, P-250, P-279) whose lack of credibility is discussed elsewhere.²²⁵² None of them, it is submitted, was in fact in the militia. Their information is based on hearsay. Katanga himself,²²⁵³ corroborated by D-148²²⁵⁴ testified that he was appointed as President of the Ngiti combatants after Bogoro.

1228. The prosecution claims that the defence witnesses corroborate the prosecution rather than the defence theory on Mr. Katanga's alleged firm leadership at the time of the Bogoro attack, and to the extent they depart from the prosecution's position, the prosecution states that they are protecting Mr. Katanga.²²⁵⁵ The prosecution observes that their testimonies differ

²²⁴² D2-300-T-324-pp.78-80 (FRA-pp.71-73).

²²⁴³ D2-300-T-317-pp.32-33 (FRA-pp.28-29)

²²⁴⁴ D2-300-T-317-p.35 (FRA-p.31); D2-300-T-322-p.2-l.19-21 (FRA-p.2-l.24-27); see also D2-300-T-324-p.81 (FRA-p.74) where Katanga said that Garimbaya was company commander.

²²⁴⁵ D2-300-T-317-pp.35-36 (FRA-pp.31-32); D2-350-T-253-p.41-l.2-9 (FRA-p.43-l.25-p.44-l.4); D2-228-T-250-pp.12-13 (FRA-pp.11-12).

²²⁴⁶ D2-300-T-317-p.36 (FRA-p.32).

²²⁴⁷ D2-300-T-317-p.36 (FRA-p.32); D2-129-T-271-p.83 (FRA-p.75).

²²⁴⁸ D2-300-T-317-p.37 (FRA-pp.32-33); D2-350-T-253-p.41-l.2-9 (FRA-p.43-l.25-p.44-l.4).

²²⁴⁹ Prosecution Brief, reliance on Katanga's testimony: paras.180-181 [D2-300-T-314-FRA-p.30, lines 8-14, T-320-p.48-l.2-15] as well as P-12's testimony: [P-12-T-197-FRA-p.15-l.19-28, p.16-l.19-23].

²²⁵⁰ P-219-T-205-FRA-p.7-l.27-28, and p.8-l.1-10; P-28-T-217-FRA-p.13-l.8-17; D02-148-T-280-FRA-p.10-l.10-28, p.11-l.1-11; P-12-T-195-FRA-p.17-l.4-16.

²²⁵¹ See section IV-A 'Self defence and 'combattantisme'.

²²⁵² Section II-A: 'Review of the credibility of Prosecution witnesses'.

²²⁵³ D2-300-T-319-p.17 (FRA-pp.18-19).

²²⁵⁴ D2-148-T-269-FRA-p.15-l.4-9.

²²⁵⁵ Prosecution Brief, para. 192-193.

from each other. This is because so much was happening in such a short time. Everyone remembers the events differently, which is a clear indicator that the defence did not try to manipulate the witnesses or their narratives.

1229. These are events that took place nearly ten years ago. Memory fades particularly when it comes to dates. It is not disputed that, at some point, Katanga became the president of the FRPI: the question is when. None of the defence witnesses contradict the defence position. At best, it can be inferred that people were generally confused about who was leading the combatants, if anyone, and in which area, and Germain Katanga's and other known combatants' positions. People in Aveba naturally saw Katanga as important because of his relations with Beni. However, being a point of contact for Beni does not translate into a *de jure* or *de facto* position vis-à-vis fellow combatants in or outside Aveba, or that he exercised the requisite effective control.

1230. Even after Kasaki nominated him as President of the Ngiti combatants on 3 March 2003, it took significantly longer for Germain Katanga to be respected as such by other combatants, particularly outside Aveba.²²⁵⁶ His '*de jure*' position therefore did not give him effective control until much later. Katanga started to use the term 'President' for the first time in mid 2003 after the *de facto* separation of the FNI and FRPI. This became official only in February 2004, when the FRPI officially announced its separation from the FNI and Germain Katanga was its President.²²⁵⁷

1231. The FRPI structure, which was set up in Beni, was something different from Kakado's nomination. The FRPI structure was rather a parallel structure to the way of being of the combatants on the ground. The FRPI did not appoint a President. The main person was Doctor Adirodu within the FRPI who was its self-proclaimed spokesperson. First Ndjabu and then Sambidu became the coordinator of the FRPI. There was a committee present at Beni among whom Pichou Iribi who came to testify. However, nobody within the FRPI held supreme authority.²²⁵⁸ Germain Katanga played no role in its establishment nor did he have any function in the FRPI. Mr. Katanga's name does not appear in the FRPI manifest and he did not sign it.²²⁵⁹

Leadership

²²⁵⁶ D2-228-T-252-pp.62-63 (FRA-pp.69-70).

²²⁵⁷ See section IV-C 'FRPI/FNI Joint Etat-Major'.

²²⁵⁸ D2-228-T-250-p.57 (FRA-pp.52-53).

²²⁵⁹ See section IV-A 'Creation of the FRPI'.

1232. The prosecution essentially relies on the testimony of P28 and P219 to establish that he was in charge of all the Ngiti combatants at the time of the Bogoro attack.²²⁶⁰ The defence has demonstrated how these witnesses are not credible or reliable. It attempts to corroborate this unreliable evidence with a range of letters, including EVD-OTP-00238; EVD-OTP-00278; EVD-OTP-00236; EVD-OTP-00237; EVD-D03-00044 and EVD-OTP-00239.

1233. The defence evidence principally through Katanga, D2-228 and D2-350 has demonstrated a plausible explanation on the leadership of Katanga (elaborated in the context), an explanation which is to be preferred to the simplified version of P-28 and P-219. This evidence may be summarized as follows: Katanga had a leadership position within Aveba on the eve of the Bogoro attack. In September 2002 the uniting of the various militias was still a developing process with contesting egos, including the infamous Cobra and Kisoro. The FRPI was an organization put forward by Adirodu but its acceptance as the recognized umbrella was itself a developing story. It is on the 3 March 2003 at Tchei that Katanga is nominated president of the combatants. Katanga officially declares himself president of the FRPI on 8th February 2004. In the interim, there are other developments related to the collaboration with the Lendu as well as increased recognition of Katanga as head of the FRPI.

Documents pre-Bogoro

1234. For a document to make it clear that there is no other reasonable conclusion than that Katanga was in charge of all the militia in Walendu Bindi at the time of the Bogoro attack, it must logically pre-date the attack. The prosecution only relies on two letters pre-dating Bogoro for this contention, neither of which achieves that objective and both of which contradict each other if we are to believe that they refer to the same individual.

EVD-OTP-00238

1235. EVD-OTP-00238 is a letter from *Rév. Pasteur Matata-Alude*, described as *Evangéliste Sectionnaire* of the Administratif department of the Evangelization Section for Kagaba. This letter is addressed to Son Excellence Colonel Katanga-Nduru Germain at AVEBA-MUKUBWA. It is dated the 1st January 2003 and is providing information about an evangelization campaign due to take place between the 15 February and 1 March 2003.

1236. No person who has come before the Chamber knows this letter such that he or she is able to authenticate it, explain its contents and its context.

²²⁶⁰ Prosecution brief, paras 188-216.

1237. The prosecution relies on the manner of address, the first and third paragraphs of this letter, to establish that Katanga was in the supreme authority over all the Ngiti combatants and commanders in Walendu Bindi before the Bogoro attack.²²⁶¹

1238. The fact that he is referred to as colonel is neither here nor there in establishing his overall authority in Walendu Bindi since it refers to a rank and not a position.

1239. The fact that Katanga is described as colonel Katanga – Nduru Germain at AVEBA – MUKUBWA, and not as for example President of the combatants at Walendu Bindi is significant, because if he was widely viewed as such, and the writer of the letter viewed him in that way, he would not fail to describe him as such, especially since he has described others who were copied the letter as president.

1240. This is in fact supported by the references to ‘son excellence’ and ‘à votre supériorité ci-grande’ which indicate, not so much that Katanga was the supreme authority as claimed by the prosecution, but rather that the author wanted to accord the receiver of the letter the highest expressions of respect. He is not described as great superior as recorded in the prosecution brief.

