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**International
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Date: 15 October 2014

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

Second Public Redacted Version of “Prosecution Reply to the Defence Response to the Prosecution’s Appeal Brief”, 29 July 2013, ICC-01/04-02/12-126-Conf

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Introduction

1. On 18 December 2012, Trial Chamber II acquitted Mr Ngudjolo of the crimes charged (“Judgment”).¹ On 20 December 2012 and 19 March 2013, the Prosecution (“the Appellant”) appealed the Judgment (“Appeal”).² On 19 June 2013, Mr Ngudjolo (the “Respondent”) filed its “Response”.³ The Appellant sought⁴ – and was granted⁵ – leave to reply to very specific issues raised in the Response with a view to further assisting the Appeals Chamber in the determination of the issues before it. The fact that the Appellant does not address most arguments included in the Response should not be understood to mean that the Appellant agrees with them.
2. Pursuant to Regulation 23bis(2), the Appellant files this document confidentially as it relates to other filings that are subject to the same classification.

Submissions

Preliminary issue: the impact on this Appeal of the severance of the charges and the Regulation 55 process with respect to Mr Katanga (Response, paras.16-26)

3. Contrary to the contention of the Respondent,⁶ the Prosecution has not renounced its case theory regarding indirect co-perpetration, neither with respect to the Mr Katanga, nor with respect to the Respondent. In its submissions in the context of the Regulation 55 process in the Katanga case, the Prosecution submitted that the evidence on the record of that case establishes the “guilt of Germain Katanga also pursuant to the mode of liability of Article

¹ ICC-01/04-02/12-3.

² ICC-01/04-02/12-39-Conf-Exp A; ICC-01/04-02/12-39-Conf-red A.

³ ICC-01/04-02/12-90-Corr (A).

⁴ ICC-01/04-02/12-119-Conf (A).

⁵ ICC-01/04-02/12-123-Conf (A).

⁶ Response, paras.16-26.

25(3)(d)(ii)".⁷ The Prosecution made this submission because in its decision initiating the Regulation 55 process, the Chamber did not dismiss any of the charges against Mr Katanga.⁸ It merely gave notice pursuant to Regulation 55(2) that "the legal characterisation of facts may be subject to change". Accordingly, the Chamber may still convict Mr Katanga as an indirect co-perpetrator pursuant to Article 25(3)(a). Even if, *arguendo*, the Respondent was right that the position taken by the Prosecution in the Katanga case was inconsistent with that taken in the Respondent's case, that would be irrelevant for the purposes of the present appeal. Neither the Judgment nor the Prosecution's Appeal deal with the issue whether there is sufficient evidence to establish the existence of a common plan between Mr Katanga and the Respondent.

Reply to Respondent's Submissions on the First Ground of Appeal

Witness P-317 (Response, paras.51-57; Appeal, paras.54-58)

4. The credibility of P-317 and weight to be given to her evidence are not the subject of this Appeal.⁹ The Chamber found P-317 to be credible and her testimony reliable.¹⁰ It accepted that the Respondent admitted to her that he had organized the attack.¹¹ The question before the Appeals Chamber is what inferences can be drawn from the evidence of P-317 bearing in mind the proper standard of proof and the correct fact-finding process.
5. The Respondent argues that the conclusion that the Respondent may have lied about his involvement in the Bogoro attack is reasonable because D02-236 lied when claiming to be responsible for the attack on Radio FRI¹² and because the

⁷ ICC-01/04-01/07-3367, para.71 (emphasis added).

⁸ ICC-01/04-01/07-3319-tENG/FRA.

⁹ Response, paras.51-53,57.

¹⁰ Judgment, paras.292,295,434.

¹¹ Judgment, para.434.

¹² Response, para.55.

Respondent testified to having lied when stating to a Congolese prosecutor that he led the attack on Bunia on 6 March 2003 in order to explain how he came to hold the position of Chief of Staff of the FNI-FRPI.¹³ The alleged lie of a third person regarding his involvement in different events does not go to proof that the Respondent had lied to P-317 when admitting his involvement in the Bogoro attack. Moreover, the Chamber expressly rejected the Respondent's testimony as to why he admitted to the Congolese prosecutor having led the attack on Bunia.¹⁴ Accordingly, it could not, and did not give any weight to it when speculating about the possibility of the Respondent lying to P-317 when he admitted having organized the Bogoro attack.¹⁵

Witness D02-176 (Response, paras.58-62; Appeal, paras.59-60)

6. Contrary to the Respondent's contention, Witness D02-176 was very clear and unambiguous in stating that at the time of the 24 February 2003 attack, the Respondent was the most senior commander at Zumbe and that he was the commander who supervised operations at Bogoro at that time.¹⁶ During re-examination, the witness clarified that his previous answer "*je ne peux pas le savoir*" related to what he understood was a different question, namely "who was the commander or leader of the Lendus".¹⁷ The witness stated he was unsure at first if the question related to the Respondent's rank within the army or his position within the Lendu movement. When the question was repeated he understood that it was about the Respondent's role during the Bogoro attack, which he confirmed was the "number one" and commander of operations.¹⁸ This clarification makes it even more unreasonable to conclude that D02-176 confused the Respondent's status in the FNI in March 2003 with

¹³ Response, para.55.

¹⁴ Judgment, paras.455-456.

¹⁵ Judgment, para.434, ft.1005.

¹⁶ T-257, p.5 l.12-p.8 l.11; T-256, p.27 l.15-p.28l.5. See Response, paras.58,60.

¹⁷ T-256, p.27 l.3-p.28, l.1.

¹⁸ T-257, p.6 l.17-p.7 l.6. See also T-256, p.27, l.3- p.28, l.1.

his earlier status in the Lendu Bedu-Ezekere militia during the attack on Bogoro.¹⁹ In fact, it demonstrates that the witness drew a clear distinction between these two issues.

