



Original: **French**

No.: **ICC-01/04-02/12**

Date: **25 October 2013**

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sang-Hyun Song
Judge Cuno Tarfusser
Judge Erkki Kourula
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. MATHIEU NGUDJOLO CHUI***

Public Redacted Version

Response of the Defence for Mathieu Ngudjolo to the observations of the Legal Representative of the main group of victims (ICC-01/04-02/12-124-Conf-Corr) and the Legal Representative of the child-soldier victims (ICC-01/04-02/12-125-Conf-Corr) on the Prosecution Brief on Appeal and the Defence's Brief in Response

Source: Defence team for Mathieu Ngudjolo

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

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INTRODUCTION

1. The Defence has carefully analysed the observations submitted by the Legal Representative of the main group of victims and the Legal Representative of the child-soldier victims on the Prosecution's document in support of its appeal and the Defence's Brief in Response. This analysis revealed two major errors on the part of both Legal Representatives which utterly invalidate their observations.
2. The first of these is that, rather than demonstrating legal or factual errors allegedly committed by the Chamber, the Legal Representatives instead evaluated Trial Chamber II's ("the Chamber") evaluation¹ of the evidence without citing any legal basis for so doing.
3. Yet, as is well known, a party alleging a legal error must demonstrate that the Trial Chamber committed one or more legal errors invalidating the judgment.² It must specifically identify the alleged error and explain how the error invalidates the Chamber's decision.³ The Appeals Chamber is empowered to dismiss *in limine* any issues raised without examining their merits⁴ and "may dismiss arguments which are evidently unfounded without providing detailed reasoning".⁵
4. Likewise, a party raising a factual error must show (1) that a decisive, manifest error was committed and (2) that this error led to a miscarriage of justice.⁶ Furthermore, relevant past decisions establish that appeals chambers respect trial chambers' decisions on factual findings. For instance, the Appeals Chamber of the ICTY ruled as follows in *Kajelijeli*:⁷

¹ Intentional repetition by the Defence to properly characterise the Legal Representatives' approach.

² Boas, Gideon, James L. Bischoff, Nathalie L. Reid and B. Don Taylor III, *International criminal law practitioner library, Volume III*, New York, Cambridge University Press, 2011, p. 442; *Juvénal Kajelijeli v. The Prosecutor*, Appeals Chamber, ICTY, *Judgement*, 23 May 2005, para. 5. For these same criteria, see also *Laurent Semanza v. The Prosecutor*, Appeals Chamber, ICTR, *Judgement*, 20 March 2005, paras. 7-11; *Prosecutor v. Ramush Haradinaj*, Appeals Chamber, ICTY, *Judgement*, 19 July 2010, paras. 9-13; *The Prosecutor v. André Ntagerura*, Appeals Chamber, ICTR, *Judgement*, 7 July 2006, paras. 11-14; *Alfred Musema v. The Prosecutor*, Appeals Chamber, ICTR, *Judgement*, 16 November 2001, paras. 15-21; *Emmanuel Ndingabahizi v. The Prosecutor*, Appeals Chamber, ICTR, *Judgement*, 16 January 2007, paras. 8-11; *Prosecutor v. Ljube Bošković*, Appeals Chamber, ICTY, *Judgement*, 19 May 2010, paras. 9-18; *Prosecutor v. Fofana*, Appeals Chamber, SCSL, *Judgment*, 28 May 2008, para. 33; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, *Judgement*, 12 November 2009, paras. 12-14; *Prosecutor v. Galić*, Case No. IT-98-29-A, *Judgement*, 30 November 2006, para. 6-8;

³ *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, *Judgement*, 22 April 2008, para. 15.

⁴ *Hadžihasanović and Kubura*, para. 14.

⁵ *Idem*, para. 16.

⁶ *Alfred Musema v. The Prosecutor*, Appeals Chamber, ICTR, *Judgment*, 16 November 2001, para. 17 [Musema]. See also La Rosa, Anne-Marie, *Juridictions pénales internationales: La procédure et la preuve*, Paris, Presses Universitaires de France, 2003, p. 226.

⁷ *Juvénal Kajelijeli v. The Prosecutor*, Appeals Chamber, ICTY, *Judgement*, 23 May 2005, para. 5 [Kajelijeli]. See also *Semanza* paras. 7-11 and 17; *Haradinaj* paras. 9-13; *Musema* paras. 15-21; *Andre Ntagerura*, Appeals Chamber, ICTR, *Judgment*, 7 July 2006, paras. 11-14 [Ntagerura]; *Emmanuel Ndingabahizi v. The Prosecutor*, Appeals Chamber, ICTR, *Judgement*, 16 January 2007, paras. 8-11 [Ndingabahizi]; *Prosecutor v. Fofana*, Appeals Chamber, SCSL, *Judgment*, 28 May 2008, para. 33 [Fofana]; *The Prosecutor v. Zoran Kupreškić*, Appeals Chamber, ICTY, *Appeal Judgement*, 23 October 2001, paras. 30-32 [Kupreškić].

As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber. Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.

In *Kupreškić*,⁸ too, the Appeals Chamber, referring to case law of the Tribunal, ruled that:

[...] the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber.⁹ Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is wholly erroneous may the Appeals Chamber substitute its own finding for that of the Trial Chamber.¹⁰ [...] it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to admit any relevant evidence which it deems to have probative value, as well as to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the fundamental features of the evidence.¹¹ [...] The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute.¹²

5. In *Haradinaj*, the Appeals Chamber lists various types of submission which may be summarily dismissed, without a detailed analysis, by reason of their deficiency.¹³ These include:

- arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings;
- mere assertions that the Trial Chamber has failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Trial Chamber;
- arguments that challenge a Trial Chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence [in the instant case, the acquittal];

⁸ *Kupreškić*, paras. 30-32. See also Trigeaud p. 1762; *Musema* para. 18; *The Prosecutor v. Rutaganda*, Appeals Chamber, ICTR, *Judgement*, 26 May 2003, para. 21 [*Rutaganda*]. See also *Čelibići*, para. 498, cited in *Musema*, para. 20: "The Trial Chamber is not obliged in its Judgment to recount and justify its findings in relation to every submission made during trial. It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole testimony unreliable."

⁹ Emphasis added by the Defence.

¹⁰ *Kupreškić*, para. 30. Emphasis added by the Defence.

¹¹ *Kupreškić*, para. 31. Emphasis added by the Defence.

¹² *Kupreškić*, para. 32. Emphasis added by the Defence.

¹³ *Haradinaj*, para. 13. See also *Boškoski*, para. 18.

- mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber;
- mere assertions unsupported by any evidence, undeveloped allegations, failure to articulate an error; and
- mere assertions that the Trial Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.

6. The submissions of the Legal Representatives fall into these categories, since they do not demonstrate any legal or factual error on the part of the Chamber which could warrant invalidating the impugned judgment. Rather than doing so, the Legal Representatives engaged in an evaluation of the Chamber's evaluation of the evidence in the record and contested the resultant findings, whereas these were fully and properly reasoned.

7. The second error committed by the two Legal Representatives was the conspicuous absence of independence and impartiality on their part.¹⁴ In their observations they were at pains to support the unfounded arguments of the Prosecution, thereby playing the part of a second prosecutor.

8. We shall address each of the arguments advanced by the Legal Representatives paragraph by paragraph, in the order they were presented in support of the Prosecution's three grounds of appeal. We shall demonstrate, point by point, how they committed the twin errors mentioned above, thereby utterly invalidating their observations.

9. All of the arguments we advanced in our Response to the Prosecution's Brief on Appeal, abundantly supported with analyses of the legal texts and references to case law and legal scholarship, remain irrefragable, since the Legal Representatives have been entirely unsuccessful in contesting them. We shall not rehearse them, focusing instead on addressing the Legal Representatives' assertions and showing the seriousness of the errors they have committed in lending unconditional support to the Prosecution's three grounds of appeal.

10. The Legal Representatives have assumed the role of a second prosecutor. Rather than, in their clients' best interests, defending the right to the truth in the Bogoro case in order to establish actual responsibility, they like the Prosecution, with which they have joined forces to form a collective Prosecution, now doggedly pursue Ngudjolo as being manifestly guilty of the attack on Bogoro. Their observations¹⁵ on the Prosecution and Defence appellate briefs do no

¹⁴ Articles 5 and 6 of the Code of Professional Conduct for counsel.

¹⁵ ICC-01/04-02/12-124-Conf-Corr, 19-07-2013, "*Corrigendum des « Observations sur le Document du Procureur déposé à l'appui de son appel et sur la Réponse de la Défense à ce document »*", 78 pp.; ICC-01/04-02/12-125-Conf "*Observations relatives au document déposé par le Procureur à l'appui de son appel et au mémoire en réponse de la Défense*", 71 pp.

more than reproduce the arguments of Prosecution. However, the support they believe they are providing the Prosecution reposes on precarious legal foundations. The Judgment acquitting Ngudjolo is legally robust, leaving it impervious to vacuous legal arguments. The Defence will show this in its categorical response to the observations of the Legal Representatives of Victims on the Prosecution's three grounds of appeal.

I. THE LEGAL REPRESENTATIVES' SUPPORT FOR THE PROSECUTION'S FIRST GROUND OF APPEAL

A. Debate concerning the application of the "beyond reasonable doubt" standard of proof

11. Contrary to the Legal Representatives' submissions echoing the Prosecution's thesis, the Defence argues that the Chamber correctly applied the "beyond reasonable doubt" standard stipulated in article 66(3) of the Statute. The Chamber's doubt which founded Ngudjolo's acquittal is a reasonable one, as it explained in its reasoning, and is based on the Chamber's evaluation of the evidence in the record.

12. At paragraph 17 of his observations the Legal Representative of the main group of victims adverts to article 74(3) of the Statute. In fact he is referring to article 74(2), which reads, "The Trial Chamber's decision shall be based **on its evaluation of the evidence and the entire proceedings**. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. **The Court may base its decision only on evidence submitted and discussed before it at the trial.**"¹⁶ The French term "*appréciation*" means *evaluation*: the act of evaluating or assessing. And to *evaluate* something – in this instance, evidence – means to determine its value, importance, or consequences. **This task falls to the Chamber, not to the Legal Representatives or the Prosecution.** The Chamber dispatched its duty properly and fairly. It based its decision on an evaluation of the entirety of the evidence in the record and only on the evidence submitted and discussed before it at trial. The Chamber's reasonable doubt was not, then, based "[TRANSLATION] on pure speculations that have no rational connection with the evidence admitted in court", as the Legal Representative of the main group of victims seeks to insinuate.¹⁷ It provided sufficient and proper reasoning for each of its findings, in strict accordance with article 74(5) of the Statute.¹⁸

¹⁶ Emphasis added by the Defence.

¹⁷ ICC-01/04-02/12-124-Conf-Corr ("Observations of the Legal Representative of the main group of victims"), para. 17.

¹⁸ Article 74(5): "The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. [...]"

13. The Legal Representative of the main group of victims makes a curious assertion in advancing his understanding of the standard of reasonable doubt. He says, “[TRANSLATION] There is hence no requirement for the trier of fact to seek every possible or plausible explanation for the evidence before him.”¹⁹ So, according to the Legal Representative of the main group of victims, the trier of fact should not seek to understand the evidence before him. This astonishing assertion raises a series of questions. If the trier of fact should not seek every possible or plausible explanation for the evidence before him, if he should not seek to understand it, how then is he to evaluate it? Should the trier of fact simply accept the Prosecution evidence without understanding it, without evaluating it, without comparing it to other evidence in the record? Should he accept it blindly, and necessarily convict the accused? If the trier of fact should not seek to understand and evaluate the evidence, what then is his role in the trial? Why not dispense with judges and leave the Prosecution entirely responsible for carrying out investigations, conducting proceedings and judging the accused itself?
14. This erroneous conception of the Chamber’s role leads the Legal Representative of the main group of victims to the equally erroneous conclusion, summarised at paragraph 19 of his observations, that the Chamber imposed upon the Prosecution a standard of proof that was higher than that required by article 66 of the Statute to establish the accused’s guilt. The false premises advanced by the Legal Representative of the main group of victims lead necessarily to a false conclusion. The Chamber correctly applied the article 66(3) standard. It is the Prosecution which, through its poor workmanship characterised, among other things, by the selection of incompetent witnesses, some of whom were introduced by intermediaries impugned in the *Lubanga* Judgment,²⁰ and by investigations focusing only on incriminating circumstances, failed to bear its evidentiary burden.
15. At paragraph 20 of his submissions, the Legal Representative of the main group of victims sets out, and then attacks, the criteria used by the Chamber in its evaluation of the evidence. The Defence submits that the Chamber’s interpretation is absolutely correct.
16. The erroneous conclusions reached by the Legal Representative of the main group of victims are a consequence of his lack of neutrality, bias and the role of second prosecutor he has reduced himself to playing. Of this he makes no secret. For instance, referring to “[TRANSLATION] standards of review”, he claims that he “[TRANSLATION] subscribes to the legal analysis of these standards expounded by the Prosecution in its Brief”.²¹ Likewise,

¹⁹ Observations of the Legal Representative of the main group of victims, para. 16.

²⁰ *The Prosecutor v. Thomas Lubanga Dylo, Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842 (“*Lubanga* Judgment”), Operative part, para. 1361: “The Chamber communicates to the Prosecutor, pursuant to Article 70 of the Statute and Rule 165 of the Rules, its findings that P-0143, P-0316 and P-0321 may have persuaded, encouraged, or assisted witnesses to give false evidence.”

²¹ Observations of the Legal Representative of the main group of victims, para. 5.

without providing any convincing demonstration of the Chamber's purported legal and factual errors, "[TRANSLATION] the [Legal Representative of the main group of victims] concurs with the Prosecution that the Chamber has committed errors of law and fact in its application of the test needed to convict the Accused (the 'beyond reasonable doubt' standard)".²² The Legal Representative of the child-soldier victims performs this same role of second prosecutor, announcing in his introduction that for each ground of appeal he "[TRANSLATION] will respond to the Defence's pleas of inadmissibility" in respect of each ground of appeal.²³

17. Reading the Legal Representatives' reasoning in unconditional support of the Prosecution, it becomes clear that what they advocate is lightening or indeed waiving the burden of proof placed on the Prosecution. Thus, for instance, the Legal Representative of the main group of victims writes, "[TRANSLATION] The Chamber hence conflates the criterion of proof 'beyond reasonable doubt' with the ascertainment of 'the veracity of the facts'. However, to convict an accused, the Chamber need not establish the 'veracity' of the facts (and hence need not explore the plausibility of other scenarios);²⁴ the Chamber must instead be satisfied by the Prosecution of the guilt of the accused 'beyond reasonable doubt'. In other words, it must not have reasonable doubt as to the existence of facts necessary for a conviction."²⁵ The assertion underlined by the Defence is astonishing. The term *veracity* means that which is in accordance with the truth: veridical. The veracity of the facts therefore means that the facts are in accordance with the truth. Accordingly, in the view of the Legal Representative of the main group of victims, in order to convict the accused, the chamber should not seek to ascertain whether the facts conform to the truth. How, then, is the chamber to arrive at a conviction? Is not seeking the ascertainment of the truth the leitmotiv of the chamber's every act? When the chamber analyses the evidence in the record, verifies whether the testimony is consistent with the truth and comes to the conclusion that the alleged facts may be untrue, is its doubt not reasonable? Can a chamber arrive at a conviction on the basis of facts the veracity of which has not been established beyond reasonable doubt? In other words, can a chamber arrive at a conviction on the basis of facts which are possibly or certainly untrue?

B. Debate concerning the Chamber's evaluation of the evidence in the record

18. Rather than demonstrate the legal and factual errors committed by the Chamber, the Legal Representatives elected to lend the Prosecution unconditional support by evaluating the Chamber's evaluation of the evidence in the record. They undertook their own evaluation,

²² *Idem*, para. 12.

²³ ICC-01/04-02/12-125-Conf-Corr ("Observations of the Legal Representative of the child-soldier victims"), para. 6.

²⁴ Emphasis added by the Defence.

²⁵ *Idem*, para. 21.

relying on their own interpretation of the testimony to argue that the Chamber should have reasoned as they do. Sadly, they make no reference to any legal provision empowering them so to act or decreeing that the Legal Representatives' and Prosecution's evaluation or interpretation of the evidence takes precedence over the Chamber's own evaluation of the evidence.

19. From the outset, in his introduction, the Legal Representative of the child-soldier victims announces the task he is setting out to accomplish, in sustenance of the Prosecution. He will address, says he, "[TRANSLATION] issues related to the Chamber's evaluation of the credibility of witnesses P-279 and P-280" in his observations on the Prosecution's first and second grounds of appeal, since these two witnesses' testimony are pivotal to Mathieu Ngudjolo's liability.²⁶ He further states that he "[TRANSLATION] will also address the Chamber's assessment of the credibility of P-250 and P-28 in so far as their testimonies contain evidence regarding Mathieu Ngudjolo's status as a military leader in Zombe".²⁷ It is clear from this announcement that what the Legal Representative of the child-soldier victims intends to do is evaluate the Chamber's evaluation of the credibility of Prosecution Witnesses P-279, P-280, P-250 and P-28. Rather than seek to demonstrate what legal or factual error the Chamber has committed, the Legal Representative of the child-soldier victims will assess and evaluate, in order to reject, the Chamber's analysis and evaluation of the credibility of these witnesses. He will place his own evaluation before that of the Chamber and find the witnesses credible. But the following basic question remains to be answered: Is the Legal Representative empowered to assess a reasoned evaluation by the Chamber, consonant with every legal provision, of the credibility of witnesses? What is the legal basis of this power?
20. Following the same approach, page 12 of the filing of the Legal Representative of the main group of victims bears a telling sub-heading: "[TRANSLATION] 2.1. *Error in the evaluation of evidence*". Yet at paragraphs 24 to 43 constituting this sub-section the Legal Representative of the main group of victims quite fails to demonstrate that the Chamber committed any factual or legal error whatsoever. Rather he performs an evaluation of the Chamber's evaluation of the testimony of P-317, D2-176 and P-280. He carries out his own evaluation of their testimony, to which he then accords precedence over that of the Chamber.
21. Acting as a second prosecutor, "The Legal Representative concurs with the errors raised by the Prosecution in its first ground of appeal (in particular at paragraphs 54 to 67 of its Brief)." The Defence has demonstrated in its Brief in Response that the Chamber committed

²⁶ Observations of the Legal Representative of the child-soldier victims, para. 3.