1241. The third paragraph, relied on by the prosecution to establish that Katanga is in charge of Walendu Bindi, is badly expressed and as a result ambiguous. It is also plainly not written with great care containing six very blatant typographical errors. It is submitted that it is a reasonably possible interpretation of this paragraph that the word ‘gestion’ or management does not mean management of Walendu Bindi but is qualified by specific reference to the areas around the Kagaba section (written as ‘Sevtio’) – ‘et précisément sur le terrain de’.

1242. Secondly, it is a reasonably possible interpretation that ‘sur le terrain de’ means ‘within’ that specified area, as opposed to ‘over the whole of’ that area’.

1243. Thirdly, it is possible to understand from this paragraph that the writer is addressing Katanga as one of those having a degree of responsibility, whatever that is, within the specified territory (sur terrain de groupement des ...) and not necessarily the one with sole responsibility.

1244. Finally, one notes that the writer has chosen to use the expression ‘la gestion pour le moment vous revient’. This seems a deliberate choice of words and a deliberate refrain from using a definite expression like ‘sous votre responsabilité’. In French this suggests that the writer may be according a right to Katanga that he might not actually possess rather than an

²²⁶¹ Prosecution brief, para 219.

actual position. In other words if it was the case that at that particular moment it was not entirely clear who was in charge, the use of the expression ‘pour le moment vous revient’ might suggest that in the writer’s mind either he is not sure of Katanga’s exact authority or that Katanga should be the one who has authority in his opinion, even if this does not for the time being represent the reality.

EVD-OTP-00278

1245. This is a letter, dated 9 February 2003, from the *Chargé du Front* (referring to Kasaki),²²⁶² addressed to *Monsieur le Président du mouvement, à Aveba Mkubwa*, basically informing the latter of a decision that military should not carry armed on the day of the cattle market on 14 February 2003. The presumed author being dead, the letter amounts to documentary hearsay from a deceased person.

1246. The prosecution submits that the letter shows that Katanga was at the head of the Ngiti movement and that Kasaki is answerable to Katanga. It submits that ‘president’ must refer to Katanga in the light of the testimonial evidence and the other documents referring to EVD-OTP-00238, the evangelization letter referred to above. The testimonial evidence cited is that of 219.²²⁶³

1247. However, as the defence has submitted at the beginning of this brief in its section on the evaluation of evidence, one unreliable or inconclusive piece of evidence cannot corroborate another. P-219 was unreliable. In any event, that evidence does not corroborate the letter because P-219 was not shown the letter and the testimony referred to by the prosecution did not confirm that Katanga had the title ‘President du Mouvement before the Bogoro attack’. The assertion of the witness, if combined with the counsel leading question, was that he carried the title ‘President du FRPI’,²²⁶⁴ which is different. If anything the two pieces of evidence contradict each other if one is to understand that ‘President du Mouvement’, with a capital M, is Katanga.

1248. With respect to the other evangelization letter: EVD-OTP-00238, another title is used for Germain Katanga: ‘Son Excellence Colonel Katanga Nduru Germain à Aveba Mukubwa’. As submitted in relation to that letter, if he had the title ‘President du Mouvement’ the question arises why it was not used from a person wishing to show such a degree of respect. So again the two items of evidence do not corroborate each other but if anything contradict each other.

²²⁶² D2-300-T-323-FRA-p.56-l.1-2.

²²⁶³ Prosecution brief, paras 220-221.

²²⁶⁴ P-219-T-205-FRA-p.12-l.5-10.

1249. The plausible explanation for the title ‘President du Mouvement’ is that this may refer to Kakado since the line of power is Kakado, then below him Kasaki.²²⁶⁵ The prosecution has produced no evidence to refute that Kakado carried this title. It is also a reasonable explanation. First of all there was evidence that Kakado was the spiritual leader for the whole of Walendu Bindi (explaining those copied into the letter). There was also evidence that he was all powerful.²²⁶⁶ Furthermore, the letter does not request him to decide that the military should not carry arms on that day, but rather informs him of that decision already made and requests him to do what he can to ensure that it is respected. This suggests that it was the person writing the letter who had the authority to make decisions on military matters and the person receiving it who had a political authority.

1250. The expression ‘*Président du Mouvement*’ also reflects the idea that there were a number of lines of authority within the militia which had not been properly structured, including Adirodu’s developing FRPI, Cobra’s group, Katanga’s group at Aveba, Kisoro’s group and so forth, but in the absence of a clearly defined structure and in the vacuum of the death of Kandro who had been the military leader who had brought many of the Ngiti under one roof and was feared, Kasaki was the one with authority in military matters until the leadership was sorted out and Kakado had overall authority as the old respected spiritual leader.

1251. This being a reasonably possible explanation, not inconsistent with the facts, it is impossible to be sure that in this letter the unnamed ‘President du Mouvement’ refers to Katanga, and not to Kakado. The prosecution has failed to prove otherwise.

Documents post-Bogoro

EVD-OTP-00239

1252. This is a letter from Colonel Cobra Matata to ‘Mr le Président du FRPI à Bolo’, dated the 3rd March 2003 and declaring that he has put into effect a gold exploration project and that the ‘encadreurs’ under the control of their chief could benefit from taxes on the buying of the gold on the market.

1253. The prosecution argues that this letter proves that Katanga had a position of authority prior to the 3 March 2003 and that he was still head of the FRPI at that date.²²⁶⁷

1254. This letter has not been authenticated by any person who was familiar with it so one only can speculate as to the motive of Cobra in writing the letter and in addressing *le*

²²⁶⁵ D2-300-T-324-p.88 (FRA-p.80).

²²⁶⁶ D2-300-T-324-p.88 (FRA-p.80).

²²⁶⁷ Prosecution brief, para 222.

Président du FRPI. Although not proved, the letter could be genuine and if so would show that on the 3rd March 2003, Cobra was describing Katanga as President of the FRPI at Bolo and himself as *Chef D'Etat Major Suprême* of the Cabinet du Colonel of the FRPI. It does not prove beyond a reasonable doubt that prior to the attack on Bogoro, this is the status that Katanga would have had or that Cobra would have recognized him as having it. Indeed, even on the 3rd March it only proves that Cobra was referring to Katanga as President of the FRPI and not that this description was accurate.

1255. To understand the importance of this letter it is necessary to consider it in the context of the evidence as to what occurred on the 3rd March 2003, the date of the letter, and the evidence of how Cobra considered himself prior to the 24 February 2004.

1256. EVD-D02-00243 is another letter from Cobra obtained by the prosecution from the same location in Medhu and disclosed to the defence. This letter is dated 17 February 2003, so very shortly before the Bogoro attack of 24th February. In that letter Cobra does not describe his office in the letterhead as FRPI – Cabinet de Colonel, but rather as *Movement de Liberation Lendu, Committee de Securite*. So he is not recognizing himself as part of the FRPI prior to Bogoro. There is therefore no reason to believe that he recognized Germain Katanga as such before 24 February 2004.

1257. What does appear to be identical is the symbol of the Cobra in the stamp on the bottom right hand side which is possibly the same stamp. If so, both stamps will state '*Chef D'Etat Major Suprême*.' This means that Cobra accorded himself this title before the 24th February. Katanga gave evidence in response to the judge president that this title made no sense because in military parlance there was a *chef d'état major* as head of an army and then you would have the supreme commander who would be the president of the country. One can deduce from the strange formulation of Cobra that prior to the 24 February he considered himself as Supreme. He has then kept this title and the stamp on the 3rd March. It is more likely that he kept this title despite demotion in his mind than that he created it at a time when he knew and respected that there was someone above him.

1258. On the 3 March Katanga gave evidence that Kakado had called a meeting at Tchey, where Cobra was present, in which he had nominated Katanga as 'President of the combatants'. Looked at in this context the letter could be Cobra flexing his muscles and trying to show his importance by talking about the gold. So the reference to president is a result of what Kakado had said. Katanga described how Kakado had said that Cobra would be the only colonel since he killed anyone else who took that title. This is perhaps reflected in the

letterhead of the 3rd March letter where he describes his office with the strange name of Cabinet de Colonel. After all colonel is a rank not a position.