7. The fact that the witness referred to *Mr Ngadjole* as one of the Lendu commanders present during the Bogoro attack on 24 February 2003²⁰ does not make the Chamber's challenged inference less unreasonable. It was never the case of the Appellant at trial that D02-176 identified the Respondent at Bogoro on 24 February 2003,²¹ nor has the Trial Chamber found that the witness placed him at Bogoro during the attack.²² The Chamber did also not rely on this portion of D02-176's statement to support its conclusion that he might have been confused about the Respondent's roles in February and March 2003.²³ To the contrary, D02-176 very clearly distinguished between the Respondent and the role that he attributed to him²⁴ from Mr Ngadjole's participation during the Bogoro attack.²⁵

Attack on Bunia, 6 March 2003 (Response, paras.63-66; Appeal, paras.61-65)

8. Concerning the attack on Bunia, the issue before the Appeals Chamber is not whether the Respondent admitted to a Congolese prosecutor that he had "led the operation on 6 March 2003",²⁶ which has been accepted by the Chamber,²⁷ but whether the grounds invoked by the Chamber for its conclusion that guilt cannot be inferred from that admission meet the threshold of "reasonable

¹⁹ Judgment, para.433. *See also* T-257, p.8, l.6- 11.

²⁰ Response, para.60; T-256, p.9 l.9-p.10 l.25.

²¹ In its Appeal, para.59, the Appellant stated that the witness "unequivocally recognized Ngudjolo as one of the Lendu commanders at Bogoro on 24 February 2003" and in footnotes 57 and 62, the Prosecution by mistake made a reference to T-256, p.9 l.8-p.12 l.9. The sole purpose of the submissions at para.59 is to replicate the findings of the Chamber in 431 of the Judgment and to refer to the evidence relied upon by the Chamber.

²² Judgment, para.431.

²³ Judgment, para.433.

²⁴ See Decision para.431 and references relied upon by the Chamber.

²⁵ Response, para.60; T-256, p.9,l.9-p.10 l.25. *See also* D02-176, T-256-CONF-ENG-ET, p.9,l.8–p.10,l.25. At the request of the Defence, the witness clarified that he was not speaking of "Ngudjolo" being present at Bogoro but "Ngadjole".

²⁶ Response, para.64.

²⁷ Judgment, paras.455-456, 496-497.

doubt". The Respondent has not provided any argument to demonstrate that the Chamber's conclusions to that effect are based on evidence or that they are grounded on logic and common sense.

Overall conclusions (Response, paras.67-70; Appeal, paras.66-68)

9. The Appellant agrees that reasonable doubt is to be based on evidence adduced at the trial or lack thereof.²⁸ However, in light of all the positive findings made by the Chamber in this case with respect to the position of authority of the Respondent in the Lendu militia both prior to the attack on Bogoro and after that attack, the only reasonable inference is that he was the leader of the Lendu fighters of the Bedu-Ezekere *groupement* also on the day of the attack. The absence of evidence does not interrupt that chain of logical reasoning; rather, it corroborates it. In order to find reasonable doubt in this case, the Chamber would need to base that conclusion on evidence that suggests that, contrary to its other factual conclusion, the Respondent was not an important leader on the specific day of the attack. The Chamber has not done so and there is no such evidence on the record of this case.

Reply to the Respondent's Submissions on the Second Ground of Appeal

10. The Respondent argues that the Chamber did not fail to take into account the totality of the evidence at the various stages of the decision-making process. He relies on other evidence on the record and in many instances fails to cite all relevant aspects of a witness's testimony or the factual context, or makes factually inaccurate assertions. However, even the alternative reading of some of the evidence by the Respondent, which the Appellant disputes, does not demonstrate that the Chamber has taken all relevant evidence into consideration at the various stages of the decision-making. The arguments advanced by the Respondent therefore do not disprove the errors argued by

²⁸ Appeal, paras.42-45.

the Appellant under its Second Ground of Appeal. Moreover, the Respondent relies on incorrect statements of law in support of its submissions.

A. Incorrect representation of evidence and facts

First stage of the decision-making process: assessment of documentary evidence and Prosecution witnesses

(a) Assessment of the authenticity of the Soap Letter and its stamp (Response, paras.136-156; Appeal, paras.87-98, 107)

(i) Testimony of P-279, P-219, P-12, P-28, D03-100, D02-300

11. Contrary to what the Respondent suggests, the witnesses (other than Germain Katanga) do not contradict the Soap Letter, or the accounts of P-250 and P-28, of the Zumbe delegation.²⁹ P-279's evidence is not contradictory, in that: (a) he does not say that no delegation travelled from Zumbe to Aveba before the Bogoro attack and that instead, Katanga travelled to Zumbe; and (b) the Soap Letter (and P-250) describe a Zumbe delegation visiting Aveba weeks before the Bogoro attack,³⁰ whilst P-279 speaks of a visit from Katanga to Zumbe just days before the Bogoro attack.³¹

12. While P-219 did say that he did not know of a Zumbe delegation meeting with Ngiti from Aveba to plan the Bogoro attack,³² the Respondent fails to mention that P-219 also stated that [REDACTED],³³ so he was in no position to know about *all* who came from Zumbe to Aveba.

13. Moreover, P-12 does not say that the military groups of the Respondent and Germain Katanga did not even know each other before 18 March 2003,

²⁹ Response, paras. 138, 146-147, 156, 175.

³⁰ Appeal, para.90. The Soap Letter (EVD-OTP-00025) refers to the Zumbe delegation having left the Bedu-Ezekere *groupement* three weeks before (4 January 2003).

³¹ P-279, T-144-CONF-ENG ET, p.48, l.7-p.49,l.9; T-147-CONF-ENG ET, p.43, l.24-p.44, l.21; T-152-CONF-ENG ET, p.40, l.7-p.41, l.21. P-280 confirmed that this was all he knew about.

³² P-219, T-208-CONF-FRA ET, p.39, ll.3-12/T-208-CONF-ENG ET, p.43, l.14-25.

