

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

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's Document in Support of
Appeal against the 'Jugement rendu en application de l'article 74 du Statut' ",
19 March 2013, ICC-01/04-02/12-39-Conf**

Source: Office of the Prosecutor

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

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A. INTRODUCTION

1. Prosecution witness P-317, a UN human rights investigator, testified that Ngudjolo admitted to her that he had organized the Bogoro attack on 24 February 2003. Ngudjolo denied having made that statement and testified that he never met witness P-317. The Trial Chamber found P-317 to be credible and thus accepted that Ngudjolo admitted to her that he had organized the attack. But it declined to accept his confession as proof of guilt, among others, because it found it "possible" that Ngudjolo had falsely confessed to her in order to bolster his reputation in the Congolese army. This wholly speculative and factually unsupported finding – contrary even to the testimony of Ngudjolo himself -- illustrates the Chamber's flawed approach to the evidence that, ultimately, led it to acquit Ngudjolo.
2. The Prosecution recognizes that credibility determinations are largely left to the fact-finder and should not lightly be reconsidered on appeal. It also recognizes that these determinations are intrinsically interwoven with the requirement that criminal charges be proven beyond reasonable doubt, and that a Chamber may entertain reasonable doubt if it has legitimate reason to question the credibility of Prosecution witnesses as to material facts. However, the Chamber is also obligated to interpret and apply the "beyond reasonable doubt" standard under article 66 of the Statute in a reasonable way; the standard does not require proof beyond *any* doubt and does not require that the Chamber search for and then reject all hypothetically possible contrary inferences, however unrealistic or unsupported, before it can declare itself satisfied that the Accused is responsible for the crimes charged. In this case, the Chamber applied an impossible standard. As illustrated by its analysis of P-317's evidence, the Chamber was reluctant to consider evidence as probative of guilt without first rejecting all potential contrary explanations, regardless whether those explanations were supported by

the record or could be reached by resorting to reason, logic or common sense. As a consequence, when analysing incriminating evidence, the Chamber refused to draw conclusions adverse to the accused, even if those were the only reasonable conclusions established by the record.

3. Second, this appeal concerns the duty of a Trial Chamber to consider the totality of the evidentiary record when issuing a judgment pursuant to article 74. In this case, the Chamber carried out a compartmentalized and selective analysis of the evidence, viewing pieces of evidence in isolation, ignoring critical corroborative evidence and relevant factual findings made by the Chamber in the same Judgment. When evidence was consistent with other evidence, its credibility was questioned on the ground that the consistency could have resulted from collusion.
4. Finally, this appeal presents a different but equally fundamental issue: what must the Trial Chamber do when faced with clear and compelling evidence of on-going efforts to interfere with witnesses and fabricate evidence to favour an accused's case. In this case, recorded conversations from the detention centre indicated that Ngudjolo and/or his associates were attempting to orchestrate the testimony of Defence witnesses and pressure Prosecution witnesses. The Trial Chamber failed to fully inquire into the matter and/or implement meaningful remedial action. Further, not only did the Trial Chamber refuse the Prosecution access to the transcribed conversations; it also rejected the Prosecution's requests to test the credibility of witnesses who were wrongly approached by the accused or persons on his behalf or had been coached, according to redacted versions of reports on the conversations that were prepared by the Registrar. Moreover, the Trial Chamber did not consider the possible collusion of Defence witnesses nor the probable pressure exerted over Prosecution witnesses as established in those phone conversations, when it assessed the evidence before it. The refusal to permit the Prosecution access to this evidence, to allow the Prosecution to elicit

evidence of improper contacts during witness examination, or to consider the efforts to pressure witnesses as relevant evidence in its own right, distorted the Chamber's ability to assess witness credibility accurately and to reach its final determination.

5. All these are serious errors that invalidate the Judgment, and as such they require remedial action by the Appeals Chamber. It is critical to the proper fulfilment of the Court's mandate that Trial Chambers apply article 66 correctly, and refrain from reaching factual conclusions on the basis of speculative hypotheses that are not supported by the trial record and are contrary to logic and common sense. It is also critical that Trial Chambers enter judgments that take into account and reflect the totality of the evidence, not piecemeal and unconnected analyses of discrete items. Finally, this Court cannot succeed in its fight against impunity if, in the face of evidence establishing the possible existence of a scheme to abuse the Court's process by interfering with witnesses and fabricating evidence, a Trial Chamber can remain a passive observer and refrain from taking meaningful steps to preserve the integrity of the trial, to assess contacts with witnesses when assessing witness credibility, or to otherwise consider the person's wrongful actions, and even prevent the Prosecution from fully inquiring into the matter. All these are, in the Prosecution's submission, additional and compelling reasons warranting reversal by the Appeals Chamber.
6. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Prosecution files this document confidentially, ex-parte, Prosecution and Defence of Ngudjolo only, because it refers, in particular under the Third Ground of Appeal, to information that is subject to the same classification. In addition, it refers to details of protected witnesses that are not in the public domain. The Prosecution will file a public redacted version of this document as soon as practicable.