1259. The FRPI existed on paper and some chose to adopt the acronym while others did not. Cobra chose at that moment to adopt it and perhaps in his mind he preferred *président du FRPI* to president of the combatants, because the latter implied authority over all the NGITI combatants, while the former was an organization and being disgruntled that he was not at the top, he perhaps could not bring himself to recognize Katanga as head of the combatants.

1260. The letter is therefore subject to a possible alternative explanation and does not prove Katanga position or authority over all the combatants of Walendu Bindi on 24 February, 10 days earlier.

EVD-D03-00044

1261. The prosecution argues that Katanga's signing of the peace accord on 22 March demonstrates his power at the time of the alleged events shows that his position as supreme authority within the FRPI is recognized by all parties.²²⁶⁸ Katanga gave evidence that he was taken to sign after a meeting with General Kali Kayihura. The document demonstrates that he was given a sufficient degree of recognition at that time to be able to sign on behalf of the Ngiti community, as were Alezo and Iribi. It does not show anything about February 2003. The FRPI was a developing notion. He officially became president on 8 February 2004. The accord does not describe him as president of the FRPI.

EVD-OTP-00236 and EVD-OTP-00237

1262. The prosecution argues that it can be deduced from these letters that 'President du Mouvement' in the Evangelization letter: EVD-OTP-00278 refers to Katanga.²²⁶⁹ This does not follow since none of them use that expression. In fact, the fact that they all use the expression President suggests that the other expression was not commonly employed with respect to Katanga, if it ever was.

1263. If it were the case that the FRPI was a fully structured organization on 24 February 2003, with Germain as President, having authority over all the militia in Walendu Bindi one would expected a range of letters with Katanga's signature and describing as such, pre-dating the 24 February. The fact that the prosecution has been unable to unearth a single document of this nature and has had to resort to inference and speculation regarding two letters dated prior to the 24 February surely, rather than supporting the prosecution case, has demonstrated that it

²²⁶⁸ Prosecution brief, para 223.

²²⁶⁹ Prosecution brief, para 224-225.

cannot convince this Chamber beyond a reasonable doubt of Katanga's overall leadership prior to the attack in question.

De facto position

1264. The defence submits that, irrespective of Germain Katanga's '*de jure*' status, the prosecution failed to establish beyond reasonable doubt that he had any effective control over anyone other than the 60 men from Atelemba. Even if his authority extended to all combatants in Aveba, this would still not give him any position of authority over, for instance, the '*garrison*' based in Kagaba. As already explained, the combatants acted in an autonomous fashion and did not easily lend themselves to obeying orders, let alone from a 24-year-old who was relatively new in the area. Katanga had no power to punish or discipline anyone; nor did he control their movement. It has already been observed that a position of influence is insufficient to establish that someone has effective control over the alleged perpetrators.

1265. Apart from the testimonies of P-28 and P-219, there is no evidence that Katanga had any power to punish or discipline any of the combatants at the time of Bogoro. The system of punishment and discipline in the Ngiti camps referred to by the prosecution was not yet fully operational at the time of the Bogoro attack. Nor was the civil and military power in Walendu-Bindi yet in the hands of the combatants or Katanga. The civilian matters remained under the responsibility of Kasaki. If Manu and others from Zumbe visited Aveba, it was because they were told that combatants and notables in Aveba were planning a mission to Beni.²²⁷⁰

1266. His *de facto* control over combatants instead grew gradually. The MONUC and human rights reports in evidence relating to events even late in 2003 demonstrate how difficult it was for any leader among the combatants to have *de facto* control over anyone – and much less effective control.²²⁷¹ This was even more complicated at the beginning of 2003, when the combatants were even more autonomous than later in that year. It is worthy to note that, as Germain Katanga's authority grew, the situation and internal conflicts between the combatants as well as harassments of the local populations gradually decreased.²²⁷² The reason

²²⁷⁰ See section IV-A 'Arrival of Chef Manu and Others from Zumbe in Aveba, around November 2002'.

²²⁷¹ See, for instance, EVD-D02-00235; and EVD-D02-00236.

²²⁷² EVD-D02-00235 (UN Monuc Report, 02.03.04 states that the security situation has improved in the region as Germain Katanga has been promoted President of the FRPI and has reportedly solved the issue of "uncontrolled commanders" in the area.

that Aveba was chosen as the location to set up the demobilisation programs was precisely because the situation there was calm and Katanga was someone who was really respected.²²⁷³

1267. The defence accepts that Katanga led the combatants to Beni; met with senior leaders in Beni; and played a role in the distribution of weapons and ammunition, under Koka's supervision. The defence submits that the weapons were not stored at Katanga's residence but rather, at BCA camp. After Koka's arrival, they were stored at Koka's residence. This makes little difference, however, in terms of Germain Katanga's position, other than in assisting in distributing the weapons from Beni. In no way does it demonstrate Katanga's *de facto* authority over any of the combatants other than those 60 from Atelemba, subject to the observations made above. It certainly does not suggest that he "enjoyed supreme authority within the FRPI", as otherwise suggested by the prosecution.²²⁷⁴ This is not the only inference that can be drawn from the evidence. In accordance with the principle of *in dubio pro reo*, the finding of guilt must be the only possible inference; if not the benefit goes to the defendant.²²⁷⁵

1268. The defence denies that there was a meeting with Blaise Koka and several FRPI commanders at Katanga's residence prior to the attack on Bogoro. This assertion is based on P-28's unreliable evidence. The defence also does not accept that there was another meeting with a Zumbe delegation in January 2003. It is again solely based on unreliable evidence. However, even if the Chamber accepts all these allegations, this does not at all demonstrate that Germain Katanga exercised effective control over the combatants on the ground. The fact that the notables or APC officers respected him or saw him as someone with authority does not suggest that the combatants accepted his authority.²²⁷⁶

1269. The prosecution submits that Katanga invented the term 'coordinator' to secure himself an acquittal.²²⁷⁷ The defence notes that nobody else has specifically referred to him as 'coordinator'. This is not surprising because 'coordinator' was not Katanga's official title, but rather, reflected his function.

²²⁷³ P-267-T-165-p.68 (FRA-p.64) (McDonald: "What was the degree of respect addressed to Germain Katanga? A. In the community he really was respected, and we, when we went to see him, we didn't call him "Germain Katanga", we called him President.")

²²⁷⁴ Prosecution Brief, para. 197.

²²⁷⁵ *Prosecutor v. Limaj*, IT-03-66-T, Trial Judgment, 30 November 2005, para.10; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Judgment, 20 June 2007, para.98 and 101; *Prosecutor v. Celibici*, IT-96-21-A, Appeals Judgment, 20 February 2001, para. 458; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 35; *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 67; *Prosecutor v. Blagojević*, IT-02-60-T, Trial Judgment, 17 January 2005, para. 21; *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, Trial Judgment, 31 March 2003, footnote 1100; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgment, 3 April 2008, para. 421.

²²⁷⁶ As was also highlighted by Pichou: D2-228-T-250-pp.12-13 (FRA-pp.11-12); D2-228-T-252-62-63 (FRA-pp.69-70).

²²⁷⁷ Prosecution Brief, para. 592.

1270. The Prosecution claims that Germain Katanga's position of authority is further demonstrated by the fact that it was Kiza, Ngudjolo, and himself who were to form the General Staff of the FNI-FRPI when a coalition between the FNI and FRPI was created in April 2003. Katanga represented the South; Ngudjolo and Kiza the North. The fact that Germain Katanga was the representative of the South further indicates that "it was because he was the military leader of the FRPI in Walendu-Bindi at the time and had authority and power of command over his subordinates; it was recognition of his pre-existing authority by the other military leaders and the community", according to the prosecution.²²⁷⁸ The defence disputes this. It has already indicated that Katanga was nominated as the chief of the Ngiti combatants in March 2003. It is then not surprising that he was the person representing the South, particularly because Katanga was Bayonga's choice.