²⁷ *Idem*, para. 4.

no legal, factual or procedural error in its evaluation of the totality of the evidence discussed during the trial and entered into the record.

22. As stated above, the Legal Representative of the main group of victims engages in his own evaluation of the testimony of P-317, D2-176 and P-280. Regarding P-317, he writes: “[TRANSLATION] **The Chamber believed P-317 to be a highly credible and reliable witness.** However, it considered that it could not rely on her statements with regard to M. Ngudjolo’s involvement in preparations for the attack on Bogoro as (1) they ‘*appear too general ultimately to determine the Accused’s precise status and role in Bedu-Ezekere groupement*’ and (2) ‘*it cannot be ruled out that Mathieu Ngudjolo, akin to others in Ituri at the time, had wanted to claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army*’.”²⁸ It should first be noted that, contrary to the submission of the Legal Representative of the main group of victims, the Chamber did not state that P-317 was a highly credible and reliable witness. At footnote 31, the Legal Representative of the main group of victims adverts to paragraphs 291 to 292 and 451 of the Judgment. Nowhere in these paragraphs does the Chamber state that P-317 is “[TRANSLATION] a highly credible and reliable witness”. The Chamber’s evaluation of this witness’s credibility is more nuanced. The italicised quotation by the Legal Representative of the main group of victims is a telling excerpt from reasoning provided by the Chamber in support of its finding. It does not cease to qualify as reasoning simply because it fails to find the Legal Representative’s pleasure. The Chamber has full discretion in preparing its reasoning, one based on its evaluation of the various items of evidence in the record, which it has analysed and compared. The Legal Representative cannot impose his will or wishes on the Chamber.

23. Substantively, the Chamber is perfectly correct to reason that P-317’s overly general statements leave it unable to determine the Accused’s status and precise role in Bedu-Ezekere *groupement*. Likewise, after analysing P-317’s testimony and other evidence in the record, the Chamber does not rule out the possibility that the purported admissions reported by P-317 were fanciful. The Legal Representative of the main group of victims fails to advance any relevant information from P-317’s testimony which establishes definitively – that is, irrefutably – the Accused’s status at the material time, his role in Bedu-Ezekere *groupement* or the consistency and reliability of Mathieu Ngudjolo’s purported admissions to P-317. He is silent with regard to the first two factors (status and role), jumping straight to the third (purported admissions), in regard to which, condemning the Chamber’s evaluation of this

²⁸ Observations of the Legal Representative of the main group of victims, para. 25. First passage emboldened by the Defence. Other passages italicised and underlined by the Legal Representative of the main group of victims.

aspect of P-317's testimony, he writes the following: "[TRANSLATION] However, as the transcript of her testimony makes clear, P-317 proffered detailed and relevant statements on Mr Ngudjolo's role at the time of the events. According to her, the Accused 'said' that he had 'organised' the attacks on Bogoro and Mandro for 'strategic reasons', namely to protect Lendu villages from UPC attacks."²⁹ The belief of the Legal Representative of the main group of victims that P-317's statements were "detailed and relevant" is a matter for him alone; it is his own evaluation, one which differs from that of the Chamber. If the Legal Representative had been impartial, neutral and rigorous in his analysis, he would have recalled that under article 65 of the Statute, a chamber must verify admissions, even when received directly from the accused. They must also be verified by the Prosecution pursuant to regulation 62 of the Regulations of the Office of the Prosecutor. It is all the more incumbent upon the Prosecution to perform rigorous analysis and verification of the reliability, authenticity and consistency of admissions received from another person, in this instance P-317.

24. In this regard, the Legal Representative should have borne in mind that P-317's visit to Ituri had taken place only from 24 March to 6-7 April 2003.³⁰ Her enquiries were conducted as part of human rights, not judicial, investigations;³¹ that is to say as part of investigations which were not conducted with the same degree of rigour as judicial investigations, were not subject to the adversarial principle, and are utterly devoid of probative value.³² However, the Prosecution failed to verify the purported admissions which she related, asking the following questions: Why would Ngudjolo make such a confession to P-317? What could he have been hoping to get from her?
25. In its evaluation of P-317's evidence, the Chamber could not blindly accord her full credibility on all aspects of her testimony. It was duty-bound to consider not only its limits and inherent deficiencies but also other evidence in the record. This the Legal Representative omits to do.
26. It is clear from paragraph 29 of the observations of the Legal Representative of the main group of victims that the Legal Representative has not understood the Chamber's reasoning. By basing its evaluation on the fact that "it cannot be ruled out that Mathieu Ngudjolo, akin to others in Ituri at the time, had wanted to claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army", the Chamber does not give a purely hypothetical explanation, as the Legal Representative of the main group of

²⁹ Observations of the Legal Representative of the main group of victims, para. 26. Emphasis added by the Legal Representative of the main group of victims.

³⁰ P-317-T-228-FRA, pp. 20-21, line 24.

³¹ P-317-T-228-FRA, p. 39, line 1.

³² See in this regard *Ngudjolo* Judgment, paras. 294 and 296.

victims wrongly asserts.³³ Its reasoning relies not only on the deficiencies in P-317's statements, which the Chamber in its evaluation deems overly general, but also on other evidence in the record; for instance, the testimony of D03-11, who is not just any witness but the president of the FNI and who had also falsely claimed responsibility for the attack on Bogoro in a bid to increase his own stature.³⁴

27. In challenging the Chamber's evaluation of P-317's testimony, the Legal Representative of the main group of victims seeks to compare the admissions alleged by P-317 to Ngudjolo's statements to a Congolese public prosecutor.³⁵ In so doing, the Legal Representative makes the mistake of failing to consider two significant elements of which the Chamber cannot have been unaware:

- Firstly, that Ngudjolo's statement to the Congolese public prosecutor regarding his involvement in the fighting in Bunia on 6 March 2003 was recorded in a *pro justitia*, an interview transcript signed by both the prosecutor and Ngudjolo. This transcript is authentic. Competent professionals that they are, the judges of Trial Chamber II know this. In contrast, P-317's words alone cannot be accorded the same level of credibility.
- Secondly, testifying under oath Ngudjolo explained the circumstances surrounding the involvement of the youth from Zumbé, including himself, in the 6 March 2003 battle of Bunia, which was in fact led by Ugandan military officers (UPDF) in response to the attack carried out by UPC troops in Dele. Corroborating testimony was provided by two other individuals, D03-66 and D03-88, the chief of Bedu-Ezekere *groupement*, who told the Chamber that the attack had been announced on Radio Candip and that Captain Kiza, the UPDF military commander in Dele, had written to him, D03-88, to inform him about the UPC attack, which also targeted Zumbé.³⁶ Following the elders' decision, the people of Zumbé went to participate in the attack, remaining behind the UPDF forces, where they merely sang and made noise.³⁷

28. Consequently, the assessment by the Legal Representative of the main group of victims of the Chamber's findings is utterly devoid of merit, since the Chamber's evaluation of this witness's testimony is not "[TRANSLATION] based on suppositions", as he claims,³⁸ but, rather, takes into consideration all the evidence in the record.

29. The Legal Representative of the main group of victims commits the same type of error in challenging the Chamber's evaluation of **D2-176's** testimony. It is clear from his criticism of

³³ Observations of the Legal Representative of the main group of victims, para. 28.

³⁴ *Ngudjolo* Judgment, para. 434 and footnote 1005.

³⁵ Observations of the Legal Representative of the main group of victims, paras. 33-34.

³⁶ D03-88-T-302-FRA, p. 30, line 24, to p. 31, line 15; D03-P-88-T-306-FRA, p. 17, line 27, to p. 28, line 17.

³⁷ D03-88-T-302-FRA, p. 30, line 24, to p. 31, line 15, and p. 33, line 28, to p. 34, line 9.

³⁸ Observations of the Legal Representative of the main group of victims, para. 35.

the Chamber's evaluation of D2-176's testimony at paragraph 433 of the impugned Judgment that the Legal Representative has failed to comprehend the manner in which the judges go about the task of performing their final evaluation of the evidence. At paragraph 433, the Chamber writes, "Further still, having examined his statement, the Chamber cannot rule out that the witness had associated Mathieu Ngudjolo's status in the FNI with the position which he considered him to have held prior to the attack on Bogoro."³⁹ This sentence makes it quite clear that the Chamber reached this conclusion after reading D2-176's full testimony.

30. What is more, in quoting this sentence at paragraph 37 of his observations the Legal Representative of the main group of victims has, in our view intentionally, omitted to include the adverb "Further still" despite the fact that it is of vital importance. It indicates that this factor relied on by the Chamber is in fact in addition to others cited earlier in its reasoning. At paragraph 433 of the Judgment, the Chamber begins by giving its evaluation of D2-176's assertion regarding Ngudjolo's alleged status at the material time in the following terms: "Nonetheless, this assertion, founded on anonymous hearsay, was made by an individual who did not live in Zombe and who, to boot, provided no further details on Mathieu Ngudjolo's status within that locality." The Legal Representative is bereft of arguments against this reasoned evaluation by the Chamber.
31. In its intelligent reasoning, set out previously at paragraph 431 of the Judgment, the Chamber cites another pertinent fact which entirely discredits D2-176's testimony on the matter but of which the Legal Representative feigns ignorance. It says, "going on to single out Mathieu Ngudjolo as Chief of Staff of the 'FNI', a group to which, in his [D2-176's] view, the Lendu combatants in Bogoro on 24 February 2003 belonged."⁴⁰ However, many other testimonies, which are more credible on this point, established that at the time of the 24 February 2003 attack on Bogoro the FNI did not exist in Bedu-Ezekere *groupement*. These witnesses included D03-11, the founding president of the FNI;⁴¹ D03-88, [REDACTED];⁴² D03-55;⁴³ and D03-66.⁴⁴ The Prosecution itself ultimately acknowledged this fact. In evaluating D2-176's credibility on this point, the Chamber could not omit to take this information into account.
32. The Legal Representative of the main group of victims again commits the same type of error in assessing the Chamber's evaluation of P-280's testimony. Since he himself refers

³⁹ Emphasis added by the Defence.

⁴⁰ *Ngudjolo* Judgment, para. 431. At footnotes 1000 and 1001, the Chamber cites D02-176, T. 257, p. 7, and T. 257, pp. 6-7, respectively.

⁴¹ D03-11-T 243-FRA, p. 9, lines 18-19; T 244-FRA, p. 5, lines 7-16.

⁴² D03-88-T-301, p. 11.

⁴³ D03-55-T-293, p. 50, lines 16-25.

⁴⁴ D03-66-T-296, p. 18, lines 15-22, and p. 19, lines 2-8.

thereto,⁴⁵ we shall demonstrate this in our examination of the Prosecution's second ground of appeal. In arriving at the conclusion he does at paragraph 43 of his observations, he displays his misunderstanding of the nature of the Chamber's final evaluation of all the evidence at the deliberation stage. At that stage, the Chamber takes into consideration not only incriminating evidence, as the Legal Representatives and the Prosecution would like, but also exonerating evidence, doing so impartially, fairly, justly and in accordance with the stipulations of articles 66(3), 74(2) and 74(5) of the Statute. In arriving at its ultimate finding, it gives due consideration to all of the evidence discussed throughout the trial proceedings. Whilst its reasoning may not be to the liking of the Legal Representatives and the Prosecution and its evaluation differs from their own, this does not mean *ipso facto* that the Chamber has committed a factual or legal error.

33. The Legal Representative of the child-soldier victims commits the same type of error as those of his colleague the Legal Representative of the main group of victims. This is manifest at paragraph 15 of his observations, wherein the Legal Representative of the child-soldier victims in fact contests the Chamber's evaluation of Prosecution Witness **P-279's** testimony.⁴⁶ In other words, he does not agree with the Chamber's evaluation of this evidence. The Defence submits that the Legal Representative of the child-soldier victims may disagree with the Chamber's evaluation of P-279's evidence, but this does not invalidate it. The Legal Representative of the child-soldier victims cannot demand that his own evaluation be accepted over that of the Chamber, the sole body entitled to exercise the powers it did in accordance with all the regulations and statutory provisions.
34. At paragraph 16, the Legal Representative of the child-soldier victims continues his reasoning, which is essentially that he prefers the Prosecution's evaluation to that of the Chamber. He demonstrates no legal or factual error on the part of the Chamber, which correctly applied the "beyond reasonable doubt" standard of proof, contrary to the mistaken assertion by the Legal Representative of the child-soldier victims. His conclusions at paragraphs 17 and 18 are entirely false,⁴⁷ being, as they are, drawn from the false premises advanced at paragraphs 14 to 16.
35. As we have already highlighted above,⁴⁸ the assertion by the Legal Representative of the main group of victims that the Chamber should not require the "[TRANSLATION] veracity of the facts"⁴⁹ is particularly astonishing. In other words, the Chamber should not have verified

⁴⁵ Observations of the Legal Representative of the main group of victims, paras. 41-42.

⁴⁶ See Observations of the Legal Representative of the child-soldier victims, para. 15 and footnotes 8 and 9, in which he adverts to paras. 278 of the impugned Judgment.

⁴⁷ Observations of the Legal Representative of the child-soldier victims, paras. 17-18.

⁴⁸ See *supra*, para. 17.

⁴⁹ Observations of the Legal Representative of the main group of victims, para. 43.

whether the facts related or alleged by P-317, D2-176 and P-280 were true or false. It should simply have convicted Ngudjolo on the basis of the statements made by these witnesses without seeking to ascertain whether they were true or false. The Defence submits that to adopt such reasoning would be to sanction arbitrariness and endanger the fundamental rights of the Accused.

II. THE LEGAL REPRESENTATIVES' SUPPORT OF THE PROSECUTION'S SECOND GROUND OF APPEAL

36. In their analysis of the Prosecution's second ground of appeal, the Legal Representatives wholly fail to demonstrate the errors purportedly committed by the Chamber. They persist in assessing the Chamber's evaluation of the evidence and playing the role of second prosecutor. Moreover, they expressly recognise this role. Thus, for example, at paragraph 57 of his observations, the Legal Representative of the main group of victims states that he "[TRANSLATION] concurs with the Prosecution in considering that the Chamber erred, in fact and in law, by failing to consider the totality of the evidence on record during its analysis." This contention, which is endorsed by the Legal Representative, as well as the assertion that the Chamber failed "[TRANSLATION] to provide sufficient reasons in its decision regarding certain findings",⁵⁰ are fundamentally flawed.
37. As under the first ground, instead of demonstrating the alleged errors, the Legal Representatives, in concurrence with and in absolute support of the Prosecution, advance their own evaluation of the evidence analysed by the Chamber to conclude that their evaluation is better than the Chamber's. This is, for example, clear from reading paragraphs 66 to 70 of the observations of the Legal Representative of the main group of victims, evocatively headed: "[TRANSLATION] 2.1. *Errors in the evaluation of certain evidence and the credibility of some of the witnesses*". In these paragraphs, the Legal Representative of the main group of victims does not demonstrate the legal or factual errors allegedly committed by the Chamber. He rather develops his own evaluation of the evidence analysed by the Chamber, in this case, the "Soap Letter" and the testimonies of P-250, P-280, P-28 and D03-66. In his view, Prosecution witnesses P-250, P-280 and P-28 are credible, whereas Defence witness D03-66 is not.
38. At paragraph 71, the Legal Representative of the main group of victims disputes the Chamber's evaluation of an item of Prosecution evidence, specifically the "Soap Letter", and quotes the reasons proffered by the Chamber for its evaluation. The reasons enunciated at

⁵⁰ Observations of the Legal Representative of the main group of victims, para. 43. See also para. 65 where the Legal Representative of the main group of victims "[TRANSLATION] concurs with the examples set out in the Prosecution's second ground of appeal."

paragraph 374 of the Judgment referring, in particular, to Section VII of the Judgment concerning the Chamber's analysis which led to the determination that P-250 was a non-credible witness are coherent, cogent and sufficient. This is proof that the Chamber did not disregard the "Soap Letter". The Chamber also examined it both intrinsically and in light of the other evidence on the record and arrived at the reasoned finding rendered in its Judgment. The Defence raises this fundamental question: Is the Legal Representative empowered to dispute the Chamber's reasoned evaluation of the "Soap Letter", in other words, an item of evidence? Whence does this power derive? Should the Judgment be reversed simply because the Legal Representative does not agree with the Chamber's evaluation of an item of evidence? The Legal Representative has not demonstrated how the Chamber erred factually and legally.