B. STATEMENT OF FACTS

7. Mathieu Ngudjolo Chui ("Ngudjolo") and co-accused Germain Katanga ("Katanga") were charged with the crimes against humanity of murder, rape and sexual slavery, and the war crimes of wilful killing, intentionally directing an attack against a civilian population, rape, sexual slavery, destruction and pillaging of property, and using children under the age of 15 years to participate actively in hostilities.¹ The charges arose from an attack on 24 February 2003 on the village of Bogoro, Ituri, in the Orientale Province of the Democratic Republic of the Congo ("DRC"), which was part of a broader armed conflict in Ituri between, *inter alia*, Lendu and Ngiti militias, who fought the *Union des Patriotes Congolais* ("UPC"), a militia predominantly composed of members of the Hema community and led by Thomas Lubanga. The Prosecution alleged at trial that Ngudjolo was head of the Lendu militia of Bedu-Ezekere *groupement* (also more generally referred to at trial as FNI, though the Prosecution did not assert that Ngudjolo was the leader of the whole of the 'FNI')² and Katanga headed the Ngiti militia of Walendu-Bindi *collectivité* (referred to generally as the FRPI).

The Prosecution Case

8. The Prosecution's evidence with respect to Ngudjolo's role in the Bogoro attack was based on witnesses and pieces of evidence, the most important individual components of which were P-250, P-279, P-280 from within the Bedu-Ezekere militia group; witnesses P-28, P-219 who were present in the neighbouring Walendu-Bindi *collectivité* at the time; the testimony of P-317, that Ngudjolo told her that he had organised those the attacks on Bogoro and Mandro; and the

¹ There was a single joined trial. Shortly before the Ngudjolo judgment was handed down, the cases against the two accused were severed and the Trial Chamber gave notice of an intention with respect to Katanga to recharacterize the mode of liability. Issues relating to that notice are currently pending on appeal.

² T-145-FRA, p.13, lines 21-24

"Soap Letter", a contemporaneous document that corroborates some of the evidence of the witnesses referred to above.

9. Centrally located at road junctions, Bogoro was a civilian and primarily Hema village that, in February 2003, also housed a UPC camp.³ The Prosecution alleged that, following UPC attacks against the Ngiti and Lendu, Ngudjolo and Katanga devised a common plan to eliminate without distinction the UPC and Hema presence in Bogoro and destroy the village. In the weeks preceding the attack, Ngudjolo and Katanga communicated directly and through emissaries, defined the directions of their attacks, and distributed weapons and ammunition. Finally, they moved their troops to jointly surround Bogoro on 23 February, as agreed.
10. The attack on Bogoro began before dawn on 24 February. Hundreds of combatants from the Bedu-Ezekere and FRPI militias overran the village, pillaging and setting houses – and their occupants – on fire. They also blocked the exit routes from Bogoro and killed civilians without distinction. Those who had sought refuge in the Bogoro Institute, a former school building in the centre of the UPC camp within the village, were massacred with machetes or gunshots. More than 200 civilian victims perished in the attack, including women who were killed because of their Hema origins. Other women, when captured, concealed that they were Hemas; though allowed to live, they were raped, forced to "marry" persons in the attacking militias or made to act as sex slaves for the soldiers.⁴

³ An expert witness provided a 360-degree video of the centre of Bogoro and the Bogoro Institute, showing the topography; the Chamber also made a site visit to Bogoro, Zumbe, Aveba and Bunia.

⁴ The Prosecution called several victims of the attack to give evidence. These men and women described the events and their sufferings during the attack and in the months that followed. Three victims described being raped, two of them testified to their experience as sex slaves. An OTP expert described bullet wounds suffered by three victims during the attack; one still has shrapnel lodged in

11. Later that same day, once Bogoro was under their control, Ngudjolo and Katanga and their subordinates celebrated their victory under the mango trees in the village centre, amid the corpses of women, children and the elderly. During and after the leaders' celebration, attackers continued to hunt down, capture, and kill civilian occupants of Bogoro.
12. Approximately six weeks after the Bogoro attack, Ngudjolo admitted to a UN worker, P-317, that he had organized the attack on Bogoro (and another attack a week later at Mandro) for strategic reasons. In response to P-317's question about the murders of civilians in the village, Ngudjolo said that there were "no Hema civilians" and that they were all armed, suggesting that all the victims, including women and children were legitimate targets. Ngudjolo also told Prosecution witness P-219, sometime after the Bogoro attack, that Katanga had prompted the battle in Bogoro but could not have won it without Ngudjolo's help.
13. Within days after the 24 February Bogoro attack, the Bedu-Ezekere and FRPI forces engaged in other battles in the vicinity: on 4 March at Mandro and on 6 March at Bunia. Ngudjolo admitted to P-317 that he organized the attack on Mandro and he admitted to a Congolese public prosecutor that he led the attack on Bunia. Several defence witnesses (D03-88, D03-P-66; D03-P-44) confirmed that Ngudjolo took part in the Bunia attack on 6 March and in several video and audio recordings made in March 2003, Ngudjolo held himself out as a military leader including of the Lendu of Djugu (in which Bedu-Ezekere is located). Other persons seen and heard in the same recordings treated Ngudjolo with deference characteristic of that given to a militia leader and Ngudjolo himself asserted his leadership when referring to another FRPI commander. In subsequent peace negotiations Ngudjolo also acted on behalf of the FRPI and FNI.

her knee. Former combatants also described how the plan of attack was devised and executed; the deaths and rapes of victims; and the destruction of the village.