³³ [REDACTED].

implying that there was no alliance between their groups by the time of the Bogoro attack. Instead, when P-12 says that the “FNI” and FRPI groups did not know each other before 18 March 2003, it is clear that when referring to the “FNI” he is not referring to Ngudjolo’s military group, because: (a) P-12 was referring to a different FNI political party,³⁴ led by Floribert Ndjabu Ngabu,³⁵ and (b) he says that by this time the Respondent was not introducing himself as “FNI” but as an FRPI commander.³⁶

14. Witnesses P-28 and D03-100 do not contradict P-250’s information regarding the Zombe delegation. P-28 confirms that a delegation that included P-250 arrived from Zombe at Aveba and met with Germain Katanga.³⁷ D03-100 does not comment on any alleged Zombe delegation travelling to Aveba. Germain Katanga denied seeing any such delegation at Aveba,³⁸ but he clearly had a self-interest as a co-accused in doing so. The Respondent further claims that P-28 is contradicted by Germain Katanga as Katanga claims that he and Ngudjolo met for the first time on 8 March 2003.³⁹ Even if this claim was true, which the Appellant disputes, this does not contradict P-28 or P-250 in their account of the Zombe delegation meeting Katanga in Aveba as neither say that the Respondent was part of that delegation.

(ii) P-250’s testimony on the Soap Letter

15. The Respondent erroneously asserts that the Appellant discussed the existence and content of the Soap Letter with P-250 before his testimony.⁴⁰ The Soap

³⁴ T-195-CONF-FRA ET, p.17, l.28 – p.18, l.17/T-195-CONF-ENG ET, p.17, l.10-p.18, l.1.

³⁵ P-12, T-195-CONF-FRA ET, p.11 l.16 – p.12, l.12/T-195-CONF-ENG ET, p.11, l.9 – p.12, l.4. *See also* P-12, T-194-CONF-ENG, p.55, l.6-p.58, l.20 (Ndjabu signed the FIPI agreement in February 2003 on behalf of FNI, which was created in Arua, Uganda); EVD-D03-00044 (Agreement for the Cessation of Hostilities in Ituri, 18 March 2003, signed by Ndjabu for FNI, and Ngudjolo as Lendu representative from Djugu territory (i.e., not for the FNI)).

³⁶ P-12, T-195-CONF-FRA ET, p.18, l.1-17/T-195-CONF-ENG ET, p.17, l.14-p.18, l.1.

³⁷ Appeal, para.90. *See e.g.* P-28, T-217-CONF-ENG-CT, p.40 ll.1-19, p.44, ll.8-21, p.45, ll.3-25; T-221-CONF-ENG-ET, p.79, l.24 – p.80, l.8; T-223-CONF-ENG-ET, p.30, ll.17- p.31, l. 21.

³⁸ D02-300, T-322-CONF-FRA-CT, p.26, l.26 – p.28, l.13/T-322-CONF-ENG-CT, p.26, l.9 – p.27, l.22.

³⁹ Response, para.182.

⁴⁰ Response, para.153, citing P-250’s witness statement DRC-OTP-0177-0249.

Letter was obtained by the Appellant after interviews with P-250 and the letter was shown to him for the first time during his testimony.⁴¹ The Respondent further argues that P-250 is not credible and his testimony regarding the Soap Letter could not be relied upon, in part, because he lied about the death of his parents.⁴² This is incorrect. P-250 explained when testifying that he had not wanted to say that his parents were alive because of fear for their security.⁴³

(iii) Organised nature of the Bedu-Ezekere militia group

16. The Respondent further asserts that the Chamber was right in its assessment of the Soap Letter, because the Bedu-Ezekere did not have a structured organization allied with the FRPI and commanded by the Respondent. In support of this argument, the Respondent asserts that the Appellant admitted that the Respondent did not have a satellite phone.⁴⁴ The Appellant did not make any such admission, but instead did not object to documents being admitted into evidence for the “*very specific and restricted context*” of records indicating that the Respondent did not have a contract in his name for a satellite phone with the Kampala-based satellite phone operator (Thuraya).⁴⁵ The Respondent further wrongly asserts that the Appellant admitted that there was no alliance between the militia groups of the Respondent and Germain Katanga before 22 March 2003.⁴⁶ The Appellant acknowledged that there was no formal political alliance between the FNI political party led by Floribert Ndjabu Ngabu, with the military groups separately led by the Respondent and Germain Katanga, until after 22 March 2003.⁴⁷ However, it has consistently

⁴¹ Appeal, paras. 94,107.

⁴² Response, paras.150,172.

⁴³ P-250, T-102-CONF-FRA ET, p. 44, l. 7-p. 48, l.15/T-102-CONF-ENG CT, p.45, l.14–p.50, l.7.

⁴⁴ Response, para.147.

⁴⁵ D03-707, T-328-CONF-ENG-CT2, p.32, ll.3-p.33, l.2.

⁴⁶ Response, para.147.

⁴⁷ Prosecution’s Closing Brief, paras.451,744-746.

maintained that there was an alliance between the co-accused's militia groups to carry out the Bogoro attack.⁴⁸

(b) Assessment of P-250's credibility (Response, paras.158-167; Appeal, paras.102-118)

(i) School records

17. The Respondent asserts that the Appellant has never contested the authenticity of the school records to show that P-250 was a student when Bogoro was attacked and not a militiaman, and that they were authenticated by P-250.⁴⁹ However, the Appellant did object to their admission contesting the manner in which the Respondent sought to prove their authenticity; and P-250 did not properly authenticate those records.⁵⁰

(ii) D03-100's testimony

18. The Respondent suggests that D03-100's testimony does not contradict but supports the content of the school records,⁵¹ because D03-100 said that when asked by a member of the Respondent team before the trial whether [REDACTED] was one of the Respondent's escorts, he confirmed that [REDACTED] was not with the Respondent but was at school at Kagaba during "those years".⁵² However, the Respondent does not cite other parts of D03-100's testimony that are relevant to understanding why D03-100 would falsely claim that [REDACTED] was just a student and not an escort of the Respondent who participated in the Bogoro attack. In this context it is essential to take into consideration the evidence where D03-100 speaks of his fears for himself and his family from the Respondent's family: D03-100 stated that when he first learnt that [REDACTED] was a witness for the Appellant, from Mr. Lopa, the

⁴⁸ Prosecution's Closing Brief, paras.1-4.

⁴⁹ Response, para.166.

⁵⁰ Appeal, para.113 and fn.196.

⁵¹ Response, para.174.

⁵² Response, para.174.