1271. The prosecution's reading of the facts goes beyond the evidence. The defence emphasises that it is not sufficient for the prosecution to produce a more credible story than the defence. It must be the only reasonable conclusion from the facts.²²⁷⁹ The testimony of P-28 and P-219, heavily relied on by the prosecution to demonstrate Katanga's leadership role, mix up details of what occurred at a later stage. Timing is of significant importance in the present case. Many events happened in the course of a relatively short time. If indeed Yuda established his camp in December 2002, this would leave a very short time for Mr. Katanga not only to become the chief of all combatants *de jure*, but also, *de facto*. Realistically, it is absurd to think that a young, 24 year old man, who grew up elsewhere, would so quickly be respected by all combatants, including those who were much older, more experienced, and who had strong links with the APC as a result of their training.²²⁸⁰

1272. Among the combatants, particularly the *garrison* stood out for its strength. It is unlikely that Yuda, who had been a close ally to Kandro and who was significantly older than Germain Katanga, would tolerate Katanga being his chief. Even if true that Yuda was no longer considered as an APC soldier, he had been trained as such and was well-connected among the APC. As previously stated, many APC soldiers were present in the Kagaba camp. The main reason for Aveba to have some significance for the APC was that it was relatively calm there and it had an airstrip where planes could land.²²⁸¹ However, to suggest that

²²⁷⁸ Prosecution Brief, para. 199.

²²⁷⁹ *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 319; *Prosecutor v. Limaj*, IT-03-66-T, Trial Judgment, 30 November 2005, para.10; *Prosecutor v. Celibici*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 458; *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 67; *Prosecutor v. Blagojević*, IT-02-60-T, Trial Judgment, 17 January 2005, para. 21.

²²⁸⁰ According to Pichou, this was complicated since Katanga was considered a stranger as he was not born in Aveba : D2-228-T-250-p.12 (FRA-p.11); D2-228-T-252-62 (FRA-p.69).

²²⁸¹ P-28-T-217-FRA-p.33-l.1-22; T-219-T-205-FRA-p.42-l.11-23; D2-300-T-324-FRA-p.71-pp.2-3.

Katanga was the chief over all autonomous groups elsewhere simply does not correspond with the reality on the ground in February 2003. The proposition is all the more absurd, in light of the predominance of the role played by the RCD-K/ML, APC and EMOI.

1273. It is clear from any public sighting of Germain Katanga that he was not very talkative ever and he did not speak out like some others, including Dark. He was rather withdrawn and did not act like a leader at all. It was reported that, when Germain Katanga replaced the Chief of Staff as FNI/FRPI representative at the Special CCGA meeting in Kinshasa (16 and 17 August 2003), Katanga did not intervene during the discussions and was “usually in the shadow of the others”.²²⁸² This is confirmed by Manu who was even irritated because Mr. Katanga was so silent and would not say a word: “He would say a word here or there and then he would fall silent and that is why I began to get irritated with him at one point, he would say nothing. I would speak then he would say nothing. He would then say a single word. He would fall silent again. He would give out another word and then he would fall silent. That’s how he would speak and that’s why I was getting annoyed but it was difficult for me also to get annoyed. Everybody was making noise but he spoke very calmly and very slowly”.²²⁸³

1274. It is also worthy to note that the UPC soldiers had never heard of Germain Katanga at the time of the Bogoro attack. D-176 testified that he started hearing about Germain Katanga for the first time in May 2003, during the pacification programme in Bunia.²²⁸⁴ Most witnesses from Bogoro had never heard of Germain Katanga, or claimed for the first time that they heard of him or saw him in the courtroom.²²⁸⁵ The MONUC reports of 2002 and 2003 also rarely refer to Germain Katanga.²²⁸⁶ Thus, in general, he was not well-known at all in the period of the Bogoro attack.

1275. It is submitted that the real authority at the time was with the *féticheurs*. This was confirmed by Katanga and Pichou Mbodina, who both stated that it was the *féticheurs* who had the supreme authority, decided about time and method of what had to be done.²²⁸⁷ The attack itself was directed by the APC.²²⁸⁸

²²⁸² EVD-D02-00237, para. 10.

²²⁸³ D03-P-0088-T-304-p.72 (FRA-p.64-l.14-21).

²²⁸⁴ D2-176-T-256-pp.22- 24 (FRA-pp.19-21).

²²⁸⁵ For instance, P-166, and P-233 did not ever refer to Germain Katanga. P-159 and P-161 mentioned Germain Katanga for the first time in the courtroom.

²²⁸⁶ EVD-OTP-00216 (Daily Sitrep from 191800 to 201800, from Sector 6, Bunia, to HQ Monuc, Kinshasa), 0129-0267; EVD-OTP-00206.MONUC Report Events in Ituri 2002-2003; EVD-OTP-00213 (UN Security Council Resolution 1484 (2003)); EVD-OTP-00209 (UNSC Resolution 1468 (2003) on the situation in DRC; EVD-OTP-00210 (UN Security Council Resolution 1493 (2003).

²²⁸⁷ D2-228-T-250-p.56-57 (FRA-pp.52-53); D2-228-T-252-pp.58-59 (FRA-pp.64-66) ; D2-300-T-316-p.44-l.15-18 (FRA-p.39-l.15-17).

²²⁸⁸ See section IV-A ‘EMOI plan of attack and preparation for the attack at Kagaba’.

1276. Accordingly, the defence submits that the prosecution failed to establish that Mr. Katanga had *de facto* or *de jure* control over the Ngiti combatants at Bogoro.

Katanga's Absence from the Battlefield

1277. The defence accepts that it is not necessary for Mr. Katanga to have been at Bogoro during the attack for liability, if any, to incur. He can be held liable as long as it can be established that he controlled or masterminded the commission of the crimes charged because he decided « whether and, if so, how the offence will be committed ».²²⁸⁹

1278. However, it is of course much easier to have knowledge of any crimes being committed by subordinates and to exercise control over them if the accused is actually present at the crime scene.

1279. In the circumstances of this particular case, Germain Katanga's absence from the crime scene, which has been addressed in the context section,²²⁹⁰ further diminishes his role because of the extremely unstructured manner in which the attack was carried out. Pichou Iribi testified that "the Bogoro attack was not carried out in a conventional manner such as happens in wars; that is, planning the time of attack, assault weapons, and so on. People simply met up as they do when they go to a feast, and Bogoro was attacked by forces from several places. Some people heard gunshots and they came along."²²⁹¹ He stated that many uninvited people participated in the Bogoro attack and that it was difficult to identify where people came from.²²⁹²

1280. In addition to this style of fighting being of such a chaotic nature, the perpetrators of the alleged crimes have not been identified. It is completely unknown whether any of Germain Katanga's alleged subordinates (at best being all Ngiti combatants) have been implicated in committing any of the crimes charged. In such a situation, it is unrealistic to expect Katanga to punish the alleged perpetrators, even if he had the ability to do so, which he did not.

1281. From the evidence, it is apparent that there were many assailants. Witnesses P-233,²²⁹³ P-287²²⁹⁴ and P-166²²⁹⁵ have identified Bira attackers. APC soldiers and even Ugandan soldiers

²²⁸⁹ Lubanga Judgement, para. 920; ICC-01/04-01/06-803-tEN, para. 330.

²²⁹⁰ See section IV-A 'Katanga's decision to remain in Aveba'.

²²⁹¹ D2-228-T-250-p.11 (FRA-p.10-l.14-19).

²²⁹² D2-228-T-250-pp.10-11 (FRA-p.10).

²²⁹³ P-233-T-83-p.59 (FRA-pp.72-73); P-233-T-88-pp.22-23 (FRA-pp.27-28); P-233-T-88-p.27 (FRA-pp.33-34).

²²⁹⁴ P-287-T-130-p.61 (FRA-p.63).

²²⁹⁵ P-166-T-226-p.33 (FRA-pp.29-30).

have been identified as having been part of the attackers.²²⁹⁶ Witness P-166 refers to the involvement of FAC, NALU, DIPI, EDIEF (Ugandan rebel groups based in Rwenzori).²²⁹⁷ In addition, it appears that many civilians followed the combatants for the purpose of pillaging.²²⁹⁸

1282. The Defence agrees with the prosecution that it has not been established that Ugandans (UPDF or Ugandan rebel groups) were directly involved in the Bogoro attack. However, the fact that so many witnesses identified Ugandans and other non-Lendu or Ngiti combatants as part of the attackers demonstrates how difficult it is to establish with any level of certainty beyond reasonable doubt whether the atrocities were committed by anyone under Mr. Katanga's or Mr. Ngudjolo's effective control.