39. To avoid rehearsing the arguments in our written submissions, especially, regarding the highly questionable authenticity⁵¹ of the stamp placed on the letter, we will simply focus on the last sentence of the Chamber's evaluation which the Legal Representative quotes in paragraph 71 of his observations: "[...] Finally, there is no other evidence to show that the FRPI was already established in Zumbe on 4 January 2003, when this document was allegedly dispatched."⁵² The Defence therefore puts the following question to the Legal Representative: Is the Chamber's finding in its evaluation of the "Soap Letter" true or false? It must be emphasised that the verb *attester* means to *substantiate the truth, to prove*. Can the Legal Representative inform the Appeals Chamber what other evidence proves that the FRPI was already established in Zumbe on 4 January 2003? There is no such evidence. On the contrary, several witnesses, particularly P-12,⁵³ Germain Katanga,⁵⁴ D03-11⁵⁵ and D03-66,⁵⁶ establish that the FRPI was not in existence in Zumbe at the material time. The Prosecution itself acknowledges that the short-lived FFI-FRPI alliance only existed after 22 March 2003.
40. After futile attempts to support the incriminating evidence, i.e., the "Soap Letter", the Legal Representative of the main group of victims, as second prosecutor, seeks to discredit Defence Witness D3-66. In this vain endeavour, the Legal Representative unjustly blames the

⁵¹ The author of the letter Defence Witness D03-66, made the following statement in respect of this matter: **D03-66-T-296**, p. 42, line 26, p. 43, line 18: "[TRANSLATION] When I wrote this letter, the FNI was at Kpandroma and the FRPI was in my *collectivité* of Walendu Bindi. The FRPI was not in existence in Zumbe at that time." With respect to the seal, D03-66 stated that, "[TRANSLATION] We did not place the stamp on this letter, we merely signed the letter. Where could we have found a stamp, there was no stamp except in my boss's office. I initialled it then Martin Banga signed it. We handed the letter to this man who took it to his office and upon his return, he gave us a sum of money and we left. We had to wait for nightfall before returning to our home"; **D03-66-T-296-FRA**, p. 39, line 28, p. 40, line 5.

⁵² *Judgment*, para. 374, the last sentence; quoted by the Legal Representative of the main group of victims at para. 71 of his observations.

⁵³ **P-12-T-195-FRA**, p. 18, lines 5-6.

⁵⁴ **D02-300-T-318**, p. 47, lines 4-11.

⁵⁵ **D02-236/D03-11-T-247-FRA**, p. 76, lines 9-16.

⁵⁶ **D03-66-T-298-FRA**, p. 30, lines 15.

Chamber for the alleged “[TRANSLATION] failure to analyse comprehensively D3-66’s credibility.”⁵⁷ The Legal Representative is seemingly unaware that the Chamber may deem a witness credible with respect to certain issues and not on other issues, by considering not only the witness’s testimony in its entirety but other testimony and evidence on the record as well.

41. At paragraphs 75 to 84 of the observations, the Legal Representative of the main group of victims fails to demonstrate that the Chamber committed such a legal or factual error. He advances his own evaluation of the credibility of the testimonies of P-250, P-28, D3-66 and D3-88. He states that the Chamber’s evaluation is wrong and proposes his own. The Defence underscores that the Legal Representative is not empowered to evaluate the credibility of witnesses. This power is vested in the Chamber and it was appropriately discharged by the satisfactory justification of each of its findings.
42. Contrary to the insinuations of the Legal Representative of the main group of victims,⁵⁸ the Chamber took into account the totality of the evidence in drawing its conclusions regarding the Soap Letter, P-250 and P-28. The Chamber considered the prevailing tension between certain members of Ngudjolo’s and D3-100’s families. The tension arising from the fact that [REDACTED] spouted falsehoods against Ngudjolo before the ICC had no impact on the testimony of D3-100 [REDACTED] and certainly not on P-250, who was enrolled in the Court’s protection programme.
43. The Legal Representative of the main group of victims demonstrates a lack of intellectual honesty when he writes: “[TRANSLATION] In light of all the foregoing, *it is astonishing that the Chamber could have considered that D3-66 and D3-55 hailed ‘from different environments’* and, by the same token, considered them credible when they stated that P-250 was not a militia member.”⁵⁹ In its analysis and reasoning, the Chamber did not confine itself to witnesses for the Defence of Ngudjolo D3-66 and D3-55, but took into account the testimonies of other witnesses, in this instance, D2-160 and D2-161, hence the conclusion that they hailed “from different environments.”
44. Paragraph 78 of the observations of the Legal Representative of the main group of victims clearly demonstrates that in attempting to evaluate the judges’ evaluation, he indulges in outrageous partiality. Not only does the Legal Representative lack the legal powers to evaluate the judges’ evaluation, but he also deliberately truncates the Chamber’s reasons so as to mislead the Appeals Chamber. In fact, the reasons must be reviewed in the context of the Chamber’s reasoning beginning at paragraph 148 and must be read in light of paragraph 152 preceding it. After emphasising the spontaneity with which D3-100 spoke about the

⁵⁷ Observations of the Legal Representative of the main group of victims, p. 28, (1).

⁵⁸ *Idem*, para. 77.

⁵⁹ Observations of the Legal Representative of the main group of victims, para. 78.

prevailing tension between his family and certain members of Ngudjolo's family, the spontaneity reflecting his desire for transparency which should be taken into account in the evaluation of his credibility, but which should not exempt the Chamber from wondering whether the threats adversely affected his testimony,⁶⁰ the Chamber writes:

152. Therefore, in order to measure the impact of any possible tension or threats from Mathieu Ngudjolo's family, the Chamber set out to compare the witness's testimony with that of other witnesses possessing useful information about P-250's schooling in 2002-2003. In this regard, the Chamber noted that four witnesses, of whom two were called to testify by the Defence for Mathieu Ngudjolo and two by the Defence for Germain Katanga, attest to the presence of Witness P-250 in Gety during the 2002-2003 school year:

- D03-66 claimed that Witness P-250 was a student in Gety during the war and that he did not live in Bedu-Ezekere with his parents;
- D03-55 claimed to have lived in Bedu-Ezekere from 2002. He maintains that P-250 is a family member and that he was a schoolboy in Gety at the material time;
- D02-160 stated that he had studied in Gety between 2002 and 2004 and that P-250 was a pupil at Gety Institute during the 2002-2003 school year;
- D02-161 claimed that P-250 was attending school in Gety, that he regularly came to Aveba to visit friends and that she had never seen him in military garb, nor had she seen him carrying a weapon or heard him talk about any fighting.

153. **These four witnesses hail from different environments.** Whilst the two witnesses called by the Defence for Mathieu Ngudjolo were living in Bedu-Ezekere *groupement*, those testifying for the Defence of Germain Katanga were students in Walendu-Bindi *collectivité*. Testimony from these four witnesses corroborates one another, and is all the more convincing by virtue of their different circumstances, thereby reinforcing the credibility of D03-100's statement that P-250 was studying in Walendu-Bindi *collectivité* at the material time.⁶¹

45. The aforementioned reasons of the Chamber are wholly coherent, cogent and sufficient. Contrary to the assertion of the Legal Representative of the main group of victims at paragraph 78 of his observations, the Chamber did not confine itself to the testimony of D3-66 and D3-55 to conclude that they hail from different environments. It considered four witnesses: D3-66, D3-55, D2-160 and D2-161 and its decision is indisputable. These four witnesses hailed from different environments as clearly explained by the Chamber at paragraph 153 of the Judgment. The truncated evaluation of the Legal Representative of the main group of victims in paragraph 78 of his observations manifests the errors in his reasoning. This demonstrates clearly that it is the Legal Representative who has an extremely restricted, compartmentalised and partial view of the evidence; whereas in its evaluation, the Chamber considered the totality of the evidence and not only analysed it intrinsically, but also examined it in light of other evidence on the record.

46. The Legal Representative of the main group of victims makes the same mistakes in his arguments regarding P-28. As early as in his introduction at paragraph 92, it is clear that the Legal Representative will not endeavour to demonstrate that the Chamber committed any legal or factual error; he rather resumes the task of evaluating the Chamber's evaluation of P-28's testimony, which he deems erroneous. In his view, P-28 is credible therefore; the

⁶⁰ Judgment, para. 151.

⁶¹ Judgment, paras. 152-153. Emboldened by the Defence.

Chamber erred in disregarding his testimony because of, “[TRANSLATION] (1) alleged inconsistencies between his testimony and prior statements; (2) imprecision in his testimony and (3) the testimony of at least four defence witnesses.”⁶² In effect, the Legal Representative of the main group of victims maintains that the Chamber erred by raising the inconsistencies between the witness testimony and his prior statements and, the imprecision in his narration of events and by taking into account the testimonies of at least four Defence witnesses.

47. The arguments of the Legal Representative of the main group of victims regarding the [TRANSLATION] (1) *The alleged inconsistencies* at paragraphs 93 to 93 are nothing other than his own analysis of P-28’s testimony which he endeavours to explain, as if to say that the Chamber should have reasoned like him to redeem the credibility of this Prosecution witness. Uppermost in his submissions relating to the second grievance against the Chamber, which is apparently accused of having unjustly criticised as imprecise P-28’s account of the attack,⁶³ the Legal Representative of the main group of victims quotes an excerpt from the evaluation: “[TRANSLATION] According to the Chamber, P-28 provided a ‘*detached report of the fighting*’; he ‘*did not deliver the account that would be expected from a combatant who had personally experienced the event, participated in it and taken risks*’; he did not ‘*really enter into the detail of events that he claimed to have experienced personally during the attack*’.”⁶⁴ We note first that the Legal Representative misquotes paragraph 241 of the Judgment, which is coherent and flows logically from paragraph 220. The Legal Representative has compartmentalised paragraph 241, albeit inconsequentially. Notwithstanding the circumscription to these excerpts which have been selected and italicised by the Legal Representative, the Chamber’s evaluation is adequately expressed therein. It is the Chamber’s evaluation. The Chamber erred neither factually nor legally in this evaluation. In fact, in making this finding, the Chamber analysed P-28’s testimony in its entirety. It should not be concluded, as erroneously maintained by the Legal Representative of the main group of victims at paragraph 98 of his observations, that the Chamber did not examine P-28’s testimony in its entirety because the Chamber merely referred to the most significant passages of the transcript of P-28’s testimony.

48. The Legal Representative’s practice of compartmentalisation characterises all the criticisms wrongly directed at the Chamber’s evaluation and reasons, which strictly complied with the statutory and regulatory provisions. To avoid going into detail every time, we hereby demonstrate that this shortcoming affects and invalidates the criticism of both Legal

⁶² Observations of the Legal Representative of the main group of victims, para. 92.

⁶³ Observations of the Legal Representative of the main group of victims, para. 37, [TRANSLATION] (2) *Alleged lack of details in the testimony of the attack*.

⁶⁴ Observations of the Legal Representative of the main group of victims, para. 97.

Representatives; this demonstration is illustrative and applies to all the submissions erroneously raised by the two Legal Representatives.

49. Paragraph 241 of the impugned Judgment is set out below in full:

241. *Finally, P-28's behaviour in court* sometimes also surprised the Chamber. After listening carefully to his account of the fighting in Bogoro, the Chamber observed that he did not really enter into the detail of events that he claimed to have experienced personally during the attack. Admittedly, his restraint could be interpreted as proof of *his difficulty in recalling painful memories and relating particularly traumatising events*. However, this explanation does not explain why the witness did not deliver the account that would be expected from a combatant who had personally experienced the event, participated in it and taken risks. On the contrary, Witness P-28 provided a detached report of the fighting in Bogoro which did not appear to reflect the acts of someone who had directly participated in the attack, but rather seemed to be the recollection of a person who was far removed from the battle field, and who had, perhaps, heard numerous accounts of the events which took place at Bogoro on 24 February 2003.⁶⁵

An analysis of this paragraph in good faith would result in the identification of key elements other than the excerpts identified by the Legal Representative of the main group of victims in his biased logic, such as the following:

- (1) This paragraph is the outcome of the Chamber's reasoning regarding this testimony. In fact, it begins with the adverb "finally". It is part of an intellectual and explanatory exercise covering paragraphs 220 to 240, including paragraph 241 and extending to paragraph 254.
- (2) The Chamber properly considered the entirety of this witness's testimony during its evaluation, including "P-28's behaviour in court sometimes".
- (3) In its evaluation, the Chamber properly considered the difficulties P-28 may have faced in "recalling painful memories and relating particularly traumatising events." The Chamber deemed that "this explanation does not explain why the witness did not deliver the account that would be expected from a combatant who had personally experienced the event, participated in it and taken risks [...]"

50. To its intrinsic analysis of P-28's testimony and behaviour, the Chamber added another important aspect, which involved juxtaposing this testimony with other testimony. This task, accomplished at paragraphs 242 to 250, resulted in the findings at paragraphs 251 to 254. This is the approach adopted by the Chamber in its evaluation of the testimony of each witness. The Chamber considered all the evidence on the record and sufficiently substantiates each of its findings.

51. Both Legal Representatives are completely wrong to accuse the Chamber of insufficient reasoning or failure to take into consideration all the evidence on the record. In fact, it is the

⁶⁵ Passages italicised by the Defence.

legal representatives who, imitating the Prosecution, advance a totally biased evaluation because they reject any criticism of Prosecution witnesses and exclude all the Defence witnesses whom they systematically deem not to be credible.

52. In keeping with the criticism levelled at paragraph 241, on which we have dwelt by way of illustration – our observations apply generally to the complaints erroneously raised by the two Legal Representatives – it is apparent that in his arguments at paragraphs 100 and 109 of his observations, the Legal Representative of the main group of victims advances his own evaluation of P-28's testimony. He intimates that the Chamber should have reasoned like him. However, in evaluating P-28's credibility, the Legal Representative of the main group of victims does not address all of the evidence on the record. This applies in particular to the testimonies of P-219, D02-161 and the nefarious role played by Office of the Prosecutor intermediary P-183, who instructed P-28 to modify his account. The Chamber properly performed its judicial duty fairly, independently, impartially, respecting the relevant legal and regulatory provisions, by having specific regard to such evidence.⁶⁶
53. The Legal Representative of the main group of victims wrongly criticises the Chamber for considering the testimonies of Defence witnesses and juxtaposing them with certain aspects of P-28's testimony in order properly to evaluate his credibility. All the arguments at paragraphs 110 *et seq* under the heading – [TRANSLATION] (3) *The Chamber's errors in the analysis of other testimonial evidence* – bear no relevance. The assertion, that the Chamber “conducted a fragmented evaluation of the credibility”⁶⁷ of Defence witness is groundless. As stated above, whenever the Chamber analysed testimony, it did so in its entirety by identifying intrinsic flaws, particularly, contradictions, inconsistencies and improbabilities, comparing it against other testimonies in order to make a finding. As a result of this rigorous and comprehensive analysis, the Chamber was able to adjudge a witness credible on certain issues and not credible on others. This is clearly within its discretion. It is paramount that the Chamber should provide the reasons for its decisions and it did so clearly.
54. The Legal Representative of the main group of victims therefore errs in maintaining that the Chamber “[TRANSLATION] conducted a fragmented analysis of the credibility of these witnesses.” For example, referring to D2-134, the Legal Representative of the main group of victims alleges that the Chamber relied on his statement, “[TRANSLATION] without a comprehensive evaluation of his credibility.”⁶⁸ This allegation is completely flawed and unfounded. The Legal Representative was not present when the Chamber was analysing and evaluating the evidence on the record. It cannot be concluded that it only read and analysed

⁶⁶ See in particular, paras. 232, 242 and 248 of the *Judgment*.

⁶⁷ Observations of the Legal Representative of the main group of victims, para. 110.

⁶⁸ Observations of the Legal Representative of the main group of victims, para. 111.

the quoted passages merely because the Chamber only quoted the relevant passages of D2-134's testimony relating to the issue under consideration when substantiating its reasoning. The Legal Representative must be aware that any analysis is followed by a detailed and structured summary to support an argument. Thus after having analysed all the evidence in the record of the case, the judges inevitably prepare a well-founded summary of the reasons for their decision. The judges cannot not set out in the judgment all the details of the analysis they undertook and, are in fact, not required to do so. It has been adjudged that, "it is not necessary [for the Trial Chamber] to refer to the testimony of every witness or every piece of evidence on the trial record."⁶⁹ If they did, the judgment would be thousands of pages rather than hundreds, thereby hampering its comprehension.

55. Later on in paragraph 111, as in paragraphs 112 to 119, the Legal Representative of the main group of victims advances his own evaluation of D2-134's testimony, which he considers lacks credibility, making reference to his closing brief. Similarly, criticising the Chamber's evaluation of these witnesses at paragraphs 120 to 122, 123 to 126 and 127 to 136, the Legal Representative of the main group of victims respectively evaluates Defence Witnesses D2-136, D2-501, D2-129 and D2-259, all of whom he deems lack credibility, as opposed to P-28 whom he deems credible. The Legal Representative would have preferred the Chamber to reason like him and find Prosecution Witness P-28 credible and Defence Witnesses D2-136, D2-501, D2-129 and D2-259 not credible. He is obviously not empowered to substitute his evaluation for the Chamber's own.
56. The judgment should not be reversed on grounds of factual or legal error merely because the Legal Representative, in concurrence with the Prosecutor, disputes the Chamber's evaluation of the testimony of a witness. The preceding analysis clearly demonstrates that it is the Legal Representatives who, in concurrence with the Prosecution's erroneous reasons and in unconditional support of the Prosecutor, err in being biased in their analysis by taking into account only incriminating evidence and systematically excluding all the exculpatory evidence.
57. This error is strewn throughout their observations and therefore affects the arguments of the Legal Representative of the main group of victims regarding the Chamber's evaluation of P-280's testimony. In fact, the Chamber provided proper reasons for its decision not to rely on P-280's testimony. At paragraph 138 of his observations, by using the adverb "[TRANSLATION] particularly", the Legal Representative of the main group of victims summarises, in a biased manner, the Chamber's reasoning which, if considered in its entirety,

⁶⁹ Appeals Chamber, *The Prosecutor v. Kvočka et al.*, IT-98-30/1-A, *Judgment*, 28 February 2005, para. 23; *Stanišić Judgment*, paras. 20 and 34.

is sufficient, intelligent and based on the evaluation of all the evidence. The Chamber's analysis of Witness P-280 is expounded in paragraphs 191 to 219 of the Judgment.