Respondent's resource person, he "*became [...] very afraid*".⁵³ It was only after being told that [REDACTED] was testifying against the Respondent that D03-100 claimed that [REDACTED] was a student. He also then asked Mr. Lopa "*are you trying to accuse me of something?*"⁵⁴ D03-100 further confirmed that Mr. Lopa helped him resolve the conflict between his family and that of Mr. Ngudjolo.⁵⁵ D03-100's family was personally known to the Respondent's family. [REDACTED].⁵⁶ Accordingly, it is not surprising that D03-100 would try to falsely maintain that [REDACTED] was not with the militia at the relevant time. Moreover, when D03-100 was taken chronologically through the events, he contradicted the content of the school records and supports [REDACTED] account of his schooling in many respects.⁵⁷

19. The Respondent argues that P-250 acknowledged that [REDACTED] [REDACTED] was right in asserting that he had been a student and not a militiaman.⁵⁸ This is incorrect, because when first confronted with [REDACTED] statement as to his date of birth, role within the family and allegation he was not a militiaman, P-250 simply acknowledged that [REDACTED] was able to provide certain precisions, namely, the relevant dates, and confirmed that [REDACTED] himself was in the military.⁵⁹

(iii) Threats against P-250's family

20. The Respondent asserts that P-250 did not receive any direct or indirect threat,⁶⁰ and that the Respondent's family did not commit any act of aggression against D03-100's family,⁶¹ which is evidenced by the way P-250 [REDACTED] left the

⁵³ D03-100, T-310-CONF-ENG-CT, p.6, l. 4-1. p.50, l. 5-13.

⁵⁴ D03-100, T-310-CONF-ENG-CT, p.50, l.11-p.51, l.8/ T-310-CONF-FRA-CT, p.43, l.4-24.

⁵⁵ D03-100, T-310-CONF-ENG-CT p.8, ll.8-17. See also p.51, 4-8.

⁵⁶ D03-100, T-310-CONF-ENG-CT, p. 21, l.16-p.22, l.22; p.54, l.2 – p.56, l.21.

⁵⁷ Appeal, para.112.

⁵⁸ Response, para.167.

⁵⁹ P-250, T-105-CONF-FRA-ET, p.43, l. 21-p.44, l.2/T-105-CONF-ENG-ET, p.44, ll.7-14.

⁶⁰ Response, para.172.

⁶¹ Response, para.173.

ICC protection program (“ICCPP”) from 2010 (after he testified), showing that he was not worried.⁶² The record before the Trial Chamber suggests otherwise: D03-100 testified that there was a conflict between his and P-250’s family and that of the Respondent;⁶³ that D03-100 was afraid for the safety of his family,⁶⁴ and their entire extended family received a death threat from the Respondent family members.⁶⁵ D03-100 confirmed that the Respondent’s “emissaries” also asked him where P-250 was located.⁶⁶ Moreover, D03-100 further testified that when [REDACTED] returned in 2010 from the ICCPP he was psychologically not well.⁶⁷

(iv) Comparison between P-159 and P-250

21. The Respondent suggests that the level of detail provided by P-250 regarding the Bedu-Ezekere Lendu militia cannot be relied upon to assess his credibility, by comparing the situation with P-159 whom the Respondent asserts also gave much detail, including the Respondent’s presence at Bogoro during the attack, whilst he was not present at Bogoro.⁶⁸ It is not appropriate to draw a comparison between the two witnesses, in particular because P-159 was withdrawn as a witness so the Chamber did not assess his credibility.

(c) Assessment of credibility of P-279 and P-280

22. It is incorrect to suggest that P-279 and P-280 denied knowing each other.⁶⁹
When P-279 was shown a photograph of P-280 he said he did not recognize the

⁶² Response, para.173.

⁶³ D03-100, T-310-CONF-ENG-CT, p.8, ll.11-17.

⁶⁴ D03-100, T-310-CONF-ENG-CT, p.55, ll.1-12.

⁶⁵ D03-100, T-310-CONF-ENG-CT, p.55, ll.5-17.

⁶⁶ D03-100, T-310-CONF-ENG-CT, p.50, l.14–24.

⁶⁷ D03-100, T-310-CONF-ENG-CT, p.8, l.8– p.10, l.4.

⁶⁸ Response, paras.169-170. Defence claims he lied about his mother’s death, but this information is supported by other evidence including from D02-176.

⁶⁹ Response, para.185.

person well (or did not know the person very well).⁷⁰ P-280 was not shown a photograph of P-279 or questioned about him.⁷¹

Second stage of the decision-making process: assessment of facts

(a) *The Respondent's admissions regarding the Bogoro attack and killing of Hema (Response, paras.188-207; Appeal, paras.122-131, 135-136)*

23. The Respondent incorrectly describes the evidence regarding the Respondent's role in the Bogoro attack and the nature of the Appellant's arguments regarding his authority. First, contrary to what the Appellant suggests, P-219 did not state that only Chef Manu was leading the Lendu who attacked Bogoro.⁷² P-219 confirmed that Chef Manu was amongst Zumbe commanders he knew that participated in the Bogoro attack;⁷³ but that Mathieu Ngudjolo was the most senior of the Zumbe commanders and was the supreme commander of the army at Bogoro.⁷⁴

24. Second, contrary to the Respondent's assertion, P-12 did not say that the Respondent's authority was just theoretical and that Katanga had the real authority.⁷⁵ P-12 explained that when the Respondent became Chief of Staff of the FRPI, in the context of the FNI-FRPI political alliance after the Bogoro attack, the Respondent was not the only leader and when it came to the Walendu-Bindi (Ngiti) soldiers, he had to give orders via their Walendu-Bindi commanders, and their general commander remained Germain Katanga.⁷⁶ P-12 confirmed that the Respondent was the leader of the Zumbe/Walendu-Tatsi

⁷⁰ P-279, T-152-CONF-ENG-ET, p. 43, l.10-p. 46, l.16/T-152-CONF-FRA-ET, p.43, ll.16–p.46, l.8. There is a slight discrepancy between the English and French transcripts.

⁷¹ See P-280, T-161-CONF-ENG-ET, p.28, ll.5-8. P-280 was only asked if he knew if he was the only person put in touch with the ICC through his intermediary, which he replied he did not know.

⁷² Response, para.197.

⁷³ P-219, T-206-CONF-FRA-ET, p.8, ll.12-18/T-206-CONF-ENG-ET, p.8, ll.13-19.