1283. Indeed, witness P-323 acknowledged the difficulties in identifying to which group, if any, the attackers belonged: "When there was the fighting [...] there's disorder. Even our own military uniform, I saw Lendu wearing them. The Lendu were even wearing the military uniform of the Ugandans. It's difficult to know. It was the same thing also with the Ngiti. They wore different types of military uniform. Some were even in civilian clothing. It's difficult to answer this question."²²⁹⁹

1284. At the ICTY, the failure to identify any culpable subordinate, whether by name, membership of a unit or a group under the accused's command resulted in a reversal of the conviction of *Oric* for command responsibility.²³⁰⁰ The defence requests that this Chamber follows the ICTY example. A finding of guilt cannot be based on the assumption that the crimes charged were committed by people under Mr. Katanga's and/or Mr. Ngudjolo's control. This is particularly so because the APC, which led the attack, is a professional army. Katanga could therefore have a legitimate expectation that civilians would not be targeted.²³⁰¹

1285. It is submitted that, even if the Chamber finds that Mr. Katanga was present at Bogoro, he can still not be held liable for the crimes allegedly committed as he had no control – and indeed, no effective control – over the alleged perpetrators.

(iv) The Prosecution failed to establish that the organisation consisted of an organized and hierarchical apparatus of power

²²⁹⁶ P-161-T-113-pp.33-35; P-161-T-114-pp.25-27 (FRA-pp.26-27).

²²⁹⁷ P-166-T-226-pp.65-67 (FRA-pp.59-62); EVD-OTP-00203 [REDACTED].

²²⁹⁸ See section V2-C 'Pillage; Lack of effective control by Germain Katanga over the crime'.

²²⁹⁹ P-323-T-117-p.32 (FRA-p.30-l.20-24).

²³⁰⁰ *Prosecutor v. Oric*, Appeal Judgment, July 3, 2008, paras. 35 & 48.

²³⁰¹ The prosecution made that same argument to suggest that the attack on Bogoro "did not bear the hallmark of a professional army, but instead pointed to an attack motivated by revenge, with the objective of eliminating all the inhabitants of a village. The attack did not target only the UPC soldiers, but also civilians, women, children and the elderly, as well as their property" (Prosecution Brief, para. 601).

1286. The Pre-Trial Chamber has found that, for an organisation to qualify as an organized and hierarchical apparatus of power, it must be demonstrated that it has a defined leadership structure, and a culture of compliance/obedience such that if one person fails to implement an order, that person will be automatically replaced by another who will.²³⁰² It must also be demonstrated that there was a method of ensuring compliance through the structures of the organization; that is to say, through disciplinary measures, installing compliance through military training/indoctrination, providing significant financial incentives or disincentives.²³⁰³

1287. The prosecution accepts this interpretation and submits that it has been complied with. The prosecution submits that, “at the time of the attack on Bogoro, the FRPI was a highly structured organisation.”²³⁰⁴ It states that, at that time, the FRPI militia from Walendu-Bindi constituted “a structured military group with a hierarchical chain of command, a centralised military command and control and headquarters were located in Aveba.”²³⁰⁵

1288. The defence highly disputes that “[i]n late 2002, the Ngiti militia under Katanga’s command was a structured organisation, with a network of camps and a military command structure”.²³⁰⁶ The defence submits that the FRPI was a very loose structure at the time of the Bogoro attack. It was based on a horizontal rather than a vertical structure. The defence refers to the context section for further details on this structure.

1289. The defence and prosecution agree on some points, but differ on some fundamental aspects of the story. In particular, the defence disagrees with the prosecution on timing. The defence submits that, at a later stage *post* the Bogoro attack, the FRPI became a structured organisation with Germain Katanga as its President. This was in February 2004 when Aveba became the Headquarters of the FRPI. Prior to that, it has been very difficult to have any organisation among the autonomous localized combatant groups.²³⁰⁷

1290. There is no dispute about the origin of the combatants. Since the beginning of Ugandan aggression from late 2000, local defence efforts were made everywhere in Walendu-Bindi and included everyone, as the community’s survival depended on it.²³⁰⁸ Combatants were indeed on battle alert. Germain Katanga would lend assistance to other villages, if he were informed of an attack.²³⁰⁹ Yet, as the prosecution itself concedes, these self-defence

²³⁰² Katanga Confirmation Decision, paras 511-514.

²³⁰³ Katanga Confirmation Decision, para. 519.

²³⁰⁴ Prosecution Brief, para. 140.

²³⁰⁵ Prosecution Brief, para. 152.

²³⁰⁶ Prosecution Brief, para 133.

²³⁰⁷ As is clear from EVD-D02-00235 and EVD-D02-00237.

²³⁰⁸ Prosecution Brief, para. 126.

²³⁰⁹ D2-300-T-314-FRA-p.57-l.14-21.

efforts were organised very locally.²³¹⁰ Every location had at least one commander if not more. They were acting autonomously and independently of each other. None of them liked to be under the orders of anyone else. Many of them had a military background and did, therefore, not tolerate anyone above them. There were significant power struggles continuing until long after Bogoro was attacked.²³¹¹

1291. There is no dispute that Kandro was in charge of the ‘*garrison mobile*’ and that he was based in Songolo until it was attacked when he moved to Avenyuma.²³¹² By virtue of this position as well as his connection with Lopondo, he became well-known. The ‘*garrison mobile*’ was notorious for its strength and manpower, which made Kandro a significant combatant.²³¹³ Many saw him as the chief of all combatants. However, the defence submits that he was only in charge of his own combatants. There was no one chief as such and there was a constant fight over leadership. The prosecution concedes that Katanga did not take control over the ‘*garrison mobile*’, but that it was rather Yuda who succeeded Kandro after intense fighting with Cobra’s and Safco Ndekote’s groups.²³¹⁴

1292. The prosecution relies on Nyakunde as evidence that the combatants were capable of planning and undertaking military operations “of greater complexity than mere defensive counterblows”. However, the significant role of the APC in the Nyakunde attack as generally acknowledged (even by the prosecution) cannot be denied. Similarly, in Bogoro, they would have been nowhere without the APC.²³¹⁵

1293. Contrary to the prosecution’s assertion, not many combatants had received a military training, although some including David Adirodu learned how to handle a weapon and shoot.²³¹⁶ P-28 spoke about a training of a week at Bulandjabo,²³¹⁷ which the defence submits is clearly a concocted story. Those who had received a more proper training owed that to the RCD/KML which trained many Lendu fighters in an APC training camp in Nyaleke in 2001 and 2002.²³¹⁸

²³¹⁰ Prosecution Brief, para. 127.

²³¹¹ See context section IV.

²³¹² Prosecution Brief, para 129.

²³¹³ Prosecution Brief, para 129.

²³¹⁴ Prosecution Brief, section 7.1.2.2.3.

²³¹⁵ See section IV-A ‘Involvement of the APC’.

²³¹⁶ D02-001-T-276-FRA-p.14-l.2-3.

²³¹⁷ P-28-T-216-FRA-p.52-l.18-28; p.53-l.17-26.

²³¹⁸ ICC-01/04-01/07-649-Anx1A, 26-06-2008 – Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute: Para. 20: “The APC, the army of the RCD-K/ML, for its part, continued to integrate and train Lendu and Ngiti fighters”.

1294. The prosecution asserts that Katanga had control over each camp headed by local commanders spread throughout the five *groupements* of the *collectivité*.²³¹⁹ However, this assertion is fully contradicted by the evidence in this case. MONUC and other documents relating to events in Ituri in 2002 and 2003 indicate that there was a problem of leadership and control among the combatants.²³²⁰ It was really hard to impose some structure on these rather autonomous combatants.

1295. The structure of battalions and their names were not in place until negotiations took place in Bunia in the context of the CPI. Some names may unofficially already have been used before but there was no official recognition yet. In asserting that these battalions were already in place and that a decent structure existed at the time of the Bogoro attack, the prosecution again relies on P-28 and P-219 whose credibility is in dispute.

1296. The prosecution concedes that Kisoro was a dissident voice who refused to obey Katanga. However, it is submitted that various others, including Cobra did not obey Mr. Katanga's orders. Germain Katanga had horizontal rather than vertical relations with Yuda and Garimbaya.²³²¹ Pascal Alezo Sipa and Emile Muhito Akobi were Katanga's political advisors but not yet in November 2002. Their links with Katanga were strong since the beginning and when ultimately Katanga declared FRPI independent, they fulfilled the roles of political advisors. This however does not go to show that the combatants formed an organized and hierarchical apparatus of power at the time of the Bogoro attack.