58. Selecting only a portion of the Chamber's reasons, the Legal Representative of the main group of victims critiques the Chamber's evaluation of the "sketch of Zumbe" drawn by this witness and the juxtaposition of P-280's testimony with that of [REDACTED], Defence Witness D-340.
59. In an attempt to demonstrate the Chamber's error regarding the "sketch of Zumbe", the Legal Representative of the main group of victims states: "[TRANSLATION] If, as noted by the Chamber, P-280 lived in Zumbe, this was only after the attack on Bogoro and for a short period of time. Prior to that, P-280 was a combatant of the Lagura camp. He did not visit Zumbe and could not precisely state what happened there. *In this context and contrary to what the Chamber claims, it was not entitled to expect P-280 to have good knowledge of the locality.*"⁷⁰ The Defence italicised the last sentence of this quotation to emphasise that the Legal Representative based his analysis on a tiny portion of the evidence taken into account by the Chamber in its decision-making. The Legal Representative has no legal basis to dispute the Chamber's right to expect P-280 to have a good knowledge of Zumbe – which he sketched and which he claimed had an airport – after its evaluation of his testimony in its entirety.
60. The summary of P-280's testimony regarding the presence of an airport in Zumbe presented by the Legal Representative of the main group of victims is completely biased. The truth is that P-280 spoke about the existence of an airport in Zumbe when he was describing the military training he purportedly received. He stated before the judges that the first time, everyone was taken out and ordered to run from Lagura to Zumbe airport.⁷¹ According to this testimony, P-280 did indeed reach Zumbe airport. He even added that Zumbe airport was not far if the road to Bunia was taken.⁷² However, the truth is that there was no airport in Zumbe. P-280 lied. This inevitably contributes to reducing his credibility. P-280's lie was evidenced by document EVD-D03-00023, a sketch he drew during his testimony and upon which he indicated, notably at point 1, the location of Zumbe airport.⁷³ This sketch is referenced by the Legal Representative of the main group of victims.
61. P-280 therefore further lied to the Chamber during his testimony regarding his alleged participation in the attack on Bogoro on 24 February 2003, when he stated that: "[TRANSLATION] We left Lagura at 10 p.m. Before our departure from Lagura, a group from

⁷⁰ Observations of the Legal Representative of the main group of victims, para. 139. Final sentence italicised by the Defence.

⁷¹ P-280-T-155-FRA, p. 32, lines 21-23.

⁷² P-280-T-162-FRA, p. 8, lines 9-15.

⁷³ EVD-D03-00023.

Zumbe and another group from Zumbe airport joined our group in Lagura. Commander Lobho was the leader of my group. I do not recall the names of the leaders of the groups from Zumbe and Zumbe airport. Each group consisted of approximately 12 militia members. In my group, the majority were adults. The three groups headed towards Bogoro.”⁷⁴

62. In its comprehensive evaluation of P-280’s credibility, the Chamber could not ignore such a significant factor as the sketch drawn by this witness, falsely confirming the existence of an airport in Zumbe.
63. Hence, during the judicial site visit, the Chamber itself proceeded to verify this information directly and determined that it appeared difficult to confirm the existence of an airport at the location indicated by P-280. Moreover, doubts regarding the presence of the church persisted.⁷⁵
64. Strangely, in its deliberately biased analysis, the Legal Representative of the main group of victims goes as far as disputing the Chamber’s power to rely on the judicial site visit report on the basis that this report was not assigned an EVD number. The Legal Representative of the main group of victims’ states: “[TRANSLATION] In this regard, the Chamber’s personal findings during the site visit do not amount to evidence. The site visit report was not admitted into evidence. The Chamber had in fact considered that the site visit report was part of *all of the proceedings in accordance with article 74 of the Rome Statute, as are, for example, transcripts of hearings*. Accordingly, the Chamber did not assign it an EVD number.”⁷⁶
65. The Legal Representative of the main group of victims’ assertion is completely illogical. The Chamber’s objective when officiating at proceedings is the pursuit of the truth. It organised the examination of witnesses, the proceedings, the discussions of the evidence presented by the parties with a view to ascertaining the truth. The judicial site visit formed part of the pursuit of the truth. In order to clarify certain issues and verify certain allegations and testimonies, the Chamber decided to conduct a site visit to the *locus in quo* in a first-hand search for the truth. It is therefore ludicrous to ask the Chamber not to take into account its own findings during the site visit in its evaluation of the testimonies. If we are to adopt the Legal Representative’s arguments, what would have been the purpose of the site visit?
66. Pursuant to article 74(2) of the Statute, “[t]he Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings.” Thus, if as pointed out by the Legal Representative of the main group of victims, the site visit report is part of the entire proceedings in accordance with article 74 of the Rome Statute, as are, for example, the

⁷⁴ P-280-T-161-FRA, p. 48, lines 2-7.

⁷⁵ ICC-01/04-01/07-3234-Conf-Anx-para. 32.

⁷⁶ The Legal Representative of the main group of victims Brief, para. 141. Passage italicised by the Legal Representative of the main group of victims.

transcripts of the hearings; then it is clearly within the Chamber's discretion to refer to the report in its evaluation of the evidence. Just as the Chamber found in the transcripts of hearings the testimonies and the discussions of the EVD documents tendered into the record, it also referred to the judicial site visit report to reflect its own findings during the site visit, in the presence of all the parties and participants who had the opportunity to submit their observations on the site visit report, in all fairness and in keeping with the adversarial principle.

67. The Defence submits that the Chamber's findings during the judicial site visit are judicial findings. They are recorded in a report which is authoritative. A question arises at this juncture. Does the Legal Representative of the main group of victims maintain that the Chamber did not note the absence of an airport at Zumbe? Does he maintain that the report on the site visit to Ituri in the DRC is false or contains fallacies? If this is the Legal Representative's position, he should make it clear. If so, why did he not dispute the contents of the report when the Chamber gave all the parties and the participants the opportunity to submit their observations thereon?
68. The Legal Representative of the main group of victims maintains at paragraph 142 of his observations that no other witness was heard regarding the existence or non-existence of an airport in Zumbe. This assertion is wholly false. In fact, another Prosecution witness, P-12, was examined on this issue. He acknowledged that there was no airport in Zumbe. P-12 drew a sketch, marked EVD-D03-00068, showing the positions of the different airports in Ituri. In response to a question put to him, he clearly responded that there was no airport in Zumbe.⁷⁷
69. In its evaluation of P-280's testimony, the Chamber was duty-bound to take into consideration all the evidence, including its first-hand findings of the site visit. The Chamber's analysis is comprehensive, impartial, independent, equitable and fair, as opposed to that of the Legal Representative of the main group of victims in paragraphs 144 to 151 of his observations, which is completely and deliberately biased. Assuming the role of second prosecutor, he skews the analysis in order to redeem P-280 at all costs, but in vain. The Legal Representative is not empowered to substitute his own assessment for that of the Chamber, which was lawful, impartial, equitable and just.
70. It is not surprising that due to his biased approach, the Legal Representative of the main group of victims attacks the credibility of Defence Witness D3-340, [REDACTED], whose testimony was objectively analysed by the Chamber and considered in light of P-280's testimony. Under heading [TRANSLATION] (2) *Errors in the evaluation of the testimony of P-280's father (D3-340)*, the Legal Representative of the main group of victims fails to

⁷⁷ P-12-T-203-FRA, p. 34-37.

demonstrate the factual or legal errors allegedly committed by the Chamber. On the contrary, he embarks upon his own evaluation, in paragraphs 152 to 156 of his observations, to conclude that D3-340 lacks credibility.

71. It is worth considering for a moment the beginning of his reasons at paragraphs 152 and 153 of his observations where he writes:

152. [TRANSLATION] P-280's father (D3-340) was called by both Defence teams jointly to contradict his son's testimony regarding his presence within the ranks of the Lagura militia. In the Chamber's opinion, D3-340's account, "though of relative probative value, further **fuelled** its doubts as to his capacity to testify to the events in this case".

153. The Chamber does not advance a comprehensive evaluation of the witness's credibility in its judgment [...]."⁷⁸

72. The insinuation of the Legal Representative of the main group of victims that the Chamber did not comprehensively evaluate D3-340's credibility is unfounded. If this was the case, how could it have arrived at the conclusion quoted by the Legal Representative of the main group of victims at paragraph 152 that D3-340's account was "of relative probative value"?

73. At paragraphs 214 to 217, the Chamber sets forth the essential elements of D3-340's testimony, which it places in perspective to evaluate P-280's credibility. This is in addition to the information highlighted in paragraphs 193 to 213 of the Judgment, where it intrinsically and comprehensively analyses P-280's testimony itself. After the lengthy and judicious analysis, the Chamber arrived at the conclusion set out in paragraphs 218 and 219 of the Judgment:

218. As previously noted, P-280's account of his presence within the ranks of the Zumbe combatants at the time of the attack on Bogoro is excessively imprecise and contradictory. What is more, the Chamber cannot exclude the possibility that the witness transposed what he knew of Aveba to flesh out his description of Zumbe. In addition, the Chamber notes that D03-340's account, though of relative probative value, further fuelled its doubts as to his capacity to testify to the events in this case. Finally, taken as a whole, the testimony of P-280 implicitly confirms D03-340's testimony that P-280 fled Dele for Aveba and never visited Bedu-Ezekere *groupe*ment.

219. For all these reasons, the Chamber finds that it is unable to rely on the testimony of P-280 in this case.

74. From the analysis of paragraph 218, it is clear that the testimony of D03-340 that was taken into account by the Chamber in the evaluation of P-280's testimony was just an "extra". D-03-340's testimony did not in and of itself contribute to the doubt harboured by the Chamber as to P-280's capacity to testify to the events in the case. These accounts only **fuelled** these doubts. "In **addition**, the Chamber notes that D03-340's account, though of relative probative value, further **fuelled** its doubts as to his capacity to testify to the events in this case." This is in "addition" to the **imprecisions** and **contradictions** the Chamber noted in P-280's testimony regarding his presence within the ranks of the Zumbe combatants at the time of the attack on Bogoro. To this *extra* is added the Chamber's consideration of the

⁷⁸ Passage italicised and emboldened by the Defence.

whole of P-280's testimony which "implicitly confirms D03-340's testimony that P-280 fled Dele for Aveba and never visited Bedu-Ezekere *groupement*."

75. This evidence that establishes reasonable doubt should be taken in accumulation with the other evidence identified by the Chamber in other paragraphs of the Judgment. Thus, for example, in its analysis of P-279's testimony the Chamber wrote at paragraph 181:

It has been established that there were good neighbourly relations between the families of D03-236 and D03-340, who were both closely related to P279 and P-280 respectively. However, the Chamber was surprised that when P280's name was mentioned to him, P-279 stated repeatedly that he did not remember that name and did not recognise P-280 in a photograph. This is all the more surprising as P-280 claimed to have also been a combatant in the Bedu-Ezekere militia. The Chamber was all the more surprised to note that P-280 also claimed to have experienced a solitary childhood, without ever spontaneously mentioning P-279, whilst Witnesses D03-340 and D03-236 claimed to have seen an intermediary from the Office of the Prosecutor having a conversation with both P-279 and P-280.

76. The Chamber is referring to Intermediary 143.⁷⁹ The Chamber could not have excluded this evidence in the comprehensive evaluation of P-280's credibility. The Defence recalls that in this regard, paragraph 1361 of the operative provision of the *Lubanga* Judgment states:

1361. The Chamber communicates to the Prosecutor, pursuant to Article 70 of the Statute and Rule 165 of the Rules, its findings that P-0143, P-0316 and P-0321 may have persuaded, encouraged, or assisted witnesses to give false evidence.

77. **The Legal Representative of the child-soldier victims has taken a similar approach to that of his colleague, the Legal Representative of the main group of victims.** It is clear upon reading paragraph 25 of his observations that he intends to analyse the Chamber's evaluation of the credibility of Prosecution Witnesses P-279, P-280, P-250 and P-28 for the purposes of challenging it. All his arguments are therefore in pursuance of this objective, instead of clearly demonstrating the Chamber's alleged legal, factual or procedural errors.

78. Contrary to the insinuations of the Legal Representative of child-soldier victims at paragraphs 26 to 28 of his observations, which support the Prosecutor's unfounded arguments, the Chamber based its evaluation of the testimonies of Witnesses P-279, P-280, P-250 and P-28 on its analysis of the entirety of the incriminatory and exculpatory evidence on the record. To reiterate, the Legal Representatives and the Prosecution would have preferred the Chamber to consider only the testimonies of Prosecution witnesses and to disregard the testimonies of Defence witnesses and exculpatory evidence. They are blatantly biased.

79. The observations of the Legal Representative of child-soldier victims at paragraphs 30 to 34 clearly highlight the Prosecution's groundless approach, supported by both Legal Representatives, which consists not in demonstrating any purported factual or legal errors of the Chamber, but in disputing the Chamber's evaluation of the evidence, preferring their own evaluation.

⁷⁹ *Ngudjolo* Judgment, footnote 406.

80. At paragraph 36, the Legal Representative of child-soldier victims makes an assumption which reveals his reasoning:

36. [TRANSLATION] The Legal Representative submits that if the Chamber had carried out a proper evaluation of the evidence, it would have arrived at a different finding regarding P-279 and P-280's credibility. One of the consequences would therefore have necessarily been a finding by the Chamber that there was a nexus between the child soldiers present during the attack on Bogoro and Mathieu Ngudjolo because of his authority over the Lendu combatants of Bedu-Ezekere, the demonstration of the existence of training and parades under Mathieu Ngudjolo's instructions, as well as the presence of child soldiers in his escort.

It is therefore clear that in essence, the approach of the Legal Representative of child soldiers consists in deprecating the Chamber's evaluation of the evidence. He would have preferred that the Chamber's evaluation be consonant with his wishes and culminate in a finding that P-279 and P-280 are credible.

81. At paragraph 39, the Legal Representative of child-soldier victims summarises the Chamber's finding following its analysis of **P-279's** testimony. It is not evident to the Defence what error the Chamber committed by finding thus. This is the Chamber's evaluation – a well-grounded one – of this witness's credibility. That the Legal Representatives and the Prosecution are dissatisfied with this evaluation does not mean that the Chamber committed any factual or legal error. Here is the Chamber's finding in its entirety:

189. Witness P-279's assertions regarding his presence within the ranks of the Zombe combatants at the time of the attack on Bogoro are, as previously noted, overly inaccurate and contradictory. Furthermore, his attitude of denial regarding his precise age and his relationship with P-280 affects the general credibility of his testimony. What is more, the Chamber notes that the testimony of D03-236, despite its relative probative value, further contributes to the doubts harboured by the Chamber as to his capacity to testify to the events in the case.

190. For all these reasons, the Chamber finds that it is not able to rely on the testimony of P-279 in this case.

82. The three issues pinpointed in this finding are sufficiently explained in the Chamber's reasons set out at paragraphs 160 to 188 of the Judgment:

- The impressions and contradictions of P-279's account regarding his alleged presence within the ranks of the Zombe combatants at the time of the attack on Bogoro are explained at paragraphs 163 and 165 to 176 of the Judgment;
- P-279's attitude of denial regarding his age and relationship with P-280 is highlighted at paragraphs 162 and 177 to 183 of the Judgment;
- D3-236's accounts which fuelled the Chamber's doubts regarding P 279's capacity to testify to the events in the case are set out at paragraphs 162, 181 and 184 to 188 of the Judgment.

83. Therefore, contrary to the Legal Representatives' allegations, the Chamber's finding is properly and sufficiently reasoned. Not only did the Chamber properly analyse P-279's testimony in its entirety in order to identify inconsistencies, inaccuracies and contradictions in addition to detecting denials, but it also weighed it against other evidence on the record, specifically the testimony of D03-236, [REDACTED], in order to correctly evaluate evaluating P-279's testimony. D03-236's account merely complements the intrinsic elements of P-279's testimony which contribute to the reasonable doubt which casts a pall over his capacity to testify to the events in the case.

84. All these elements identified by the Chamber in its finding are *bona fide* and on the record. They were not invented by the Chamber. Thus, upon analysis of paragraphs 41 and 42 of the observations of the Legal Representative of child-soldier victims regarding the contradictions in P-279's alleged functions, it is apparent that the Legal Representative does not demonstrate that the Chamber erred factually or that it omitted parts of P-279's account. The Legal Representative of child-soldier victims rather provides, at paragraph 42, his own explanation of the inconsistencies in P-279's testimony and would have liked the Chamber to have reasoned as he did. He writes:

41. [TRANSLATION] The Chamber indicated that the witness was contradictory because he claimed, in a previous statement, to have worked as a bodyguard for Boba-Boba, whereas during the hearing he claimed to have worked as a bodyguard for his wife.

42. The Legal Representative notes that the Chamber did not take into account the fact that P-279 was unwavering in his account throughout his testimony, despite being examined and cross-examined on this issue numerous times. The contradiction with the previous statement could be explained by the fact that the witness having earned Boba-Boba's trust, as he stated, was subsequently appointed by Boba-Boba as a bodyguard to his wife. He could therefore be Boba-Boba's guard, assigned to guard Boba-Boba's wife. This interpretation makes it possible to reconcile P-279's accounts: it makes the contents of his testimony logical.