⁷⁴ P-219, T-206-CONF-FRA-ET, p.8, ll.19-27/T-206-CONF-ENG-ET, p.8, l.20-p.9, l.3. See also: P-219, T-205-CONF-FRA-ET, p.58, l.24–p.59, l.9/T-205-CONF-ENG-ET, p.59, ll.2–15.

⁷⁵ Response, para.206.

⁷⁶ P-12, T-204-CONF-FRA-CT, p.17, l.26–p.19, l.11/T-204-CONF-ENG-CT, p.18, l.19–p.20, l.7.

Lendu forces,⁷⁷ and that Katanga asked the Respondent to send his troops to support Katanga's forces in attacking Bogoro.⁷⁸ Moreover, the Appellant has never argued, as the Respondent claims, that FRPI Commander Dark was the Respondent's immediate subordinate during the Bogoro attack,⁷⁹ but instead observed that Dark's obvious deference to the Respondent, his role as the Respondent's "*opérateur*" and videos depicting the Respondent confirming he gave orders to Dark/FRPI forces occupying Bogoro, all shortly after the attack, demonstrate the Respondent's authority at the time of the Bogoro attack.⁸⁰

25. The Respondent also claims that P-12's evidence about the Respondent's admission to him made at the time of the MRC creation could not be correct, because according to P-12 this was in 2004, when the Respondent was in prison.⁸¹ The date of the creation of the MRC, namely 2005, is not unclear.⁸² When shown the MRC creation document, the Respondent himself testified that he had signed it and presented it to the Ugandans in 2005.⁸³ Similarly, the Respondent wrongly asserts that P-160 excluded the Respondent from the plan of the attack on Bogoro. She confirmed that she was aware that Lendu were involved in the attack and that Germain Katanga received help from "*the Lendu [...] from the Ngudjolo side*".⁸⁴

(b) Exclusion of Hearsay evidence of D02-176 (Response, paras.208-212; Appeal, paras.132-134)

26. Finally, it is incorrect to suggest that when D02-176 spoke of Lendu that he recognized during the Bogoro attack from his school days, that he was not

⁷⁷ P-12, T-196-CONF-ENG-ET, p.69, l.14–p. 70, l.6, p.31, l.2–p.32, l.2, p.36, l.1–23.; T-198-CONF-ENG-ET, p.7, l. 4–20.

⁷⁸ P-12, T-197-CONF-ENG-ET, p.24, l.16–23, p.27, 15–19; T-201-CONF-ENG CT, p.29, l.13–p.30, l.16.

⁷⁹ Response, para.206.

⁸⁰ See Prosecution's Closing Brief, paras.380,449, 451, 453, 458, 478-479, 509, 526, 528, 536, 542, 554, 574-575, 580-581, 602, 633, 766.

⁸¹ Response, paras.202- 203.

⁸² Response, para.203.

⁸³ D03-707, T-330-CONF-ENG-CT, p.30, ll.20-23; T-332-CONF-ENG-CT, p.73, l.25–p.74, l.5, p.78, ll.8-16; T-333-CONF-ENG-CT2, pp.2-3.

⁸⁴ P-160, T-210-CONF-ENG-ET, p.75, ll.15-22; T-212-CONF-ENG-CT2, p.63, l.19- p.66, l.14.

speaking of any Lendu commanders but normal foot soldiers.⁸⁵ While D02-176 did not name specific individuals he knew from school,⁸⁶ he confirmed that he personally saw and recognized Lendu commanders Kute, Besto, Ndjabu, Mbiti, and Ngadjole at the attack.⁸⁷

B. Incorrect statements of the law

(a) *Applicable burden of proof and standard of proof (Response, paras.151, 154, 157, 166, 213-234; Appeal, paras.40-50, 71-86)*

27. First, the Respondent wrongly states the law on establishing authenticity of documentary evidence to support its arguments that the Soap Letter was not authentic, whilst the alleged school records of P-250 could be relied upon. The Respondent asserts that in the *Musema* case, an ICTR Trial Chamber held that when assessing the authenticity of a document a Chamber must determine “whether, a document is signed, sealed, certified, stamped or in any other way officially sanctioned by some authority or organisation”. Accordingly, the Respondent submits that this Chamber was right to conclude that it could not consider the Soap Letter or its stamp as reliable because it could not properly assess the circumstances in which the stamp was put on the Soap Letter.⁸⁸ However, in *Musema* the Trial Chamber made it clear that proof of official sanction was not a requirement in proving the authenticity of documents, but just one of a number of potential matters for a chamber to consider.⁸⁹ Moreover, the Trial Chamber in *Musema* explicitly stated that “in assessing authenticity, the Chamber observes that as a general rule, it is insufficient to rely on any one factor alone as proof or disproof of the authenticity of the document.

⁸⁵ Response, para.208.

⁸⁶ D02-176, T-256-CONF-FRA-ET, p.51, l.11-16./T-256-CONF-ENG-ET, p.60, ll.19-24.

⁸⁷ D02-176, T-256-CONF-FRA-ET, p.8, l.16-p.9, l.28, p.10, l.19-p.11, l.10/T-256-CONF-ENG-ET, p.9,l.8-p.10, l.25, p.11, l.22-p.12, l.18.

⁸⁸ Response, para.151. Citing *The Prosecutor v Musema*, Judgment and Sentence, Case No. ICTR-96-13-A (“*Musema*”), paras.66-67.

⁸⁹ *Musema*, para. 67: “includes such matters as...”.

Authenticity must be established through reference to all relevant factors.”⁹⁰ In any event, in addition to the stamp there were other indicia of official sanction of the Soap Letter [REDACTED] and President of the Zumbe delegation.⁹¹ Pursuant to Rule 63(2), the Chamber is free to assess the Soap Letter and is not bound by any formalistic rules as suggested by the Respondent.