1297. The prosecution further alleges that "[t]he scale of the attack on Bogoro and the ensuing Lendu and Ngiti victory alone prove that it was a planned, coordinated and well-executed operation."²³²² The defence submits that, if there was any organisation at all compared to any previous attacks committed by combatants, it is due to the involvement of the APC, RCD-K/ML, and EMOI.

1298. The requirement to establish an organized and hierarchical apparatus of power must be construed narrowly because it is the essence of the liability mode based on control over the crime by means of "control over an organisation".²³²³ The Pre-Trial Chamber held that "it is critical that the chief, or the leader, exercised authority and control over the apparatus and that

²³¹⁹ Prosecution Brief, para 142; reliance on: [P-28-T-217-FRA-p.4-l.11, p.5-l.5, p.14-l.12, p.15l.4]; EVD-OTP-00197, [P-219-T-205-FRA-p.14-l.21-25 and p.16-l.2-7: P-219 circled those *localités* in which a camp was located: Bukiringi, Aveba, Kaswara, Geti, Buguma, Kagoro, Kagaba, Bavi Olongba, Soki, Lakpa, Golgota, Lengabo, Medhu, Songolo and Kombokabo]; [P-250-T-101-FRA-p.60-l.-12].

²³²⁰ EVD-D02-00235 and EVD-D02-00237.

²³²¹ D2-300-T-317-p.29 (FRA-p.25) ; D2-228-T-250-p.12 (FRA-pp.11-12).

²³²² Prosecution Brief, para. 176.

²³²³ Katanga & Ngudjolo Confirmation Decision, paras. 498-514.

his authority and control are manifest in subordinates' compliance with his orders".²³²⁴ The defence submits that the prosecution failed to demonstrate the existence of an organized and hierarchical apparatus of power of which Mr. Katanga is the mastermind.

(v) The Prosecution failed to demonstrate that the execution of the crimes was secured by almost automatic compliance with the orders issued by Katanga

1299. In order for the actions of physical perpetrators to be attributed to the defendant, the Prosecutor must establish that the "direct and physical perpetrator is nothing but a cog in the wheel that can be replaced immediately."²³²⁵ The execution of the accused's orders must not be compromised by disobedience on the part of any subordinate, who may readily be replaced within the organisation.²³²⁶

1300. The prosecution submits that the evidence in the record of the case demonstrates that Mr. Katanga and his subordinate commanders were guaranteed with almost automatic compliance through their orders within the FRPI: "there were a significant number of Ngiti combatants under the orders of Katanga, making them interchangeable; there were child soldiers; there was a disciplinary system within the FRPI which applied both to combatants and commanders; Ngiti combatants participated in military parades, which were an opportunity to discipline the troops; Ngiti combatants were united both by ethnicity and because they shared a common goal, which was to defend their territory and to fight against the enemy – the Hema/the UPC; and, lastly, the FPRI's power also extended to civilian matters."²³²⁷

1301. It is unclear how many combatants there were at the time of the Bogoro attack. The prosecution asserts that there were three to five thousand combatants at Mr. Katanga's disposal guaranteeing almost automatic compliance. However, in order to establish that there was near automatic compliance, it must be demonstrated that Germain Katanga had effective control over them. Clearly, in a disorganised militia composed of autonomous commanders with combatants loyal to them, no such automatic compliance is guaranteed. How is it possible that Germain Katanga, relatively new to the area, would be able to control so many combatants? The defence disagrees with the prosecution that there were already battalions in Aveba. There was no organised structure until much later.

²³²⁴ Katanga & Ngudjolo Confirmation Decision, para. 513.

²³²⁵ Dissenting Opinion of Judge Schomburg, *Prosecutor v. Gacumbitsi*, Appeals Judgment, 7 July 2006, para 20; *Katanga and Ngudjolo*, Decision on the confirmation of charges, paras. 511-518.

²³²⁶ *Katanga and Ngudjolo*, Decision on the confirmation of charges, paras. 516-517.

²³²⁷ Prosecution Brief, para. 226.

1302. The prosecution relies on P-28 for its assertion that combatants who were guilty of misconduct were disciplined, which could mean they were arrested and imprisoned.²³²⁸ Both P-28 and P-219 testified that there were gaols inside the Ngiti camps including at Aveba.²³²⁹ The defence submits that this disciplinary regime was not put in place until later.

1303. The prosecution failed to establish how the military parades allegedly held in the Ngiti camps would possibly guarantee almost-automatic compliance with the orders allegedly issued by Mr. Katanga.²³³⁰ In any event, apart from the testimonies of unreliable witnesses, there is no evidence to demonstrate that such parades did, in fact, take place.

1304. The prosecution also asserts that there was community pressure to participate in the self-defence efforts. In some cases, this allegedly led to forceful recruitment. However, in asserting this, the prosecution exclusively relies on P-267,²³³¹ who the defence submits is not a credible witness. There is no other evidence demonstrating that people were under pressure to join the self-defence efforts. On the contrary, ample defence witnesses testified who were of the age that they may have been expected to join. None of them had been pressurised to do so. Mr. Katanga's younger brother had some involvement in the self-defence efforts in their initial stages. At that time, it was indeed a concern for the entire village to defend itself and there was perhaps an expectation for the young men to join at least for nightly surveillance of the town. However, when it became more of a militia, no such pressure was put on anyone. It must be stressed that Aveba was not in the war zone. Apart from Kisoro, there were no imminent threats. Accordingly, there was no need to pressure anyone in Aveba to participate.

1305. The prosecution also relies on the allegation that, amongst them, there were many child soldiers. Given their age and vulnerability, the prosecution alleges that they were effective subordinates who ensured that the orders given by the military commanders would be followed almost automatically.²³³² However, elsewhere in this brief it is submitted that there is insufficient evidence to demonstrate that a significant number of children were used in direct participation in hostilities. None of the 'child soldier' witnesses were credible.²³³³ The defence submits that if any children have been properly identified to having been present at Bogoro during the attack, they could have been children from neighbouring villages who came for the purpose of pillaging.²³³⁴ They could also have been Bira children.²³³⁵ In any

²³²⁸ P-28-T-218-FRA-p.36-l.2-12.

²³²⁹ P-28-T-218-FRA-p.37-l.5-9; P-219-T-205-FRA-p.25-l.25-28, p.26-l.1-13.

²³³⁰ Prosecution Brief, section 7.1.2.7.

²³³¹ Prosecution Brief, para 232.

²³³² Prosecution Brief, para. 228.

²³³³ See section V2-F 'Using Children to Participate Actively in Hostilities'.

²³³⁴ See section V2-C 'Pillage'.

event, the defence submits that Mr. Katanga had no children under his effective control. There is no evidence that any child from Aveba participated in the Bogoro attack or came for pillage.

1306. Finally, relying on P-28 and P-219, the prosecution alleges that Mr. Katanga “acted not only as a military authority, but also as a civilian authority”.²³³⁶ In response, the defence submits that it is simply impossible for a 24-year-old to be in charge of absolutely everyone in the entire Walendu-Bindi collectivity, including the elders, his own father and the féticheurs. This is obviously a stretch which is not supported by the factual circumstances of that time. It is not denied at some stage, there was a tribunal at camp BCA but not yet in 2002.

1307. The defence reiterates that Mr. Katanga only had 60 men under his limited control, none of whom participated at Bogoro. Katanga had no control over anyone from the *garrison mobile*. It is also worthy to repeat that Mr. Katanga was not present at Bogoro. Thus, it would have been difficult for him to secure compliance with his orders at a distance.

1308. Accordingly, the defence submits that the prosecution failed to demonstrate with convincing evidence that the execution of the crimes at Bogoro was secured by almost automatic compliance with the orders issued by Mr. Katanga.