The Defence wishes to emphasise that this is not the witness's explanation but the interpretation of the Legal Representative of child-soldier victims, who is chagrined that the Chamber did not reason like him.

85. At paragraph 43, referring to P-279's claim regarding his alleged presence near the market when he saw Katanga and Ngudjolo enter a school, the Legal Representative of child-soldier victims then notes, for the purposes of criticism, the Chamber's conclusion that this statement is not credible in that the market and the camp were too far apart. The Legal Representative of child-soldier victims summarises paragraph 176 of the Judgment which clearly states:

176. Finally, there also appears to be an issue with the statements offered by P-279 to the effect that he had seen the two Accused enter a school located near the military camp in order to hold a meeting. Indeed, the witness claimed that he was near the market in Bogoro when the Accused entered the school, yet on a visit to the site, the Chamber was able to note that the camp and the market are too far apart for the witness to have been able to see the Accused enter Bogoro Institute. In its closing statement, however, the Prosecution contended that P-279 was in fact referring to a secondary [UPC] position located at Kavali School, and that this school building was indeed near the market. The Chamber is of the opinion that it was for the Prosecution to

clarify with the witness during his testimony whether he was referring to Bogoro Institute or Kavali School. The Chamber considers that the explanations provided by the Prosecution on the subject are but one interpretation, amongst others, of the witness's testimony.

86. This is the Chamber's evaluation; it is well-reasoned and well-grounded. The Chamber itself conducted a site visit and noted that the market and the camp are too far apart. This is the truth. The Legal Representative of child-soldier victims, assuming the role of second Prosecutor, unsuccessfully attempts to refute this truth, which Chamber actually observed during the site visit, by propounding an ungrounded hypothesis.
87. At paragraph 45 of his observations, the Legal Representative of child-soldier victims raises the existence of a discussion as to whether the witness was referring to the Bogoro Institute or Kavali School. If this was ever in doubt, why did the Prosecution or the Legal Representative not move to provide clarification during the trial? If such an uncertainty persists, should the Prosecution benefit from it? Which principle or legal provisions would be applicable?
88. With respect to the contradictions identified by the Chamber regarding P-279's testimony regarding his presence within the ranks of the militia, the Legal Representative of child-soldier victims claims that the Chamber "[TRANSLATION] attached significance to the fact that the witness's statements were confused and inconsistent regarding the various stages of his experience."⁸⁰ At footnote 22, he quotes paragraphs 172 and 174 of the Judgment, thus implicitly acknowledging that the Chamber provided reasons for its finding. The Legal Representative of child-soldier victims then states that "[TRANSLATION] it is regrettable that the Chamber failed appropriately to take into account the witness's specific vulnerability and the fact that his experience necessarily risks impacting his account of the events as well as his perception of time."⁸¹ The question here is: On what grounds does the Legal Representative of child-soldier victims take such a view? The Defence underscores that the Chamber conducted the entire proceedings in absolute fairness and regularly sought VWU's intervention whenever warranted by the witness's situation. Hence, on what expertise does the Legal Representative of child-soldier victims rely to assert that P-279 was especially vulnerable and that his experience necessarily risked impacting his account of the events as well as his perception of time? These are unwarranted assumptions and unfounded speculation.
89. Having made his assumptions, the Legal Representative of child-soldier victims goes on to criticise the Chamber's evaluation of P-279's credibility,⁸² then provides his own

⁸⁰ Observations of the Legal Representative of child-soldier victims, para. 47.

⁸¹ *Idem*, para. 47.

⁸² *Idem*, paras. 49-50.

interpretation of P-279's testimony regarding his age.⁸³ He subsequently provides his own personal evaluation of the testimonies of D03-236 and D03-340.⁸⁴ Rejecting the Chamber's evaluation of these witnesses, the Legal Representative of child-soldier victims provides his own.⁸⁵

90. The Legal Representative of child-soldier victims follows the same approach by rejecting the Chamber's evaluation of P-280's testimony and proposing his own.⁸⁶ In a nutshell, he submits that the Chamber should have reasoned like him in finding P-280 credible.
91. However, the Legal Representative of child-soldier victims took a different approach in regard to Defence Witness D03-240. He criticised the Chamber's evaluation of this witness's testimony and, having proposed his own, argued that the Chamber should have reasoned like him to find that D03-340 was not credible.⁸⁷
92. With great blitheness, seeking to juxtapose P-280's testimony regarding his account of the flight to Aveba with D03-340's testimony, the Legal Representative of child-soldier victims maintains that the Chamber's reasoning is "erroneous" and based on "suppositions", as opposed to factual findings.⁸⁸ As demonstrated *supra*⁸⁹ by the Defence, the Chamber's conclusion set out at paragraph 218 of the Judgment is based on the factual findings outlined in its reasoning. It should be recalled that D03-340, [REDACTED], testified **publicly** before the Chamber from 20 to 24 May 2010, *inter alia* regarding his stay in Dele and Aveba, the date of birth, the disappearance, relocation and testimony of P-280 before the ICC, the role played by Prosecution Intermediary P-143, and regarding P-279 and [REDACTED]. In his testimony, D03-340 especially confirmed that P-280 was with him in Aveba during the entire material time;⁹⁰ that he was 16 years old at the time;⁹¹ that he believed that P-279 and P-280 were almost of the same age;⁹² that P-280 had attended school but could not continue his education after the family was forced to flee the war;⁹³ that [REDACTED], P-280, was never a member of the Aveba militia;⁹⁴ that [REDACTED], P-280, was never a member of any other militia;⁹⁵ that he lived with [REDACTED] P-280 throughout the material time and that P-280 never said that

⁸³ *Idem*, para. 52.

⁸⁴ *Idem*, para. 56.

⁸⁵ *Idem*, paras. 57-61.

⁸⁶ *Idem*, paras. 63-71.

⁸⁷ Observations of the Legal Representative of child-soldier victims, paras. 75-78.

⁸⁸ *Idem*, para. 77.

⁸⁹ See our arguments at paras. 69-74.

⁹⁰ D03-340-T-264-FRA, p. 35, line 1.

⁹¹ D03-340-T-264-FRA, p. 35, line 3.

⁹² D03-340-T-266-FRA, p. 8, line 12.

⁹³ D03-340-T-264-FRA, p. 35, lines 5-6.

⁹⁴ D03-340-T-264-FRA, p. 35, line 9.

⁹⁵ D03-340-T-264-FRA, p. 30, line 17.

he had participated in the battles at Bogoro, Mandro or Kasenyi;⁹⁶ that he knew P-279, [REDACTED] D03-236;⁹⁷ and confirmed that P-279 was in Aveba with the rest of the family;⁹⁸ that he saw P-279 and P-280 with P-143;⁹⁹ that afterwards, P-143 came to see D03-340 following the disappearance of [REDACTED] to inform him that [REDACTED] had gone to study;¹⁰⁰ that P-143 informed him that [REDACTED] would be in position to assist the community upon his return;¹⁰¹ that he acknowledged saying that he was afraid of [REDACTED] cooperation with the ICC;¹⁰² and that this fear stemmed from the fact that [REDACTED] had lied.¹⁰³

93. These are aspects of D03-340's public testimony which are on the record. The Chamber could not ignore them in its evaluation of P-280's credibility. It is therefore completely false to assert that the Chamber's reasons set forth *in toto* at paragraph 281 of the Judgment are based on "suppositions" and not on factual findings.
94. The Defence recalls that in light of D03-340's truthful public testimony before the Chamber, the Prosecution was compelled to decide, as it had done with P-279, that it would no longer rely on the testimony of P-280 as a child soldier.¹⁰⁴ Even though the Prosecution tried to deny it, this is irrefutable acknowledgement on its part of the lies told by P-280 and P-279 regarding their age, lies which completely discredit these two witnesses. In regard to P-280, in addition to the lie about his age, consideration should be equally given to the false claim regarding the existence of an airport in Zombe.¹⁰⁵
95. Both P-280 and P-279's lies were motivated by lucre; they wanted to benefit from the opportunity offered to witnesses, to study at the expense of their benefactor and, to take full advantage of the promise to that effect Intermediary P-143 made to them.
96. At paragraph 78 of his observations, the Legal Representative of child-soldier victims' lays his wishes bare, criticising the Chamber for seeking evidence which raises doubts as to the credibility of Prosecution witnesses rather than seeking and accepting the evidence which proves the Prosecution case. Clearly, the Legal Representative of child-soldier victims would have preferred that the Chamber disregard the exculpatory evidence and only take into account incriminatory evidence concordant with the Prosecution case. The Legal Representative of child-soldier victims forgets that the judges must be completely impartial,

⁹⁶ D03-340-T-264-FRA, p. 30, lines 23-24, line 26.

⁹⁷ D03-340-T-264-FRA, p. 39, line 17, line 20.

⁹⁸ D03-340-T-264-FRA, p. 40, line 11.

⁹⁹ D03-340-T-264-FRA, p. 42, line 18.

¹⁰⁰ D03-340-T-264-FRA, p. 43, lines 1-2.

¹⁰¹ D03-340-T-265-FRA, p. 30, line 16.

¹⁰² D03-340-T-266-FRA, p. 3, line 11.

¹⁰³ D03-340-T-266-FRA, p. 4, line 7.

¹⁰⁴ ICC-01/04-01/07-3251, Conf, para. 781.

¹⁰⁵ ICC-01/04-01/07-3251, Conf, para. 784.

equitable and fair during their evaluation, in their consideration all the evidence on the record, both incriminating and exculpatory. In this instance, to counter to the Legal Representative of child-soldier victims' false assertion, it is worth noting that the Chamber did not seek out evidence that would raise doubts as to the credibility of witnesses; it examined and analysed all such evidence during its comprehensive evaluation of the evidence. The Chamber could not disregard the evidence as do the Prosecution and the Legal Representatives; the evidence is on the record and was discussed fairly and adversarially during the trial.

97. The Legal Representative of child-soldier victims follows the same sterile approach in relation to P-250. He summarises in four lines at paragraph 79 of his observations, the Chamber's findings ensuing from its evaluation of P-250's credibility at paragraphs 157 to 159 of the Judgment, findings drawn from the comprehensive analysis of P-250's testimony which was juxtaposed with other documentary and testimonial evidence on the record. This analysis, which forms the Chamber's reasoning, is set out at paragraphs 127 to 156 of the Judgment.
98. There is nothing in the criticism of the Legal Representative of child-soldier victims which demonstrates that the Chamber erred factually or legally. Instead, he considers the Chamber's interpretation of the witness's account, an interpretation he deems erroneous.¹⁰⁶ He then provides, at paragraphs 85 to 89, his own interpretation of the witness's account, taking into consideration only incriminating evidence. He would therefore have preferred the Chamber to adopt his interpretation and declare P-250 credible. However, the Chamber cannot adopt such an approach, which is totally partial and hence unlawful, since it advocates consideration of Prosecution evidence to the complete exclusion of exculpatory evidence, in flagrant violation of the provisions of article 74(2) of the Statute.
99. The Legal Representative of child-soldier victims' advocates this partial and unlawful approach at paragraphs 92 to 110 of his observations. He considers lacking credibility, all the exculpatory evidence which was analysed and considered by the Chamber in its comprehensive evaluation of the evidence, *inter alia* that pertaining to P-250's credibility. Assuming the role of second prosecutor, the Legal Representative of child-soldier victims refers to the Prosecution Closing Brief on this issue, thereby demonstrating his lack of partiality and neutrality. The evidence at issue is: P-250's school records establishing that he was a student in Walendu-Bindi *groupement* at the material time; the testimony of D03-100, [REDACTED]; the testimonies of Ngudjolo Defence witnesses, D03-66 and D03-55 and testimonies of Katanga Defence witnesses, D02-160 and D02-161.

¹⁰⁶ Observations of the Legal Representative of child-soldier victims, para. 83.

100. The insinuation of the Legal Representative of child-soldier victims at paragraph 95 of his observations regarding these Defence witnesses is completely erroneous. During his examination-in-chief, D03-100 spoke spontaneously about the existence of tension between his family and certain members of Ngudjolo's family. This spontaneity demonstrated that D03-100 honoured his oath to tell the Chamber the truth and nothing but the truth. Thus, the Chamber judiciously put only one final question to D03-100: whether D03-100 had indeed told the whole truth. Without hesitation and with total conviction, D03-100 responded clearly: yes.¹⁰⁷

101. The Defence submits that the tension between certain members of Ngudjolo's family and D03-100's family referred to by the Legal Representative, in support of the Prosecution, is understandable because by virtue of a local sociocultural specificity, it is a grave breach for an individual to lie to a court in order falsely to accuse and unfairly tarnish a person's reputation and thus, indirectly, that of the person's family. Accordingly, the fact that P-250 was lured by lucre to make false accusations against Ngudjolo before the ICC, which is justifiably considered by the Congolese as the highest judicial institution in the world,¹⁰⁸ could have only antagonised certain members of Ngudjolo's family.

102. The Chamber took into account the tension that D03-100 spontaneously mentioned during his examination-in-chief. The Defence underscores that the existence of tension does not impugn D03-100's sincerity or the truthfulness of his testimony. For example:

- 1. This tension did not affect D03-100's testimony to the Chamber regarding the real age of [REDACTED] P-250, whereas P-250 had lied about his age in order to claim falsely that he was a child soldier. The documentary evidence corroborated D03-100's testimony in this regard.¹⁰⁹
- 2. Long before his parents knew that he had been called as a Prosecution witness, P-250 had lied to the Prosecution investigators by maintaining that his parents were deceased. This manifest lie is unrelated to the tension to which the Prosecution – supported by the Legal Representatives – is seeking to cleave.
- 3. The tension to which the Prosecution and the Legal Representatives are trying to cleave does not affect D03-100's testimony regarding P-250's school attendance. D03-100 told the Chamber the whole truth, that P-250 was in no wise a combatant at the material time, but was instead a regular student in Kagaba. There is authentic documentary evidence corroborating D03-100's testimony on this issue: P-250's school

¹⁰⁷ D03-100-T-310-FRA, p. 56, lines 7-12.

¹⁰⁸ D03-100-T-310-FRA, p. 46, lines 9-15, lines 25-28.

¹⁰⁹ EVD-D03-00004; EVD-D03-00005-00009.

records for the 1998-1999 to 2003-2004 academic years.¹¹⁰ The school reports, which P-250 publicly acknowledged were his, show clearly that he attended school regularly. He attended all the scheduled classes in each school year and there are no absences shown on his reports. It is therefore clear that P-250 lied to the Chamber when he stated that he was a combatant in Zombe. He was never in Zombe at the material time and was never a combatant.

- 4. The tension referred to by the Prosecution and Legal Representatives does not explain P-250's lie regarding the FNI's presence in Zombe in February 2003, whereas the FNI was non-existent in Zombe at the time. The Prosecutor eventually acknowledged this truth.

103. The Legal Representative of child-soldier victims claims not to subscribe to the Chamber's interpretation of P-250's account of his conversation with P-28 regarding his testimony. The Legal Representative mounts a defence of Prosecution Witness P-250 to the extent of making inferences regarding certain aspects of his account at paragraph 98 of his observations, stating:

98. [TRANSLATION] The Chamber finds fault with P-250 for not explicitly denying having discussed his testimony with P-28. **The Legal Representative does not subscribe to the Chamber's interpretation of P-250's account on this issue.** The witness responded honestly to the Defence for Germain Katanga that P-28 was someone who lived in his neighbourhood in Ituri: **it can be inferred that the witness wished** to express the fact that their testimonies were analogous on a certain number of issues. His failure to deny unreservedly having discussed his testimony with P-28 is not an indicator of any collusion.¹¹¹

It is thus apparent that the Legal Representative of child-soldier victims fails to demonstrate that the Chamber distorted either the facts or the witness's account, but rather disparages the Chamber's interpretation. The Defence reiterates that the fact that the Legal Representative advances his own assumptions of the witness testimony and does not subscribe to the Chamber's interpretation does not mean the Chamber erred. The Legal Representative of child-soldier victims does not state the legal provision giving precedence to his assumptions over the Chamber's evaluation.

104. The Legal Representative of child-soldier victims adopts a similarly futile approach in relation to Prosecution Witness P-28. He summarises, at paragraphs 102 and 103 of his observations the Chamber's evaluation, which clearly demonstrates that the Chamber fairly adjudged P-28 credible on certain issues and not credible on other issues. This proves that the Chamber carried out a comprehensive evaluation of P-28's credibility by taking into account

¹¹⁰ EVD-D03-00005-00009.

¹¹¹ Emboldened by the Defence.

both incriminatory and exculpatory evidence and by juxtaposing P-28's testimony with other testimonies.

105. Criticising this evaluation, the Legal Representative of child-soldier victims deems that the discrepancies pointed out by the Chamber in P-28's testimony "[TRANSLATION] appear unproven and incidental given the witness's very detailed account of the attack and its preparation."¹¹² Endorsing the Prosecution's Brief on Appeal, he decries the Chamber's evaluation, defends the witness and evaluates the witness's testimony which he considers to be detailed.¹¹³ Conversely, he criticises the Chamber for attaching weight to the testimonies of Defence witnesses called by the Defence for Germain Katanga, notably D02-134, D02-136, D02-501, D02-129 and D02-161.¹¹⁴

106. Once again, the Legal Representative of child-soldier victims fails to demonstrate that the Chamber distorted the witness's testimony. He rather attacks the Chamber's evaluation and conducts his own without reference to the legal texts which so empower him and give precedence to the Legal Representative's evaluation over the Chamber's.