28. Second, the Respondent argues that when admitting documentary evidence, the Prosecution is required to prove its reliability and probative value beyond a reasonable doubt whilst the Respondent is only required to prove that on the balance of probabilities.⁹² This is incorrect. Although the decision in *Prosecutor v. Brdjanin* relied upon by the Respondent makes a finding to that effect, the authorities relied upon by the Chamber in that decision do not support that finding.⁹³ The correct approach is that burden rests with the party seeking to introduce documentary evidence to show *prima facie* that it has some probative value and some relevance, and that no distinction between the burden of the Prosecution and the burden of the Defence in that respect is made.⁹⁴ Even after being admitted into evidence, individual items of evidence do not need to be

⁹⁰ Musema, para.72.

⁹¹ Appeal, para.88.

⁹² Response, para. 221.

⁹³ See *Prosecutor v Brdjanin*, Judgment, IT-99-36-T, 1 September 2004, para.29 (“Brdjanin”). The citations relied upon are (a) *Prosecutor v Vasiljevic*, Judgment, IT-98-32-T, 29 November 2002, para.282; where the trial chamber was referring to the unrelated principle that defence must prove any defence raised of diminished mental responsibility on the balance of probabilities; (b) *R v Matthey* [1995] 2 Cr App R 409 (UK CA), which dealt with the unrelated issue of admissibility of statements when it is impractical for witnesses outside the UK to attend to give testimony (the burden of proving the impracticality lay on the party seeking to admit that testimony on a balance of probabilities); (c) *Rush v DPP* [1994] RTR 268, which does not deal with documentary evidence but the standard of proof to which an accused needs to prove a defence and related burden on the Prosecution as regards that defence.

⁹⁴ ICC-01/04-01/06-1399, paras.25-30; ICC-01/04-01/07-2635, paras.12-13; *Prosecutor v Delalic et al.*, Decision on Application of Defence Zejnic Delalic for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), 4 March 1998, para.17; *Prosecutor v. Stakic*, IT-97-24-PT, Provisional Order on the Standards Governing the Admission of Evidence and Identification, 25 February 2002, Annex, para.10; *Prosecutor v Hadzihasanovic et al*, IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic, 22 June 2005, para 21; *Prosecutor v. Bagosora*, ICTR-98-47-T, Decision on Bagosora Defence Request for Admission of Documents, 21 March 2007, para.4; *Prosecutor v. Bagosora*, ICTR-98-47-T, Decision on the Request to Admit United Nations Documents into Evidence Under Rule 89 (C) (TC), 25 May 2006, paras.2, 4; *Musema* (also relied upon by the Defence), paras.56-58, fn.27, referring to a standard of “balance of probabilities”. The chamber referred to a limited exception of the Prosecution needing to prove beyond reasonable doubt that evidence it sought to admit was voluntarily obtained and did not violate the accused’s right to a fair trial. See also Triffterer, at 1306, 1322, 1324.

proven beyond reasonable doubt to be relied upon. Rather the Chamber must give each item of admitted evidence its appropriate weight in the context of the evidentiary record as a whole.⁹⁵ Only after the end of the process, and taking into consideration the entire evidentiary record, does the Chamber apply the standard of proof beyond reasonable doubt and only to establish the elements of a crime and the facts indispensable to establish these elements.⁹⁶

29. Accordingly, the Respondent incorrectly suggests that the Appellant was obliged to proffer additional evidence to undermine the authenticity of the school records of P-250, and because it did not do so it is precluded from questioning the authenticity and reliability of these documents.⁹⁷ Since D03-100 was not shown the school records he was said to have provided, and his own testimony contradicted those same records,⁹⁸ it was not incumbent upon the Appellant to then cross-examine D03-100 on them.⁹⁹

30. Moreover, contrary to the Respondent assertion,¹⁰⁰ documentary evidence does not need to be associated with the testimony of a witness or tendered through a witness if there are sufficient indicia of reliability and probative value on the face of the document itself. If evidence is tendered without a witness, this is just one factor to be considered when deciding on its admissibility, which in the past has been outweighed by other indicia of reliability.¹⁰¹ Whilst the Soap

⁹⁵ *Prosecutor v Seselj*, ‘Decision on Prosecution Motion for Certification to Appeal the Decision of 7 January 2008’, IT-03-67-T, 21 May 2008, para.26; *Prosecutor v Hadzihasanovic et al.*, ‘Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic’, IT-01-47-T, 22 June 2005, para.15.

⁹⁶ *Prosecutor v Ntagerura*, Appeal Judgment, ICTR-99-46-A, 7 July 2006, para.174; *Prosecutor v Halilovic*, Appeal Judgment, IT-01-48-A, 16 October 2007, para.125; Taper (ed.), *Cross & Tapper on Evidence*, 12th ed., Oxford University Press, 2010, at.164-166; *United States v Viafara-Rodriguez*, 729 F.2d.912 (2d Cir.N.Y.1984);; *Shepherd v R* (1990), 97 ALR 161, at.164-166; see also *Chamberlain v. R (No 2)* (1984), 153 CLR 521 at 626; *R v. Morin*, [1988] 2 SCR345 at 346-347, 354-362; *R v JMH*, [2011] 3 SCR 197, at para.31; *R v. MacKenzie*, [1993] 1 SCR 212; to see an example of this error, see *R v Rudge*, [2011] ONCA 791 (Ontario Court of Appeal), paras 65-66; *Thomas v. The Queen* [1972] NZLR 34 (CA) at 37-38; Northern Ireland Court of Appeal: *R v. Meehan*, [1991] 6 NIJB 1 at 32-34; See also in *R v. Murray* (1991), [1993] NI 105 at 126-127.

⁹⁷ Response, para.166.

⁹⁸ Appeal, paras.110-113.

⁹⁹ Response, para.166.

¹⁰⁰ Response, paras.155, 221.

¹⁰¹ ICC-01/04-01/06-1398-Conf-Corr, paras.23-29; ICC-01/04-01/06-2662, para.9; ICC-01/04-01/07-2635, para.12; *Prosecutor v Delalic et al*, Decision on Motion for the Admissibility of Evidence, IT-96-21, 19 January

Letter has sufficient indicia of reliability and probative value on its face, the school records did not.¹⁰²

31. Finally, the Appellant is not obliged to indicate to the Chamber every item of evidence the Chamber should rely upon.¹⁰³ As a matter of law, the Chamber correctly stated that it has a duty to assess all evidence and that it “did not restrict its analysis to the evidence expressly referred to by the parties [...] in their arguments”.¹⁰⁴ It could not derelict its duty to make its findings based on a cumulative assessment of all evidence by requesting the parties to identify discrete items of evidence.