(vi) (vi, vii, viii) The prosecution failed to establish beyond reasonable doubt that Katanga satisfied the subjective elements of the crimes, in that:

- it failed to establish beyond reasonable doubt that Katanga and Ngudjolo were mutually aware and accepted that implementing the common plan will result in the fulfillment of the material elements of the crimes;**
- it failed to establish beyond reasonable doubt that Katanga was aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s)**

1309. The observations on the subjective elements of the crime under article 30 of the Statute, that is, knowledge and intent, have been set out above. The prosecution must show that Katanga and Ngudjolo intended, and were aware of, the commission of the crimes of murder, directing an attack against civilians, wilful killings, destruction of property and the direct participation of children in hostilities.²³³⁷ These crimes are alleged to be encompassed by the common plan to ‘wipe out’ Bogoro.

²³³⁵ As stated earlier, Bira people have been identified at Bogoro on 24 February 2003: P-233-T-83-p.59 (FRA-pp.72-73); P-233-T-88-pp.22-23 (FRA-pp.27-28); P-233-T-88-p.27 (FRA-pp.33-34); P-287-T-130-p.61 (FRA-p.63); P-166-T-226-p.33 (FRA-p.30).

²³³⁶ Prosecution Brief, para. 233.

²³³⁷ Katanga Confirmation Decision, paras. 271, 295, 315, 575, 579.

1310. With regard to the charges of pillaging, sexual slavery, rape, and the use of child soldiers to participate directly hostilities, the defence submits that the prosecution similarly must demonstrate that the accused meant to engage in the conduct. If the Chamber rejects the defence argument, the prosecution must at least show that, though not explicitly instructed, these crimes were committed with the knowledge of the accused that the implementation of the alleged common plan would inevitably result in the pillaging of Bogoro village, sexual slavery, rape and the direct participation of child soldiers in hostility.²³³⁸

1311. With regard to the prosecution's submission "that the two Accused should at least individually incur responsibility as (direct) perpetrators for the use of child soldiers on their own account", the defence notes that it is too late for the Chamber to do so. Mr. Katanga and Mr. Ngudjolo are clearly charged with this crime as co-perpetrators. Without having given an appropriate warning under Regulation 55, the Chamber cannot, at this stage, alter the mode of liability. The defence will therefore only make submissions with regard to the subjective elements of the direct participation of children in hostilities as an act of co-perpetration.

1312. The defence submits that the prosecution failed to establish the subjective requirements of any of the crimes charged. The defence will first of all demonstrate that Mr. Katanga had no intention to commit the crimes charged; nor knowledge of their commission. The defence will also demonstrate that none of the crimes charged were the virtually certain result of the implementation of a legitimate plan to dislodge the UPC from Bogoro.

Direct Intent in the First Degree

1313. The prosecution has alleged that the Bogoro attack was driven by revenge, which was why the commission of the crimes charged relating to the killings of civilians and destruction of property was directly intended. The defence accepts that, there were some who had ethnic prejudices. Katanga acknowledged that there were combatants who threatened Hema refugees passing through their village.²³³⁹ The Defence, however, submits that some sense of revenge may have been an element for some individuals, but it was not the reason behind attacking Bogoro; nor indeed the intent of the military plan.

1314. The main prosecution source supporting this theory of revenge is W-28 who the defence submits is unreliable.²³⁴⁰ The prosecution further alleges that Mr. Katanga told P-160 and P-12 that he had ordered and planned the attack on Bogoro, "amongst others, in order to

²³³⁸ Katanga Confirmation Decision, paras. 550, 575, 566.

²³³⁹ D2-300-T-325-p.16 (FRA-pp.14-15).

²³⁴⁰ Prosecution Brief, para.504, reliance on: P-28-T-217-p.42-l.5, to p.43-l.5 (FRA-p.37-l.12-18). See section 9.1.2.

wreak revenge for the massacres”.²³⁴¹ Elsewhere in this Brief, the defence provides reasoning as to why the Chamber should not accept that this conversation took place as alleged.²³⁴²

1315. This is also contradicted by other evidence submitted in this case clearly demonstrating that, at no point did Mr. Katanga feel any hatred towards the Hema. Katanga denied that he had a prejudice against the Hema.²³⁴³ In Lolwa, he stayed with the older sister of Thomas Lubanga Pasha and considered her sons as his brothers. He went to school together with one of them, and the younger son came to visit him in the Kinshasa central prison.²³⁴⁴ Katanga did not even know of his Ngiti heritage until his uncle’s death, when he heard for the first time that his biological father was in Gety.²³⁴⁵

1316. Later, when he had more of a position of authority to do so, Mr. Katanga sought to intervene when combatants ill-treated Hema civilians.²³⁴⁶ Mr. Katanga also testified that there was reluctance to provide ammunition to combatants who did not behave properly to the civilian population.²³⁴⁷

1317. Malivo testified that he saw two male Hema in Aveba when they were boarding a plane to Beni.²³⁴⁸ These men were of Gegere (Hema North) ethnicity and had been held as prisoners at Kagaba. When they arrived in Aveba, they were under Katanga’s guard at his residence until they left for Beni.²³⁴⁹ This conduct on the part of Germain Katanga does not at all correspond with the image that a number of witnesses have sought to depict of him as a Hema hater. Katanga vehemently disputes this. Accordingly, Katanga had no motive to kill civilians or destroy their property; the prosecution failed to establish that he did.

Direct Intent in the Second Degree

1318. The defence has argued above that the plan to which Germain Katanga made a contribution was a legitimate plan to attack the UPC base at Bogoro. It did not include the killings of civilians, as is suggested by the prosecution. On the contrary, the defence sets out elsewhere in this brief that the general instructions were not to kill civilians.²³⁵⁰ In light of this, the defence submits that Katanga had no intention or awareness of any of the crimes committed at Bogoro as elaborated upon in the sections of this brief addressing each crime.

²³⁴¹ Prosecution Brief, para. 511, reliance on: [P-160-T-212-FRA-p.37-l.18, to p.38-l.3].

²³⁴² See section II-A : ‘Review of the credibility of Prosecution witnesses’.

²³⁴³ D2-300-T-315-p.21 (FRA-pp.19-20).

²³⁴⁴ D2-300-T-315-pp.21-22 (FRA-pp.19-20).

²³⁴⁵ D2-300-T-315-pp.22-23 (FRA-pp.20-21).

²³⁴⁶ D2-300-T-325-p.16 (FRA-pp.14-15).

²³⁴⁷ D2-300-T-325-p.18 (FRA-p.16).

²³⁴⁸ D02-P-0129-T-272-pp.37-38 (FRA-pp.33-34).

²³⁴⁹ D02-P-0129-T-272-pp.37-39, 45-46 (FRA-pp.33-35, 40-41).

²³⁵⁰ See section V1-B: ‘Facts Relevant to Article 7 Chapeau Elements - Crimes Against Humanity: Attack Directed Against a Civilian Population’.

1319. It is submitted that an attack on a military base does not, in the ordinary course of events, lead to the killing of civilians. The standard to be applied is “in the ordinary course of events”, which is significantly higher than the standard of “foreseeable consequences”. It must be a virtual certainty – and not a mere probability – that the crimes charged will be committed. In this case, the prosecution did not meet this standard in relation to any of the crimes charged.

1320. In conclusion, the prosecution failed to establish beyond reasonable doubt that Katanga and Ngudjolo were mutually aware and accepted that implementing the common plan will result in the commission of the crimes charged. The prosecution also failed to establish beyond reasonable doubt that Germain Katanga was aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person.

VII- Prohibition of Cumulative conviction for rape and sexual slavery as war crimes and crimes against humanity

1321. The Defence submits that, were the Chamber to consider that the factual and contextual elements of these crimes were met, there should not be a cumulative conviction for rape and sexual slavery as both war crime and crime against humanity.

Lack of significant material differences between these crimes.

1322. The definitions of both rape and sexual slavery are the same for war crime and crime against humanity. The only difference is the context required, a context over which the Accused has no control.²³⁵¹ Crimes against humanity of rape and sexual slavery require indeed that “a widespread or systematic attack directed against a civilian population”, while war crimes require the characterization of “an international armed conflict”.²³⁵²

1323. In this respect, it must be noted that if the specific context of crimes against humanity is retained, *i.e.* an attack targeting civilians, this context will necessarily be included in the more general context of war crimes since the existence of an armed conflict in Ituri and of an attack on Bogoro on 24 February 2003 are not disputed.