107. In this unsubstantiated approach, the Legal Representative of child-soldier victims has no qualms about propagating falsehoods, as is apparent from the sub-heading of his observations at page 41 entitled: "4. [TRANSLATION] Failure to consider the situation of D03-100, D03-236, D03-340 and D02-134 and the pressure exerted on D03-100 by Mathieu Ngudjolo in examining their credibility and that of P-250, P-279, P-280 and P-28." This title contains two flagrant falsehoods.

108. **Firstly, it is absolutely false to assert that the Chamber did not take into consideration the situation of D03-100, D03-236, D03-340 and D02-134 in its evaluation.** It suffices to read the Chamber's conclusions and reasons to appreciate that the Chamber took this factor into account.

– The Chamber juxtaposed P-250's testimony with [REDACTED], D03-100, at paragraphs 148 to 153 of the Judgment. At paragraph 151, the Chamber clearly and expressly considered the "conflict between the two families" which "D03-100 himself spontaneously volunteered."¹¹⁵ In reaching its conclusion, the Chamber did not only consider D03-100's testimony but also considered P-250's imprecise, contradictory and peculiar testimony, his school reports as well as the testimony of four other witnesses (D03-66, D03-55, D02-160 and D02-161).¹¹⁶

¹¹² Observations of the Legal Representative of child-soldier victims, para. 106.

¹¹³ *Idem*, paras. 107-109.

¹¹⁴ *Idem*, paras. 110-118.

¹¹⁵ *Judgment*, para. 151.

¹¹⁶ *Judgment*, paras. 152, 157 and 158.

– The Chamber also analysed P-279’s testimony in respect of that of his father, D03-236,¹¹⁷ and took D03-236’s situation into consideration. Thus, the Chamber concluded that D03-236’s account has “relative probative value” and further fuelled “doubts harboured by the Chamber as to [P-279’s] capacity to testify to the events in the case.” In making this finding regarding P-279’s testimony, the Chamber noted P-279’s overly inaccurate and contradictory assertions, his attitude of denial regarding his age and his relationship with P-280 “in addition” to D03-236’s testimony.¹¹⁸

– Following the same intellectual approach, the Chamber assessed P-280’s testimony vis-à-vis that of his father’s, D03-340.¹¹⁹ At paragraph 216, the Chamber noted the Prosecution argument¹²⁰ which expressly referred to “pressure he had undergone from his community to provide exonerating testimony.” In view of the close ties between D03-340 and D03-236 and “the attendant risk of collusion, it is difficult for the Chamber to attach a high probative value to these two testimonies.”¹²¹ Accordingly, D03-340’s testimony could only be considered an “addition” to P-280’s overly imprecise and contradictory testimony – which descended into lies as evidenced by his claim of the existence of an airport in Zumbe. D03-340’s account, to which the Chamber did not attach much probative value, only fuelled its doubts as to [P-280’s] capacity to testify to the events in this case.¹²² It is therefore logical to ask in passing why the Prosecution, which presented P-279 and P-280 as child soldiers, made no effort to call their fathers as witnesses. This omission denotes the inchoate and partial nature of a Prosecution investigation limited to incriminating evidence. Similarly, the Prosecution made no attempt to verify P-250’s claim that both his parents, mother and father [REDACTED], were already deceased. It was the Defence who took the initiative to call the [REDACTED] – D03-100, D03-236 and D03-340 – before the Chamber to divulge the truth.

– Finally, the Chamber’s analysis of P-28’s account was not only limited to his entire¹²³ testimony, but was also juxtaposed with other testimony, including D02-134’s testimony which is corroborated by five Defence witnesses: D02-129, D02-161, D02-136, D02-259 and D02-501.¹²⁴ At paragraph 243, before summing D02-134’s pertinent testimony, the Chamber “notes, however, that D02-134 voiced his concern as to the possible deterioration of relations between the family of the Accused and his own because of the incriminating testimony of P-

¹¹⁷ *Judgment*, paras. 184-190.

¹¹⁸ *Judgment*, paras. 189 and 190.

¹¹⁹ *Judgment*, paras. 241-219.

¹²⁰ The Chamber quoted, at footnote 470, para. 783 of the Prosecution Closing Brief.

¹²¹ *Judgment*, para. 217.

¹²² *Judgment*, paras. 218 and 219.

¹²³ *Judgment*, paras. 220 to 241.

¹²⁴ *Judgment*, paras. 244.

28. Such a statement inevitably leads the Chamber to view his testimony with caution.”¹²⁵

The Chamber took into account the close ties between these witnesses and Germain Katanga’s extended family.¹²⁶ In light of this analysis:

[T]he Chamber found that their accounts of P-28’s itinerary before arriving in Aveba were not similar. Thus, Witness D02-134 was able to state with precision that P-28 arrived in Aveba in February 2003. Witness D02-129, however, estimated a gap of one month between his own arrival in Aveba and P28’s arrival. Witness D02-136 said that P-28 had not yet arrived in Aveba by the time he himself left that location in December 2002. Given the range of points of view expressed, the Chamber does not consider itself able to accept the allegation of collusion.¹²⁷

These are the Chamber’s findings, based on its analysis of the evidence which resulted in the logical conclusion expounded in paragraphs 251 to 254 of the Judgment. In view of the findings, “the Chamber does not intend to take into consideration the testimony [of P-28] concerning Mathieu Ngudjolo’s participation in the attacks on Bogoro and Mandro, since it does not consider credible the witness’s statement that he was in the militia.”¹²⁸

It is there unjustifiable for the Legal Representative of child-soldier victims to assert that the Chamber did not take into account the situation of all the Defence witnesses D03-100, D03-236, D03-340 and D02-134.

109. **Secondly, it is also completely false to assert that Ngudjolo exerted pressure on D03-100.** This assertion is not based on any part of the evidence on the record and is therefore a new aspect introduced by the Legal Representative of child-soldier victims. Ngudjolo was in detention in The Hague and could not therefore exert any pressure over D03-100.

110. In fact, what the Legal Representative of child-soldier victims contends at paragraphs 119 to 121 is that only incriminatory evidence should be evaluated to the exclusion of exculpatory evidence, which he deems to lack credibility in its entirety. Thus, for example, Legal Representative of child-soldier victims’ assessment of D03-100’s testimony which he dismisses is totally partial.¹²⁹ At paragraph 121 of his observations, he merely quotes an excerpt of the Prosecutor’s cross-examination of D03-100. His analysis fails to take into account the following three factors:

1. It was D03-100 himself who, during his examination-in-chief, spontaneously mentioned the information regarding the tension triggered by P-250’s lies before the ICC against Mathieu Ngudjolo. In all fairness, impartiality and justice, the Chamber took into account D03-100’s spontaneity in telling the Chamber all he knew to duly determine his credibility.

¹²⁵ *Judgment*, paras. 243.

¹²⁶ *Judgment*, paras. 246-250.

¹²⁷ *Judgment*, paras. 250.

¹²⁸ *Judgment*, paras. 254.

¹²⁹ Observations of the Legal Representative of child-soldier victims, para. 121.

2. During his testimony, D03-100 emphasised that his son was exploited by a Prosecution intermediary who misled P-250 by telling him that he would be sent to study and his school fees would be paid. This enticed P-250 to tell gross and inconsistent lies, to the extent of stating that his parents were deceased, while both his parents were alive and distressed by his sudden disappearance. D03-100 expressed his grief to the Chamber and discussed the current implications of [REDACTED] situation. D03-100 said:

[TRANSLATION] In 2002 and 2003, [REDACTED] was a student. In 2004, he did not study for a year but resumed his studies in 2005. Unfortunately, today his life is ruined. He is no longer a normal child and I believe he has been killed intellectually. I would like you to help me in this regard because [REDACTED] is no longer normal; he has no awareness at all about his life and he roams aimlessly, this breaks my heart. I personally noticed in 2010 that he was in a terrible state and this persists to date. You must know that the white people who sought after [REDACTED] ruined him: **what they told him was untrue. I do not know whether they gave him money or something else.** These days, he no longer has any money. He is wandering around. When he returned from Kinshasa, he had clothes which he started distributing to his friends but he now only has one dirty outfit. Before coming to the Court, [REDACTED] asked me to buy [REDACTED] some clothes. I bought him a pair of trousers and a shirt. I'd say he's almost insane. The cannabis has destroyed him. It is the cannabis which controls him, which is affecting his mind. I have said nothing bad about [REDACTED]. I have held back from speaking ill of [REDACTED]. **I came here so that the white people who fooled [REDACTED] and the Prosecutor should know that he hurt me and he should acknowledge his fault.** He should also help [REDACTED] in his life.¹³⁰

3. The Chamber put a clear question to D03-100 to determine whether the tensions between the two families had any adverse effect on his testimony.¹³¹

111. The fact that the Legal Representative of child-soldier victims supports the Prosecution wholesale, ignoring D03-100's clear responses, exposes to the cold light of day the partial nature of his analysis. This analysis should, in no circumstances, prevail over the Chamber's assessment which is impartial, equitable, fair and consonant with the legal provisions, viz., article 74 of the ICC Statute.

112. The assertion of the Legal Representative of child-soldier victims' at paragraph 126 of his observations is completely erroneous. Ngudjolo never communicated P-250's name to unauthorised persons. Everything Ngudjolo did fell within the legal framework of the preparation of his defence. The Legal Representative of child-soldier victims is well aware that P-250 had informed the Prosecution's investigators that [REDACTED], were deceased. Therefore, the Legal Representative of child-soldier victims cannot blame Ngudjolo for lawfully locating D03-100, who was not a Prosecution witness, in the preparation of his defence.¹³²

¹³⁰ D03-100-T-310-FRA, p. 49, line 28, p. 50, line 12, p. 54, lines 4-24, p. 55, lines 17-21. Emboldened by the Defence.

¹³¹ See *supra*, para. 100.

¹³² ICC-01/04-01/07-1758-Conf-Exp, 12 January 2010, "*Requête relative aux deux témoins potentiels de la Défense.*"

113. This witness, D03-100, enabled the Chamber to learn the truth about the lies told by [REDACTED], P-250.¹³³
114. Confirming his role of second prosecutor, the Legal Representative of child-soldier victims merely refers to the Prosecution Brief regarding the alleged errors committed by the Chamber in its evaluation of P-317's credibility in respect of the alleged admissions,¹³⁴ already discussed *supra*.¹³⁵ He also echoes the Prosecution Brief in his criticism of the Chamber's evaluation, though well-grounded, of D02-176's credibility regarding the role allegedly played by Ngudjolo at the material time.¹³⁶ We have already responded to these arguments.¹³⁷
115. At paragraphs 133 to 140, the Legal Representative of child-soldier victims refers to and quotes certain excerpts of the testimonies of Victims V-2 and V-4. Firstly, it should be noted that the choice of excerpts is characteristic of the partiality which marks the Legal Representative's entire analysis. However, even if we confine ourselves to these excerpts, the flagrant falsehoods in the testimonies of these witness-victims should be noted. To quote just one example, V-4's claim that the attack on Bogoro in 2001 was carried out by Germain Katanga and Ngudjolo's forces is completely false.¹³⁸ The fact that Presiding Judge Cote sought, on behalf of the Chamber, clarification on this issue¹³⁹ is indubitably because the Chamber having found V-4's testimony implausible, wanted to give her the opportunity to correct or rectify the testimony. In fact, several items of evidence on the record established that in 2001, Ngudjolo was a student nurse in Bunia and had nothing to do with the attacks on Bogoro.
116. Furthermore, several items of evidence on the record also established that Ngudjolo had no involvement in the attack on Bogoro on 24 February 2003. These include, in particular, the testimonies of D03-88, D03-66, D03-55 and D03-44, as well as Katanga's testimony which resulted in the severance of charges. Katanga confirmed his contribution to the attack was non-essential and that Ngudjolo was in no way not involved in the attack.¹⁴⁰

¹³³ See *supra*, para. 102.

¹³⁴ Observations of the Legal Representative of child-soldier victims, para. 129.

¹³⁵ See *supra*, our arguments at paras.22-27.

¹³⁶ Observations of the Legal Representative of child-soldier victims, para. 131.

¹³⁷ See *supra*, our arguments at paras.28-31.

¹³⁸ Observations of the Legal Representative of child-soldier victims, para. 136.

¹³⁹ Observations of the Legal Representative of child-soldier victims, para. 137.

¹⁴⁰ **D03-88-T-306-FRA**, p. 70, lines 20-26, [REDACTED]: "[TRANSLATION] Ngudjolo did not fight at Bogoro. Ngudjolo did not have any group in Zumbe. I was at Zumbe: Ngudjolo did not have a group of youths [...]. I am very certain that Ngudjolo was not at Bogoro." See also EVD-D03-00101: the excerpt of a video of the ICC Prosecutor's visit to Zumbe in July 2009; **D03-44-T-291-FRA**, p. 41, line 19, p. 43, line 15, p. 46-l; **D03-55T-293-FRA**, p. 37, lines 9-22, p. 38, lines 23-27, p. 39-42, p. 48, lines 8-23; **D03-55-T-293**, p. 50, lines 16-25; **D03-66-T-296**, p. 18, lines 15-22, p. 19, lines 2-8; p. 42, line 26, p. 43, line 18; D02-300, Germain Katanga, T-317-FRA- CT WT, 5-10-2011, p. 20, lines 14-15; p. 33, lines 6-10; p. 40, lines 1-8; **D02-300-T-318**, p. 16, lines

117. In his arguments for the absolute exclusion of exculpatory evidence, the Legal Representative of child-soldier victims quotes an excerpt of V-2's testimony¹⁴¹ but overlooks the testimony of Defence Witness D03-410, [REDACTED]. V-2 claimed in Court that she had become aware of the preparations of the attack on Bogoro from: her parents who learnt about it from [REDACTED];¹⁴² certain otherwise unidentified women who had come to Bogoro market;¹⁴³ and certain occasionally kind men,¹⁴⁴ shortly before the attack. However, [REDACTED]¹⁴⁵ – Defence Witness D03-410 – vehemently denied V-2's claim. Indeed, even if he acknowledged that V-2's father was his former schoolmate and that they had maintained their friendship, D03-410 informed the Chamber that he did not see V-2's father between 2000 and 2006 and that he therefore never warned V-2's parents of the imminent attack on Bogoro on 24 February 2003.¹⁴⁶ D03-410 rejected outright V-2's account that he had told her parents that youths had undergone training with the aim of invading Bogoro and, that they had to get ready and leave Bogoro.¹⁴⁷ V-2 also stated that she was warned by the women who came to Bogoro market to restock their food supplies.¹⁴⁸ She admitted that she could not identify the women.¹⁴⁹ These are material factors intentionally excluded by the Legal Representative of child-soldier victims in his subjective analysis.

118. In its comprehensive evaluation of the evidence, the Chamber could not disregard V-2 and V-4's testimonies as the Legal Representative of child-soldier victims maintains: “[TRANSLATION] on the common ground that neither of these witnesses had lived in Zombe; that in respect of one witness, the source of the information provided cannot be ascertained and that in respect of the other witness, the testimony was implausible.”¹⁵⁰

119. The errors allegedly committed by the Chamber in its factual findings, as illustrated by the Legal Representative of child-soldier victims at page 49 of his observations,¹⁵¹ do not exist. The issues raised by the Legal Representative under point 3 make it apparent that he it is who lacks rigour in analysis. For example, at paragraph 146 appertaining to training, the Legal Representative of child-soldier victims adverts to a MONUC report which refers to bases and

3-9; p. 36, lines 17-27; **D02-300-T-322**, p. 21, line 28, p. 23, lines 8-9; T-324-FRA- CT WT, 18-10-2011, p. 67 *et seq*; **D02-300-T-325**, p. 17, line 9.

¹⁴¹ Observations of the Legal Representative of child-soldier victims, para. 134.

¹⁴² **V19-2-T-231-FRA**, p. 23, line 1, lines 18-19, lines 22-24, line 26.

¹⁴³ **V19-2-T-231-FRA**, p. 23, lines 10-13.

¹⁴⁴ **V19-2-T-232-FRA**, p. 9, lines 7-9.

¹⁴⁵ EVD-DO3-00103; EVD-D03-P0410.

¹⁴⁶ **V19-2-T-233-FRA**, p. 23, line 1.

¹⁴⁷ **V19-2-T-231-FRA**, p. 23, lines 18-20.

¹⁴⁸ **V19-2-T-232-FRA**, p. 33, lines 16-17.

¹⁴⁹ **V19-2-T-233-FRA**, p. 9, line 22.

¹⁵⁰ Observations of the Legal Representative of child-soldier victims, para. 138.

¹⁵¹ Observations of the Legal Representative of child-soldier victims, p. 49, point 3.

camps used by the FNI/FRPI. He however fails to give consideration to the following evidence on the record:

- 1. The founding President of the FNI, [REDACTED], personally testified publicly under oath and stated that at the material time, the FNI did not exist in Zumbe.¹⁵²
- 2. Other Defence witnesses, particularly, D03-55, D03-66 and D03-88 stated that the FNI did not exist in Zumbe at the time of the events.¹⁵³ D03-88, chief of Bedu-Ezekere *groupement* testified in public.
- 3. Prosecution Witness P-12, stated that at the time of the events in Bogoro, the FNI/FRPI alliance did not exist.¹⁵⁴
- 4. The Prosecution itself finally acknowledged that the transitory FNI/FRPI alliance only came into existence after 22 March 2003.

120. Criticising the Chamber for its findings,¹⁵⁵ the Legal Representative of child-soldier victims' claims, in effect, that the Chamber should not have taken into account all this relevant evidence on the record.