Reply to the Respondent’s Submissions on the Third Ground of Appeal

32. The Respondent argues that the Appellant’s Third Ground of Appeal was improperly raised under Article 81(1)(a), and that the violation of the right to a fair process can only be raised by the convicted person, or the Prosecution on his/her behalf under Article 81(1)(b)(iv).¹⁰⁵ The Respondent further submits that the litigation related to his phone conversations from the detention center constitutes *res judicata* because the Appellant had not sought leave to appeal the final decision.¹⁰⁶

33. As it is described below, the Respondent’s submissions are without merit. First, the Prosecution’s Third Ground of Appeal presents a procedural error that falls squarely within the grounds set out in Article 81(1)(a). Second, the Respondent confuses the notion of *res judicata* with the purpose and characteristics of the appeal proceedings against a final judgment.

1998, para.22; *Prosecutor v Blaskic*, Judgment, IT-95-14-T, 3 March 2000, para.35; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Request to Admit United Nations Documents into Evidence under Rule 89(C), 25 May 2006, para.4.

¹⁰² Appeal, paras.88-98, 112-113.

¹⁰³ Response, paras.214-218.

¹⁰⁴ Judgment, para.47.

¹⁰⁵ Response, para.243.

¹⁰⁶ Response, paras.283-285;286,288-289.

(a) The Chamber's violation of Article 64(2) constitutes a procedural error that falls within the scope of Article 81(1)(a)

34. The Respondent requests the dismissal of the Third Ground because a strict reading of Article 81(1)(a) forbids the Appellant to raise the violation of the Prosecution's right to a fair process under Article 64(2) as a ground of appeal. According to the Appellant, only the convicted person or the Prosecution on his/her behalf could raise such ground under Article 81(1)(b)(iv), namely, as "[a]ny other ground that affects the fairness or reliability of the proceedings or decision".¹⁰⁷

35. The Respondent's submissions lack merit. The Appellant correctly presented the Third Ground of Appeal as a procedural error within the terms of Article 81(1)(a)(i).¹⁰⁸ The Trial Chamber, when faced with information related to witness interference and evidence tampering, abused its discretion by refusing the Appellant's persistent requests and by failing to exercise its own powers to ensure the fairness of the trial proceedings. As a result of the cumulative effect of the Chamber's decisions and its passivity, the Prosecution's right to a fair trial under Article 64(2) was violated.¹⁰⁹ Hence, the Chamber committed procedural errors that materially affected the final Judgment.¹¹⁰ The Appellant further noted that, to the extent that these cumulative errors involved a defective interpretation of the scope and breadth of the Chamber's duties under Article 64(2) – and other statutory provisions such as Article 69(3) or 64(3)(a) or (f) of the Statute, the Appeals Chamber may consider that the error is partially legal in nature.¹¹¹ Therefore, the Appellant validly raised the Third Ground

¹⁰⁷ Response, paras.242-245.

¹⁰⁸ Appeal, para.35.

¹⁰⁹ Appeal, paras.31,140-142, 204-210.

¹¹⁰ *Ibid.* With respect to procedural errors that arise previously to the impugned decision see ICC-02/04-01/05-408OA3, paras.46-49.

¹¹¹ Appeal, fn.299.

within the terms of Article 81(1)(a)(i) as a procedural error and, in the alternative, as an error of law within the terms of Article 81(1)(a)(iii).

36. The additional ground of appeal set out in Article 81(1)(b)(iv) was added as a “catch-all” provision to ensure that any miscarriage of justice would be capable of correction on appeal in instances of conviction.¹¹² Commentators have noted that this ground adds little to the other specified grounds of appeal¹¹³ and was introduced out of an abundance of caution since any valid grounds of appeal would likely fall within one of the other categories.¹¹⁴ In particular, anything occurring within the context of the trial itself that affects the fairness or reliability of the proceedings could be regarded as a procedural error, since fairness is a procedural requirement under Article 64(2).¹¹⁵ Thus, the fact that the drafters were vigilant and sought to safeguard the exercise of the accused’s right to appeal in instances of conviction, does not entail an automatic restriction on the Prosecution’s right to appeal when it is exercised within the parameters set out in Article 81(1)(a).

37. For the foregoing, the Respondent’s submissions shall be dismissed and the Prosecution’s Third Ground of Appeal considered as properly filed.

(b) The Respondent confuses the notion of Res Judicata with the nature and purpose of appeal proceedings

38. The Respondent further argues that the litigation relating to the Respondent’s phone conversations from the detention center terminated prior to the Judgment and therefore constitutes *res judicata*.¹¹⁶ The Respondent submits that

¹¹² Staker C. in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C.H.Beck-Hart-Nomos, 2008), p.1466.

¹¹³ Ibid. See also p.1453.

¹¹⁴ Ibid.

¹¹⁵ Ibid. Note that Staker referred to Article 67(1). But the same would arguably apply with respect to Article 64(2).

¹¹⁶ Response, p.116, paras.286,288. The Respondent argues that as a result of the Chamber’s decisions the content of the phone conversations was not evidence discussed and submitted before the Chamber at trial within the terms of Article 74(2).

the Appellant had exhausted all available remedies¹¹⁷ and improperly raised these matters in its Third Ground.¹¹⁸ In particular, the Respondent refers to decision #3120 whereby the Chamber rejected the Prosecution's request to reclassify the Registrar's five reports so that it could use them in its cross-examination of the two accused and Defence witness D03-88, and argues that the Prosecution did not seek leave to appeal that decision.¹¹⁹ Further, the Respondent also refers to the Chamber's decision #1958, which rejected the Prosecution's application for leave to appeal the Chamber's oral rulings denying both, the Prosecution's request to refresh the memory of witness P-250, and to ask him leading questions, and notes that the decision was also final and irrevocable.¹²⁰

39. The Respondent's submissions lack merit. The Respondent confuses the notion of *res judicata* with the purpose and characteristics of the appeal proceedings against the final judgment. *Res judicata* is a well-settled principle of law that applies to a decision which is final, binding and without appeal.¹²¹ According to the ICJ, *res judicata* requires identity of parties, subject-matter and cause,¹²² the last two requirements being a common subdivision on one more general requirement of identity of "the question at issue".¹²³ The questions at issue in those procedural decisions differ from that in the instant appeal proceedings

¹¹⁷ Response, paras.284,292,.