²³⁵¹ Cumulative convictions in International Criminal Law: Reconsideration of a seemingly settled issue, Ildikó Erdei, Suffolk Transnational Law Review, Vol. 34, Book 2, (thereafter ‘Erdei’s Article’), p. 26, according to which Article 20 “requires that all material elements be committed with intent and knowledge. This suggests that for an element to be a “material element” it must be within the control of the accused. [...] Thus, the intent definitions could be interpreted to mean that material elements cannot involve contextual elements because the accused does not cause these elements.”

²³⁵² Elements of Crimes, Article 7 (1) (g)-1 and -2; Article 8 (2) (b) (xxii)-1 and -2.

1324. In the present case, the rapes and sexual slavery alleged by the Prosecution targeted only civilian women and no combatants. Consequently, not only is the distinction as to the context of the crimes artificial, but the criminal intent required for each offence is so closely linked to the context that it necessarily also overlaps in this case, by amounting to the awareness of the perpetrator of an attack against civilians.²³⁵³

1325. Besides, interests undermined by the war crimes and crimes against humanity of rapes and sexual slavery are the same: the sexual integrity of civilian victims is violated under both qualifications. In this respect, in civil law²³⁵⁴ but also in common law systems and international criminal law,²³⁵⁵ when the elements of several crimes are present in the commission of one act, it is only and exceptionally possible to charge a defendant for each of those crimes when the several crimes have undermined different protected interests or values. Applying this theory, French Courts for example have refused to charge cumulatively for murder and crime against humanity.²³⁵⁶

1326. Consequently, it would be unfair and prejudicial to Germain Katanga to convict him twice for the alleged same undermining acts. Only the most serious or most specialized offence should be retained,²³⁵⁷ which is the crime against humanity in the present case.²³⁵⁸

ICC Case Law

1327. ICC pre-trial chambers have ruled on the issue of cumulative conviction but their reasoning cannot be applied at the trial stage, especially in the light of the consequences that such reasoning would have at this stage. A cumulative charging at the pre-trial stage can

²³⁵³ Elements of Crimes, Article 7 (1) (g)-1 and -2; Article 8 (2) (b) (xxii)-1 and -2.

²³⁵⁴ For instance, French law prohibits double conviction when one single protected interest has been undermined (pursuant to the theory of '*concours idéal d'infractions*'). The French *Conseil Constitutionnel* has linked the prohibition of double conviction to the principle of legality and article 8 of the Déclaration des droits de l'Homme et du Citoyen (Decision n°2001-455 DC, 12 January 2002, para. 85). See for example *Crim.* 28 Jan. 1969, N° 68-91.876 ("*Attendu que, s'agissant d'un fait unique ayant donné naissance à un délit et à une contravention, une seule peine, celle du délit, doit être prononcée.*"); *Crim.* 8 March 2005, Bull. crim. N°78 and *Crim.* 16 May 1984, N. 84-90.052 ("*une faute pénale unique ne peut être sanctionnée que par une seule peine*" and "*Mais attendu que les faits poursuivis procédant d'une seule et même action coupable ne pouvaient faire l'objet de peines séparées*"; *Crim.* 11 May 2004, Bull. crim. N°115; *Crim.* 6 Jan. 1999, Bull. crim. N°6; *Crim.* 4 Feb. 1998, Bull. Crim. N°46 ("*Attendu qu'un même fait ne saurait entraîner ni une double déclaration de culpabilité, ni le prononcé de deux amendes distinctes*"); *Crim.* 4 févr. 1998; *Crim.* 20 Feb. 2002, B., N° 00-81.093; *Crim.* 26 March 1974, N° 73-90.584.

²³⁵⁵ See, *inter alia*, *Prosecutor v. Kupreskic & all*, (TC) Judgment, IT-95-16-T, 14 January 2000 (thereafter '*Kupreskic Trial Judgement*'), para. 693; *Prosecutor v. Clément Kayishema and Obed Ruzindana*, (TC) Judgment, ICTR-95-1-T, 21 May 1999, para. 627; STL-11-01/I/AC/R176bis, (AC) Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging with corrected front page, 16 February 2011, (thereafter '*STL Interlocutory Appeal Decision*'), para. 15, p.152.

²³⁵⁶ *Crim.* 27 Nov. 1992, Bull. crim. N°394; *Crim.* 21 Oct. 1993, Bull. crim. N°307.

²³⁵⁷ *Ie.* '*Lex consumens derogat legi consumptae*' and '*Lex specialis*'. See, *inter alia*, *Kupreskic Trial Judgement*, paras.683-684, 686-692; *Prosecutor v. Kunarac & all*, IT-96-23-A & IT-96-23/1-A, (AC) Judgment, 12 June 2002 (thereafter '*Kunarac Appeal Judgement*'), para.170; STL Interlocutory Appeal Decision, para.298; Erdei's Article, p.27.

²³⁵⁸ See Erdei's Article, pp 22-25.

indeed be justified by the fact the Chamber does not know which context will be proved beyond reasonable doubt and, more particularly, if beyond the existence of an armed conflict, there is sufficient evidence that civilians were targeted. On the contrary, at trial, the Chamber will have received a complete overview of the case and, hence, will be able to retain the most specific context in order not to convict twice the Accused for the same acts. In this respect, the Defence notes that Article 20 of the Statute recognizes the principle *ne bis in idem*²³⁵⁹ and submits that this reasoning should be applied to the present case.

1328. It must be noted that in the *Bemba* case, the Pre-Trial Chamber II adopted an approach against cumulative charging. Relying on the rights of the Defence and principles of fairness, it clarified that only distinct crimes could justify a cumulative charging approach, and that this was possible “only if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.”²³⁶⁰ The Chamber added it “may re-characterise a crime to give it the most appropriate legal characterisation” pursuant to Regulation 55 of the RoC.²³⁶¹ Given this significant statutory difference, the *ad hoc* tribunals’ case law on cumulative charging or conviction cannot be applied automatically to the ICC.

1329. In this respect, the *Celebici test*²³⁶² cannot be applied to this case. First, while the ICC is an international mixed system combining civil law and common law, the ICTY Appeals Chamber quoted only domestic American case law.²³⁶³ Second, the Appeals Chamber emphasized itself the necessity of justice toward the Accused and concluded that this test could not be applied blindly but with caution, and that the Chamber must take into account the overall situation.²³⁶⁴

²³⁵⁹ See, for an interpretation, Erdei’s Article, pp 5-6.

²³⁶⁰ ICC-01/05-01/08-424, (PTCII) Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 202. See also ICC-01/05-01/08-532, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, para. 53: “the Chamber is duty bound to safeguard the rights of the Defence at any time of the proceedings. This entails that, when circumstances so warrant, the Chamber may not confirm all charges as such, in case the essence of the violation of the law underlying these charges is fully subsumed by one charge.”

²³⁶¹ ICC-01/05-01/08-424, para. 203. See also ICC-01/05-01/08-532, para. 57.

²³⁶² *Kunarac* Appeal Judgement, para. 168; see also *Celebici* Appeal Judgement, paras 412-13 : “multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide on the basis of the principle that the conviction under the more specific provision should be upheld.”

²³⁶³ See *Kunarac* Appeal Judgement, para. 168. See, for a critical comment of the *Celebici* test, Erdei’s Article.

²³⁶⁴ *Kunarac* Appeal Judgement, paras 169, 172-174. See also Erdei’s Article, pp 7-8.

1330. The Defence also notes that the Bemba approach against cumulative charging was followed by the Appeals Chamber of the Special Tribunal for Lebanon.²³⁶⁵

1331. Applying these case law and principles to the current case, it is submitted that if the context of crimes against humanity is confirmed, *i.e.* of an attack against the civilian population, it will subsume the context of war crime, *i.e.* international armed conflict.

1332. For all these reasons, the Defence submits that if the Chamber were to retain the crime of rape and/or sexual slavery, it should only enter a conviction for war crime, or crime against humanity, but not both.

²³⁶⁵ STL Interlocutory Appeal Decision, para. 298; para. 15, p.152.

VIII- CONCLUSION

1333. The Defence requests that additional submissions be made pursuant to article 76 (2), if need be.

Respectfully submitted,



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Andreas O'Shea

Dated this 29 June 2012

At The Hague