121. In relation to the existence of a reporting system,¹⁵⁶ the Legal Representative of child-soldier victims' analyses paragraph 389 of the Judgment without reading it in conjunction with the preceding paragraph 388. The Chamber's reasoning is perfectly coherent and based on the evidence on the record. The assertions of the Legal Representative of child-soldier victims at paragraph 152 of his observations are completely wrong and reflect his misunderstanding of the standard of proof beyond reasonable doubt. He states, *inter alia*: "[TRANSLATION] The Chamber particularly erred here by dismembering a fact into several inter-related components (which are therefore corroborative) and by applying the standard of proof beyond reasonable doubt to each facet of the same fact and thus wrongly obligating the Prosecution to prove each facet." It is clear that the Legal Representative of child-soldier victims is reasoning like a zealous defender of the Prosecution. In fact, he is advocating for the Prosecution's burden of proof to be reduced. In so doing, he introduces a vague concept, that is, "[TRANSLATION] a multifaceted fact", and decries the Chamber for dismembering a fact into several components. No, the Chamber did not dismember any fact whatsoever. Such course of action is absurd and inconceivable. What the Legal Representative of child-soldier victims is referring to as "facets" are discrete factual allegations. The Defence emphasises that the Prosecution is duty-bound to prove each relevant factual allegation beyond

¹⁵² D03-11-T 243-FRA, p. 9, lines 18-19; T 244-FRA, p. 5, lines 7-16.

¹⁵³ D03-88-T-301, p. 11; D03-55-T-293, p. 50, lines 16-25; D03-66-T-296, p. 18, lines 15-22, p. 19, lines 2-8.

¹⁵⁴ P-12-T-195-FRA, p. 18, lines 5-6: "[TRANSLATION] Even the FRPI did not know the FNI. The FRPI had come into contact with the FNI only during the Ituri Pacification Commission meetings."

¹⁵⁵ The Legal Representative of child-soldier victims criticises the Chamber at para. 149 of his observations.

¹⁵⁶ Observations of the Legal Representative of child-soldier victims, p. 51, para. 150.

reasonable doubt. The Chamber rationally considered the whole of the evidence on the record. It analysed each relevant factual allegation to verify that it was established beyond reasonable doubt.

122. The Chamber's findings, referred to by the Legal Representative of child-soldier victims at paragraphs 153 to 155 of his observations and regarding Ngudjolo's alleged role and the presence of child-soldiers at Bedu-Ezekere, clearly demonstrate that the Chamber did not disregard any evidence on the record: it took into consideration and analysed all the incriminatory evidence. However, the Legal Representative of child-soldier victims intentionally neglects to provide the Appeals Chamber with the exculpatory evidence that the Trial Chamber could not have disregarded, given its legal obligation to consider evidence on the record in its entirety. It was by balancing the incriminatory and exculpatory evidence that the Chamber completed its evaluation, following a thorough, logical and impartial evaluation of the evidence. The Legal Representative of child-soldier victims disagrees with the Chamber's exhaustive and impartial analysis. He would have preferred the Chamber to take into account only incriminatory evidence in order to make certain of establishing Ngudjolo's responsibility.

123. In his biased analysis, the Legal Representative of child-soldier victims goes as far as alluding to "[TRANSLATION] the certainty that Mathieu Ngudjolo was a commander prior to the attack", without demonstrating the probative basis of this "certainty" or even the "absolute certainty"¹⁵⁷ which the Chamber purportedly excluded. As sole support for his unjustified assertion, he quotes paragraph 68 *in fine* of the Prosecution's Brief on Appeal, therefore confirming his role of second prosecutor.

124. The Legal Representative of child-soldier victims further assumes the role of second prosecutor at paragraph 163, where he once again refers to "[TRANSLATION] the Prosecution's observations regarding the Chamber's reasoning on the possible collusion between P-12 and P-160 [...]". The Legal Representative adopts the Prosecution's criticism of the Chamber's evaluation of P-12's testimony regarding the use of child soldiers.¹⁵⁸ Considering the Chamber's conclusions erroneous, notwithstanding the substantial and proper reasons therefor, he advances his own interpretation of P-12's testimony.¹⁵⁹ The Legal Representative obviously fails to provide any indication of the legal provisions under which his interpretation should prevail over the Chamber's evaluation.

125. At paragraph 164, the Legal Representative of child-soldier victims criticises the Chamber for failing to take a position on the credibility of P-12 and P-160's relating to Katanga's

¹⁵⁷ Observations of the Legal Representative of child-soldier victims, para. 158.

¹⁵⁸ *Idem*, paras. 159-161.

¹⁵⁹ *Idem*, paras. 162.

alleged admissions to P-12, referring to Ngudjolo's participation in the attack on Bogoro. The Chamber deemed it justifiable to reserve its determination of the credibility of these witnesses on this issue, as it affects Katanga's case which is still pending. The Legal Representative of child-soldier victims neglects to mention two key factors:

- 1. Katanga testified under oath and denied having made such an admission to P-12 and P-160, [REDACTED];¹⁶⁰
- 2. Katanga acknowledged having played a non-essential role in the attack on Bogoro and clearly stated that Ngudjolo had no involvement whatsoever in this attack.¹⁶¹

III. THE LEGAL REPRESENTATIVES' SUPPORT FOR THE PROSECUTION'S THIRD GROUND OF APPEAL

126. In reviewing the observations of the Legal Representatives of Victims on the Prosecution's third ground of appeal, the Defence notes first of all the deceptive nature of the title of their submissions. Though they claim to be making observations on both the Prosecutor's Brief on Appeal and the Defence's Brief in Response, the submissions are almost entirely neglectful of the Defence, failing to address any of the legal arguments made for rejecting the appeal.

127. The Defence is referenced only twice in the observations of the Legal Representative of the main group of victims, in footnotes 290 and 292, even though the footnotes on this theme run from number 280 to number 311. And the footnotes of the Legal Representative of the child-soldier victims' numbers 109 to 124 do not reference the Defence Brief in Response at all. This is eloquent testimony to the fact that the two Legal Representatives have not addressed all the arguments raised by the Defence demonstrating the inanity of the Prosecution's third ground of appeal.

128. The Legal Representatives of Victims have merely followed the Prosecution's lead and alleged that the Chamber committed a procedural error violating the Prosecution's right to a fair trial. Whilst both fully adopt the Prosecution's arguments in this regard,¹⁶² the Legal Representative of the main group of victims is distinguished by a personal note. He opines that the Trial Chamber was mistaken in excluding the victims from the dispute regarding the monitoring of telephone calls.¹⁶³ Their common argument (A) and the personal argument of

¹⁶⁰ D02-300-T-319, p. 31, line 25, p. 32, line 17; p. 45, lines 27-28

¹⁶¹ D02-300, Katanga, T-317-FRA-CT WT, 5-10-2011, p. 20, lines 14-15; p. 33, lines 6-10; p. 40, lines 1-8; D02-300-T-318, p. 16, line 3-9; p. 36, lines 17-27; D02-300-T-322, p. 21, line 28, p. 23, lines 8-9; T-324-FRA-CT WT, 18-10-2011, p. 67 *et seq*; D02-300-T-325, p. 17, line 9.

¹⁶² See, in this regard, the Observations of the Legal Representative of the main group of victims, pp. 69-75, and the Observations of the Legal Representative of the child-soldier victims, pp. 61-69, which are but a carbon copy of the Prosecution's Brief.

¹⁶³ See para. 173 of his Observations.

the Legal Representative of the main group of victims from Bogoro (B) both merit a response.

A. Argument common to the Legal Representatives of Victims

129. When analysing the Legal Representatives' submissions on the Prosecution's third ground of appeal, one is struck by how few pages they devote to their theme.¹⁶⁴ It can doubtless be countered that what matters is quality, not quantity. But the sparseness of their submissions in this regard evidences the paucity of their arguments on the Prosecution's third ground of appeal.

130. Unlike the Defence, the Legal Representatives argue for the admissibility of the Prosecution's third ground of appeal. The Legal Representative for the Bogoro victims writes, "[TRANSLATION] Contrary to the Defence's assertion, the simple fact of not appealing a decision – *a fortiori* an interlocutory appeal – may not be interpreted therefore as a form of acquiescence to that decision. An affirmation to the contrary would utterly undermine the foundation of the system of appeal established by the Statute of the Court."¹⁶⁵ This is the only point on which he responds to the Defence, doing so in a manner which is legally quite unsound. How, then, should the choice not to appeal a decision be interpreted from a legal perspective? The Legal Representative does not define acquiescence, any more than he describes the system of appeal he hails in order to indicate to the Appeals Chamber the legal provision on which it might rely to reopen a factual or legal issue settled by a judicial decision which has become *res judicata*.

131. The Defence will here once more asseverate that by failing to appeal against the said decision, the Prosecution acquiesced to it, unless understanding of this concept¹⁶⁶ has evolved in a manner of which the Defence is ignorant. By unreservedly and uncritically endorsing the Prosecution's Brief on Appeal, the Legal Representatives merely reassure the Prosecution that its incoherent and inconsistent arguments are correct.

¹⁶⁴ The Legal Representative of child-soldier victims devotes a mere eight pages to this: pp. 61-69 (paras. 167-190). The Legal Representative of the main group of victims from Bogoro devotes 11 pages to it: pp. 64-75 (paras. 159-192).

¹⁶⁵ Para. 172 of his Observations, at p. 68.

¹⁶⁶ Cornu, G., *Association Henri Capitant, Vocabulaire juridique*, current revised edition, 9th revised edition "Quadrigé" 2011, Presses Universitaires de France, 1987, p. 17: "[TRANSLATION] **ACQUIESCENCE**: *nm* – from *v.* to acquiesce

1. Action of acquiescing (general sense), cf. Consent, acceptance, approval, accord, agreement, assent.

2. Unilateral legal act, committed with express intent or by tacit agreement, by which a party to the proceedings resolves an issue by submitting to the request of his or her adversary or to the judgment of the court (French code of civil procedure, article 384)

– **to a judgment**. One who, with regard to a judge's decision, submits to the rulings of the judgment and renounces the use of remedies, except in the event that another party subsequently duly lodges an appeal. (French code of civil procedure, article 409).

3. Legal measure arising from any active or passive conduct demonstrating acceptance by a State of the judicial claim of another State and rendering such acceptance effective against that state in future. See also *estoppel*, *recognition*, *renunciation*."

132. Lacking arguments on the issue of the inadmissibility of the third ground of appeal, the Legal Representative of the child-soldier victims merely adverts to his prior submissions on the Defence's observations challenging the Prosecution over Decision 3319 severing the charges. Reading both sets of submissions, one is surprised at the extremely tenuous legal basis of these assertions. For instance, in regard to the said decision, they affirm that failure to appeal a decision does not constitute acquiescence thereto.¹⁶⁷ Then, what does it constitute? What legal characterisation is one to give to an attitude of passivity towards a decision such that the time limit for any remedy is allowed to expire?¹⁶⁸ What do they make of the legal concept of time-bar?¹⁶⁹ What legal argument allows the parties, during the praetorian jousting, to go on debating factual or legal issues indefinitely after all remedies have been exhausted? The Appeals Chamber will not find any legal argument of this kind in either the Prosecution's or the Legal Representatives' submissions.
133. It is significant that the Legal Representatives do not cite any legal argument – whether from the legal texts, from past decisions and case law, or from the scholarship – by which they are entitled to re-litigate an issue already definitively resolved by decisions which have now become *res judicata*.
134. Finally, we must point out, without any risk of contradiction, that neither of the Legal Representatives responds to the Defence on any of the legal submissions against the Prosecution's third ground of appeal. The Defence refutes the Prosecution's third ground of appeal by stating that the right to a fair trial does not constitute a ground of appeal for the Prosecution against a judgment pursuant to article 74 of the Statute;¹⁷⁰ that the issue of the monitoring of Mathieu Ngudjolo's telephone conversations is *res judicata*, having been previously settled by irrevocable decisions of the Chamber;¹⁷¹ that the dispute regarding the monitoring of telephone calls was finally resolved before the acquittal;¹⁷² that the contents of the monitored telephone calls were not subject to adversarial proceedings between the parties and the participants before Trial Chamber II and are not evidence submitted and evaluated at

¹⁶⁷ See, in this regard, Mr Jean-Louis Gilissen, filing 125, paras. 10 and 11, 22, 23 and 24. Mr Fidel Nsita Luvengika, filing 124, para. 62.

¹⁶⁸ Cornu, G., *Association Henri Capitant, Ibidem*, p. 18: “[TRANSLATION] **ACQUIESCE**: From Lat. *acquiescere*: to be at rest, whence to rest on... to consent. (general sense). Endorse the opinion of another, accede to a request, accept a decision, adopt a suggestion, yield to an entreaty. See, more specifically, in the precise procedural sense, acquiescence to a request, acquiescence to a judgment. Ant. *Oppose, challenge*.”

¹⁶⁹ Cornu, G., *Association Henri Capitant, Ibidem*, p. 468: “[TRANSLATION] **TIME-BAR**: Penalty imposed upon a person vested with a right or an entitlement to act, for failure to perform a required formality within a legal, contractual or judicial time limit, prohibiting the time-barred person henceforth from performing that formality, with the exception of cases in which he or she may be granted leave to exceed the time limit. For instance, someone who has not lodged an appeal against an impugned decision within a time limit of one month is subject to a time-bar. See also *Deprivation, nullity, lapse, setting aside, cancellation, expiry of a time limit*.”

¹⁷⁰ Defence Brief in Response, paras. 242-245.

¹⁷¹ Defence Brief in Response, paras. 246-281.

¹⁷² Defence Brief in Response, paras. 282-285.

trial pursuant to article 74(2) of the Statute;¹⁷³ and that the fair treatment of all the parties and participants was a consistent feature of the Chamber's judicial activity.¹⁷⁴

135. In duly responding to the Prosecution's third ground of appeal, the Defence addressed point by point all the other issues raised; to wit, the Chamber's alleged error in taking more than minimal steps to protect the integrity of its own proceedings;¹⁷⁵ the alleged error pertaining to the Chamber's refusal to allow the Prosecution to challenge the Defence evidence and rehabilitate its own witnesses;¹⁷⁶ the Chamber's denial of disclosure to the Prosecution of the recorded conversations and of its use of reports analysing them;¹⁷⁷ and the refusal of the Prosecution's request to refresh the memory of Witness P-250 and ask him leading questions.¹⁷⁸ In short, the Defence provided potent legal arguments demonstrating that the Prosecution's right to a fair trial was in no wise violated by the Chamber.¹⁷⁹

136. Any attempt by the Appeals Chamber to find even an infinitesimal response to, or even an observation on, the Defence's legal reasoning will be in vain.

137. The Defence wishes to emphasise that during the dispute on the monitoring of telephone calls, the main reason why the Prosecution was not granted access to the relevant transcripts is that the various reports prepared by the Registry's Victims and Witnesses Unit did not find anything out of the ordinary which might endanger victims or witnesses. The Chamber trusted VWU, which has specialist experience in this area, and criticised the Prosecution for gratuitously calling its work into question.¹⁸⁰

138. It should be noted that the Prosecution itself acknowledges VWU's capacity in this area. In a recent filing in response to a request by the Legal Representative of the main group of victims for protection measures for his clients on the ground that he feared for their safety, specifically after reading the Prosecution's third ground of appeal, the Prosecutor asserted that only VWU was competent to handle victim and witness protection,¹⁸¹ thereby jeopardising, with its intellectual honesty, the solidarity of the Prosecutorial collective. The Legal Representative's motion was subsequently denied.¹⁸² How, then, can VWU's competency be doubted, called into question, in the former case (telephone calls) and trusted in the latter (application of the Legal Representative of the main group of victims), which in fact relies on the same dispute to request new protection measures?

¹⁷³ Defence Brief in Response, paras. 286-293.

¹⁷⁴ Defence Brief in Response, pp. 123-127.

¹⁷⁵ Defence Brief in Response, paras. 306-312.

¹⁷⁶ Defence Brief in Response, paras. 313-317.

¹⁷⁷ Defence Brief in Response, para. 318.

¹⁷⁸ Defence Brief in Response, paras. 319-323.

¹⁷⁹ Defence Brief in Response, paras. 324-358.

¹⁸⁰ [REDACTED].

¹⁸¹ [REDACTED].

¹⁸² [REDACTED].

139. [REDACTED].¹⁸³

140. [REDACTED].¹⁸⁴

B. Argument specific to the Legal Representative of the main group of victims from Bogoro

141. The Legal Representative of the main group of victims criticises the Chamber for excluding the victims from the proceedings, in his own words, “[TRANSLATION] with regard to access to relevant documents in the establishment of the truth, it failed in its duty to ensure the fairness of the proceedings in respect of the victims authorised to participate”.¹⁸⁵ He accuses the Chamber of violating the adversarial principle.¹⁸⁶ This accusation is baseless, for the reasons given below.

142. [REDACTED].

143. Secondly, the Prosecution itself, to whose aid the Legal Representatives have flown, never sought their involvement in those proceedings. It should also be noted that in its reasoning in support of its third ground of appeal, the Prosecution at no point criticises the Chamber for excluding the Legal Representatives from its examination of the issue. The case law of other international criminal courts also protects such filings in order to preserve the confidentiality of certain information which, if it were known to the excluded parties, could unfairly prejudice the interests of the applicant.¹⁸⁷

144. [REDACTED].¹⁸⁸

CONCLUSION

145. Contrary to both Legal Representatives’ submissions, the Chamber committed no legal, factual or procedural error in its Judgment. It evaluated all of the incriminating and exonerating evidence in the record equally, in accordance with article 74 of the Statute. It correctly applied the standard of proof under article 66 of the Statute. The facts being sacred, it paid strict attention to them. It analysed each relevant factual allegation and verified

¹⁸³ [REDACTED].