¹¹⁸ Response, para.285.

¹¹⁹ Response, paras.283,289.

¹²⁰ Response, paras.291.

¹²¹ The Corfu Channel Case, ICJ Reports 1949, p.248; ICJ Reports, 1954, p. 53; 21 ILR, p. 314, and the Laguna del Desierto (Argentina/Chile) case, 113 ILR, pp. 1, 43. See also AMCO v. Republic of Indonesia, 89 ILR, pp.366, 558; Cheng, General Principles, chapter 17; S. Rosenne, The Law and Practice of the International Court, 1920–2005 (4th edn, Leiden, 2006), pp.1598 ff.; M. Shahabuddeen, Precedent in the International Court (Cambridge, 1996), pp.30 and 168, and I. Scobbie, 'Res Judicata, Precedent and the International Court', 20 Australian YIL, 2000, p.299.

¹²² Bosnia & Herzegovina v. Serbia & Montenegro, ICJ Judgment of Feb. 26, 2007, ¶ 4 (dissenting opinion), available at http://www.genocide.watch.org/images/ICJ-26-Feb-07-Joint_dissenting_opinion_of_Judges_Ranjeva,_Shi_and_Koroma.pdf (last visited 24 July 2013). See also Interpretation of Judgments Nos. 7 & 8 (Chorzow Factory) (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13, at 23 (Sept. 13) (dissenting opinion of Judge Anzilotti).

¹²³ B.Cheng, 'General Principles of Law as Applied by International Courts and Tribunals' (UK: Cambridge University Press, 2006), p.340.

which seek to determine whether the Trial Chamber erred in its acquittal of the Respondent. The Prosecution is not seeking to re-litigate the merits of the Chamber's managerial decisions issued throughout the trial. Nor does the Prosecution argue that the content of the phone conversations was evidence which the Chamber ought to have considered. To the contrary, the Prosecution submits that the Chamber's decisions which led, *inter alia*, to exclude the content of the phone conversations from the record, coupled with the Chamber's passivity when presented with compelling information on witness interference and evidence tampering, constituted a procedural error¹²⁴ which had a material impact on the acquittal of the Respondent.¹²⁵

40. The Appeals Chamber has confirmed that procedural (and substantive) errors that may have arisen prior to the impugned decision but which are germane to its legal correctness or procedural fairness can be raised in appeal,¹²⁶ as long as the appellant clearly identifies the errors and shows that they materially affected the impugned decision.¹²⁷

41. This is precisely the procedure followed by the Appellant in its Third Ground. In its Appeal, the Appellant listed the managerial decisions issued by the Chamber whereby the Chamber, *inter alia*, denied disclosure to the Appellant of the Respondent's recorded conversations and list of contacts;¹²⁸ did not rule on the Appellant's request for active monitoring;¹²⁹ rejected disclosure of the phone conversations even after the Appeals Chamber overruled its prior ruling noting that "it was not minded to revisit this position";¹³⁰ rejected re-classification of the reports so the Appellant could use them in cross-

¹²⁴ Appeal, paras.31,140,142.

¹²⁵ Appeal, paras.223-226.

¹²⁶ ICC-02/04-01/05-408OA3, paras.46-47; quoted in ICC-01/05-01/08-962OA3, para.101, ICC-01/09-01/11-307OA, para.87, and ICC-01/09-02/11-274OA, para.85.

¹²⁷ ICC-01/05-01/08-962OA3, paras.102;133-134; ICC-02/04-01/05-408OA3, para.48. Cited in ICC-01/09-01/11-307OA, para.87 and ICC-01/09-02/11-274OA, para.85.

¹²⁸ Appeal, paras.190-191, fn.416, para.200.

¹²⁹ Appeal, para.193.

¹³⁰ Appeal, paras.191, 201-202. See ICC-01/04-01/07- 2187, para.74(b).

examination of the two accused and witness D03-88¹³¹ and rejected the Appellant's request to refresh P-250's memory and to ask him leading questions and its subsequent application for leave to appeal those rulings.¹³² In sum, the Chamber took no action to ascertain the veracity of the information elicited in the reports relating to witness interference and evidence tampering nor did it permit the Appellant to do so.

42. Further, the Appellant indicated how the Chamber's decisions, coupled with its passivity, materially affected the Judgment. First, the Chamber rejected for the purposes of its final Judgment the evidence of witness P-250 in light of his behavior in Court and inconsistencies in his testimony.¹³³ The exclusion of P-250's evidence, alone, had a material impact on the Judgment.¹³⁴ Second, the Chamber did not ascertain - nor did it permit the Appellant to do so - the extent of witness interference and evidence tampering that may have impregnated the proceedings. Thus, it is unknown if and how many Prosecution witnesses were approached, and Defence witness coached, and to what extent the evidentiary record is infected.¹³⁵ Had this information been uncovered, the Chamber would have excluded the evidence of certain witnesses from the record and/or considered this information in its assessment of the possible pressure or influence exerted over witnesses and collusion.¹³⁶

43. Further, the Appellant was unable to test at trial the credibility of the Respondent and of one of his closest associates (D03-88) with the information contained in the reports.¹³⁷ The Appellant reiterates that in these circumstances it is impossible to rely on the Judgment with confidence.

¹³¹ Appeal, para.203.

¹³² Appeal, paras.213-215.

¹³³ Judgment, para.159.

¹³⁴ Appeal, para.223. See the Appellant's submissions with respect to material impact on para.36 of the Appeal.

¹³⁵ Appeal, para.226.

¹³⁶ Judgment, para.53.

¹³⁷ Appeal, paras.224-225.

Relief Sought

44. For the foregoing, the Appellant requests that the Respondent's Response be rejected and renews the relief that it had sought in its Appeal.¹³⁸



Fatou Bensouda, Prosecutor

Dated this 15th day of October 2014

At The Hague, The Netherlands

¹³⁸ Appeal, paras.227-233.