¹⁸⁴ [REDACTED].

¹⁸⁵ Para. 192 of his Observations.

¹⁸⁶ Para. 163 of his Observations.

¹⁸⁷ ICTY, Trial Chamber III, *The Prosecutor v. Simić et al.*, *Decision on (1) application by Steven to re-open the decision of 27 July 1999, (2) motion by ICRC TO RE-OPEN SCHEDULING ORDER OF 18 November 1999, and (3) conditions for access to material*, 28 February 2000, paras. 39, 40 and 41.

¹⁸⁸ *Idem*, para. 11.

whether it had been established beyond reasonable doubt. The reasonable doubt at which it arrived resulted from its analysis of the evidence in the record.

146. Neither the Prosecution nor the Legal Representatives have succeeded in showing that the Chamber committed any factual, legal, or procedural errors. The reason is clear: none were committed. As such and absent any errors, the Legal Representatives and the Prosecutor alike engaged in an evaluation of the Chamber's evaluation of the evidence in the record. Playing the part of a second prosecutor and adopting the same approach as the Prosecution, the Legal Representatives have performed their own analysis of the evidence and are in fact requesting the Appeals Chamber to accept their evaluation over that of the Trial Chamber. Unhappily for them, they cite not a single legal provision under which their analysis might take precedence over that of the Chamber.

147. It will be clear to the Appeals Chamber that both the Legal Representatives and the Prosecution consider only the incriminating evidence in their evaluation, ignoring all exonerating evidence. They assign credibility to all of the Prosecution witnesses and to none of the Defence witnesses. To their mind, the "Soap Letter", a Prosecution exhibit, is credible, whilst P-250's school records, a Defence exhibit, are not, despite the fact that they were publicly recognised by P-250 himself and their authenticity is above reproach. Such a biased approach must not be allowed to prevail against the Chamber's own comprehensive, reasoned, neutral, unbiased, fair and just evaluation.

148. The Chamber, for its part, analysed the entirety of the evidence in the record, both incriminating and exonerating. It provided sufficient reasoning for each of its findings.

149. At paragraphs 33 to 72 of its Judgment, it gave full account of the criteria it employed in evaluating the evidence. These criteria unquestionably allowed for the correct application of the provisions of article 66 of the Statute, under which "the accused is presumed to be innocent until the Prosecutor has proven his guilt. For a conviction, each element of the particular offence charged must be established 'beyond reasonable doubt'."¹⁸⁹

150. As it clearly stated, the Chamber's Judgment was based on the entirety of the proceedings and its evaluation of the evidence, in accordance with article 74(2) of the Statute. As provided by article 74(2),¹⁹⁰ it relied only on evidence submitted and discussed before it at trial. It gave full account of its approach, which allowed it to ensure the following legal provision was fully implemented:

45. The Chamber began by assessing the credibility of all relevant evidence presented. The various witness statements and the exhibits were analysed in light of all the other relevant evidence in the record of the case.

¹⁸⁹ Judgment, para. 34; *Lubanga* Judgment para. 92.

¹⁹⁰ Judgment, para. 43; *Lubanga* Judgment para. 94.

46. On the basis of this analysis, the Chamber decided whether the evidence on which the Prosecution relied should be accepted as establishing the alleged facts, notwithstanding the exculpatory evidence submitted.¹⁹¹

151. It is thus clear that the Chamber did not and, in light of the stipulation of article 74(2) of the Statute, could not limit its analysis to the evidence submitted by the Prosecution, being instead duty-bound also to examine the exonerating evidence to establish whether, this evidence notwithstanding, the facts alleged by the Prosecution had been successfully proved beyond reasonable doubt.

152. In evaluating the evidence as a whole, the Chamber did not restrict its analysis to the evidence relied on by the parties and participants in their closing submissions. It took into consideration all of the evidence discussed at trial and admitted into the record, thereby extending its evaluation to the entirety of the evidence. The Chamber's own words explain it best:

47. In determining whether an allegation by the Prosecution had been proven, the Chamber did not restrict its assessment to the evidence to which the parties and participants referred explicitly in their closing statements. It considered on a case-by-case basis whether it could rely on evidence in the record which was not referred to explicitly in order to establish a factual allegation, taking into account the requirements of articles 64(2) and 74(2) of the Statute. In particular, it satisfied itself that the Defence had been afforded the opportunity to make submissions as to the evidence in question.¹⁹²

153. The error committed by the Legal Representatives and the Prosecution was in fact to perform their own evaluation not only without identifying the legal basis for doing so but also in a deliberately biased manner, entirely ignoring the exonerating evidence or displaying a pre-formed opinion of it, systematically dismissing it as lacking credibility. They go on to maintain that their evaluation is better than that conducted by the Chamber.

154. In vain do the Legal Representatives, following the Prosecution's lead, seek, by means of this legally unfounded evaluation of the Chamber's evaluation of the evidence, to call into question the Chamber's discretion freely to evaluate after analysing the totality of the evidence. In an attempt to justify their actions, they engage in a fruitless search of the Chamber's reasoning for an overlooked piece of testimony, a contradiction, a weakness. These challenges are without merit and are indicative of a lack of independence and objectivity in their evaluation of the Chamber's work.

155. The Chamber was not neglectful of any relevant evidence. It provided satisfactory, coherent reasoning for each of its findings, and there were no contradictions between the grounds and the disposition or between the individual grounds themselves. From start to

¹⁹¹ Judgment, paras. 45-46.

¹⁹² Judgment, para. 47.

finish, the Chamber's reasoning in its Judgment is coherent, well-argued, founded in its assessment of the evidence in the record, and characterised by a neutrality, an impartiality, a rectitude and a fairness which are worthy of the International Criminal Court.

156. For instance, with respect to its evaluation of witnesses' credibility, the Chamber gave good account of its examination and evaluation of the testimonial evidence, as follows:

[It] engaged in an assessment of the credibility of a number of the witnesses, essential to the Mathieu Ngudjolo[...] case (Section VII). In light of this assessment, it analysed all the evidence in order to establish the facts that had been proven beyond reasonable doubt. At the same time, it limited its ruling to the extent necessary, in this case, to make a determination on the Accused's guilt or innocence. According to the Chamber, this approach was particularly judicious considering the aforementioned *Decision on the implementation of regulation 55 of the Regulations of the Court*. A separate judgment will subsequently be pronounced based on the same evidence relevant to Germain Katanga.¹⁹³

157. Thus, in Section VII, the Chamber carried out an analysis of the credibility of witnesses relevant to the determination of the Mathieu Ngudjolo's role at the material time. The Chamber detailed this rigorous analysis in 89 paragraphs, from paragraph 124 to paragraph 313, providing sufficient, coherent reasoning for each of its findings, as can be seen from the breakdown below. The Chamber began by assessing the testimony of the three key Prosecution witnesses, P-250, P-279 and P-280.

1. P-250

- (1) Number of paragraphs devoted to assessing P-250's evidence: 32 – paragraphs 127 to 159.
- (2) Chamber's evaluation with reasoning: 21 paragraphs; nos. 135 to 156.
- (3) Incriminating evidence, other than P-250's own testimony, relied on in the Chamber's analysis: exhibit EVD-OTP-00022; P-279; P-28.
- (4) Exonerating evidence relied on in the Chamber's analysis: exhibits EVD-D03-0006 to 0009, School records of P-250; D03-100, father of P-250; D03-55; D03-66; D03-88; D02-160; D02-161.
- (5) Chamber's conclusion, explaining its reasonable doubt: 3 paragraphs; nos. 157 to 159.

2. P-279

- (1) Number of paragraphs devoted to assessing P-279's evidence: 32 – paragraphs 160 to 190.
- (2) Chamber's analysis with reasoning: 20 paragraphs, nos. 168 to 188.

¹⁹³ Judgment, para. 109.

- (3) Incriminating evidence, other than P-279's own testimony, relied on in the Chamber's analysis: P-28, P-280.
- (4) Exonerating evidence relied on in the Chamber's analysis: exhibits EVD-D02-00124, Birth certificate of P-279; EVD-02-125, Birth certificate of P-279; EVD-OTP-D02-00126, Invoice – these were the exhibits, whose authenticity has not been challenged by the Prosecution, which convinced it of P-279's true age and led it to no longer rely on him as a child soldier;¹⁹⁴ as discussed below, the Prosecution did likewise in respect of P-280, consequently presenting not a single child soldier at trial – EVD-D02-00037, Employment contract of P-279's father; EVD-D02-0039; Photograph of Witness P-280; *Procès-verbal* of the judicial site visit; -D03-236, father of P-279; -D03-340, father of P-280. It bears noting that in its analysis of P-279's testimony, the Chamber noted that "Witnesses D03-340 and D03-236 claimed to have seen an intermediary from the Office of the Prosecutor having a conversation with both P-279 and P-280", deciding in its wisdom, however, not to consider the role of Intermediary 143 – for that is who it was – in weighing the credibility of P-279 and P-280.¹⁹⁵
- (5) Chamber's conclusion explaining its reasonable doubt: 2 paragraphs, nos. 189 and 190.

3. P-280

- 1) Number of paragraphs devoted to assessing P-280's evidence: 28 – paragraphs 191 to 219.
 - 2) Chamber's analysis with reasoning: 17 paragraphs, nos. 200 to 217.
 - 3) Incriminating evidence, other than P-280's own testimony, relied on in the Chamber's analysis: P-279.
 - 4) Exonerating evidence relied on in the Chamber's analysis: exhibits EVD-03-00023, Sketch of the village and airport of Zumbe drawn by P-280; EVD-D02-00153, Sketch drawn by D02-258; *Procès-verbal* of the judicial site visit; D03-340, father of P-280; D03-236, father of P-279.
 - 5) Chamber's conclusion explaining its reasonable doubt: 2 paragraphs, nos. 218 and 219.
158. The Chamber also analysed three other Prosecution witnesses, P-28, P-219 and P-317, and one Defence witness, D03-88, the chief of Bedu-Ezekere *groupement* at the material time.

4. P-28

- 1) Number of paragraphs devoted to assessing P-28's evidence: 34 – paragraphs 220 to 254.

¹⁹⁴ Judgment, para. 161, footnote 353.

¹⁹⁵ The Chamber provides the following explanation at footnote 406: "This refers to Intermediary 143. As the question of the credibility of Witnesses P-279 and P-280 is resolved on the basis of other factors than those referring solely to the involvement of this intermediary, the arguments presented by the parties in this regard are not addressed in this Judgment." This clearly shows that the Judgment is a summary, agreed upon and delivered by the Chamber as sufficient, coherent explanation of its reasons and ruling.

- 2) Chamber's analysis with reasoning: 23 paragraphs, nos. 227 to 250.
- 3) Incriminating evidence, other than P-28's own testimony, relied on in the Chamber's analysis: P-219.
- 4) Exonerating evidence relied on in the Chamber's analysis: exhibits EVD-02-00086, Voting card; EVD-D02-00088, Record of proceedings; EVD-D02-00089, Court document; EVD-D02-00090, Register; D02-161; D02-259; D02-134; D02-129; D02-136; D02-501.
- 5) Chamber's conclusion explaining its reasonable doubt: 3 paragraphs, nos. 251 to 254.

5. P-219

- 1) Number of paragraphs devoted to assessing P-219's evidence: 28 – paragraphs 255 to 283.
- 2) Chamber's analysis with reasoning: 12 paragraphs, nos. 265 to 277.
- 3) Incriminating evidence, other than P-219's own testimony, relied on in the Chamber's analysis: P-28.
- 4) Exonerating evidence relied on in the Chamber's analysis: exhibit EVD-D02-00077, Transcript of telephone conversations; D02-134; D02-161; D02-228; D02-129; D03-11; D03-88.
- 5) Chamber's conclusion explaining its reasonable doubt: 2 paragraphs, nos. 281 to 283.

6. P-317

- 1) Number of paragraphs devoted to assessing P-317's evidence: 12 – paragraphs 284 to 296.
- 2) Chamber's analysis with reasoning: 5 paragraphs, nos. 289 to 294.
- 3) Incriminating evidence, other than P-317's own testimony, relied on in the Chamber's analysis: exhibits EVD-OTP-00205, MONUC interim report on the events in Ituri; EVD-OTP-00285, MONUC report on the events in Ituri.
- 4) Chamber's conclusion explaining its reasonable doubt: 2 paragraphs, nos. 295 and 296.

7. Regarding D03-88

- 1) Number of paragraphs devoted to assessing D03-88's evidence: 16 – paragraphs 297 to 313.
- 2) Chamber's analysis with reasoning: 7 paragraphs, nos. 305 to 312.
- 3) Incriminating evidence relied on in the Chamber's analysis: [-] exhibit EVD-D03-00098: Letter to the President of RCD-Kis/ML in Beni ("letter of complaint").
- 4) Chamber's conclusion: paragraph 313.

159. Another section serving to illustrate the rigour and exhaustiveness of the Chamber's evaluation of the evidence is Section IX, in which it examines "Factual findings on the role of Mathieu Ngudjolo". This examination is carried out over 164 paragraphs, from paragraph 339 to paragraph 503.
160. In that section, the Chamber sets forth its evaluation of Ngudjolo's role and functions in Bedu-Ezekere *groupement* at the time of the 24 February 2003 attack on Bogoro. To this end, it provides an exhaustive analysis of the considerable quantity of relevant evidence admitted into the record during the trial proceedings. We cannot detail all of the evidence reviewed by the Chamber in its analysis here. The reader is simply directed to footnotes 912 to 1149, that is to say 237 footnotes, which demonstrate that the Chamber did not neglect a single piece of incriminating or exonerating evidence, testimony or filing in making its determination.
161. This thoroughgoing, rigorous, fair and impartial analysis of the evidence, performed in strict compliance with article 74 of the Statute, constitutes the more than sufficient and coherent justification which it provides in its conclusion at paragraphs 490 to 503: "Consequently, the Chamber cannot, on the basis of all the evidence in the case record, find beyond reasonable doubt that the Accused was the leader of the Lendu combatants who took part in the 24 February 2003 attack on Bogoro."¹⁹⁶
162. The same approach characterised the Chamber's review of the participation of child soldiers from Bedu-Ezekere *groupement* in the 24 February 2003 attack on Bogoro. Its analysis is set forth at paragraphs 504 to 516 of the Judgment. In performing its analysis, the Chamber gave consideration to all of the relevant filings, all of the incriminating and exonerating evidence, without exception. Footnotes 1150 to 1203 stand testimony to the magnitude of the analytical work which the Chamber performed impartially, independently, fairly and lawfully.
163. This analysis highlights the factors sustaining the Chamber's reasonable doubt and leading it to its logical conclusion set forth at paragraph 516.
164. Thus, on all the issues, the Chamber's reasoning is more than sufficient and coherent. Its findings are logically inescapable. No contradiction can be found between its reasoning and its ruling. Its doubt as a result of its evaluation of all the evidence is a reasonable one, patiently explained by the Chamber, arrived at on the basis of contradictions, incoherencies and implausibilities in the incriminating evidence; demonstrated fallacies and falsehoods fully invalidating the Prosecution's key witnesses, P-250, P-279 and P-280, as well as other Prosecution witnesses, to such an extent that in support of its evaluation the Chamber did not

¹⁹⁶ Judgment, para. 503.

even need to consider the offences committed by Intermediaries P-143 and P-183, who induced the Prosecution's key witnesses to lie.

165. The Chamber committed no legal, factual or procedural errors. The Defence shall ever reiterate that a Legal Representative of Victims is not competent to assess a chamber's evaluation of a witness. The Legal Representative cannot conclude that the Chamber has committed an error in its evaluation merely because he does not agree with its lawful, fair and impartial evaluation.

166. It bears noting that any analysis must be followed by a summary. At the deliberation stage, after analysing all of the evidence in the record, the Chamber unfailingly produces a summary. The Judgment it delivers is the fruit of that analysis and summary. Given the remarkable quantity of material in the record, were it not to have been summarised the Judgment would run not to hundreds but to thousands of pages, thereby hampering comprehension.

167. Whereas their submissions are, as required by the Appeals Chamber, intended to address both the Prosecution Brief on Appeal and the Defence Brief in Response, both of the Legal Representatives have deliberately omitted to address the Defence criticisms of the whole of the Prosecution Brief. They seek instead, to no avail, to accomplish the feat of imbuing with fresh credibility certain witnesses of the Prosecution and the Legal Representative of the main group of victims who were disqualified by the Trial Chamber with proper and coherent reasoning. What criticisms they do level at the Defence Brief are mere rehearsals of the Prosecution arguments, never including legal arguments to counter those of the Defence against the Prosecution's three grounds of appeal. This attitude on the part of the Legal Representatives can be seen in the case of the Defence statements on the incoherence and inconsistency of the Prosecution with regard to Decision 3319. They studiously avoid responding to the Defence, which traces this attitude back to the Prosecution's efforts to secure the joinder of the cases against Katanga and Ngudjolo. They know that if they were to respond, they would demonstrate the Prosecution's irrational conduct in respect of the Chamber's severance of the cases on 21 November 2012.

168. In conclusion, therefore, the submissions by the Legal Representatives of Victims leave the Defence Brief in Response utterly unassayed, and it remains entirely apposite.

RESPECTFULLY SUBMITTED.

For the Defence for Mathieu Ngudjolo Chui
[signed]

Mr Jean Pierre Kilenda Kakengi Basila
Lead Counsel

Dated this 19 August 2013, at Brussels