14. Several witnesses also testified to the presence of child soldiers in Zumbe and Aveba in the period following the attack on Bogoro.
15. The Prosecution also presented evidence that linked Ngudjolo specifically and directly to the attack.

The Defence Case

16. In his defence, Ngudjolo alleged that the attack was carried out by Kinshasa government and Ugandan forces; that he was not the leader of the militia at the time of the events; and that he had an alibi for the time of the Bogoro attack (never disclosed before trial), claiming that he was engaged in nursing duties, in particular in assisting a woman to give birth in another village. Regarding his admissions to P-317 and P-219, he disputed the testimony of both witnesses and denied having made the statements.
17. He also called witnesses to rebut evidence of prosecution witnesses. In particular, [REDACTED] testified that [REDACTED] had been a student, not a soldier, at the time of the Bogoro attack. Ngudjolo also offered school records to establish that P-250 had been in school, though the records were not consistent with the particular details offered by [REDACTED].

The Trial Chamber's Judgment regarding Ngudjolo

18. On 18 December 2012 Trial Chamber II issued a judgment against Ngudjolo, finding him not guilty of all charges ("Judgment").⁵
19. After preliminary observations (paras.322-336), the Chamber concluded that the Prosecution proved the attack on Bogoro and that Ngiti combatants from the Walendu-Bindi collectivity and Lendu combatants from Bedu-Ezekere *groupement* were present in Bogoro on that day (para.337). It also found that children under 15 years of age, some carrying bladed instruments, who were from Bedu-Ezekere *groupement*, were present during the attack on Bogoro on 24 February 2003 (para.516).
20. The Chamber also rejected almost all of the key lines of defence, including Ngudjolo's claim that he was just a nurse and imposter who duped senior officials in Ituri; that he was delivering a baby all day on 24 February 2003; that no Lendu from Bedu-Ezekere participated in the Bogoro or Mandro attacks; that Bogoro presented no strategic interest to the Bedu-Ezekere *groupement* and that they had no permanent military posts or commanders. The Chamber further rejected Ngudjolo's claim that he never met P-317, and that he had not admitted leading the Bunia attack to a public prosecutor.
21. The Chamber found that Ngudjolo's nomination to the post of deputy chief of staff for the FNI-FRPI alliance showed that the FNI President D03-11 recognised Ngudjolo as a person of real influence militarily as well as someone who was sufficiently capable of occupying the post (para.471). Indeed, it found multiple "signs of just how important the accused was [in early March 2003]" and that he held "such a senior position" at that time (paras.464, 500), including the significant fact that he signed the Cessation of Hostilities Agreement on 18

⁵ ICC-01/04-02/12-3. The Judgment was issued in French. In this document in support of the Appeal, the Prosecution at times quotes from an unofficial internal OTP English translation of the Judgment.

March. However, it declined to find beyond reasonable doubt that Ngudjolo led the Bedu-Ezekere *groupement* in late February and thus declined to find him criminally responsible for the 24 February Bogoro attack (para.503), including for the use of child soldiers during that attack (para.516).

22. The Chamber detailed its reasoning underlying the decision. In pertinent part, it also expressed doubts as to credibility in certain respects and thus declined to rely on the evidence of three key Prosecution witnesses – P-250, P-279, and P-280 – whose testimony was offered to establish Ngudjolo's leadership role. It further rejected the probative value of other Prosecution evidence on various grounds, including that because it was corroborated by Prosecution witnesses whose credibility the Chamber rejected, the evidence itself could not be relied upon.
23. The Chamber accepted the credibility of the UN worker, P-317, who testified that Ngudjolo admitted his role to her. But it nonetheless declined to find that evidence persuasive, concluding that Ngudjolo's confession to her was not sufficiently detailed and hypothesizing that he could possibly have falsely claimed responsibility for the Bogoro attack in order to make himself appear more important (para. 434).
24. **P-250** testified as an insider witness, a member of the Bedu-Ezekere militia. The Chamber found that P-250's evidence about the militia had "an undeniable ring of honesty" and "described [details] clearly and with an apparent concern for accuracy" (para.137). However, it found his testimony about Ngudjolo's authority lacked the same level of detail, seemed "particularly wavering" (para.138), or was vague and self-contradictory (paras.139-141); noted occasional "strange" statements during the witness's 16-day testimony; and characterized two specific in-court incidents as "peculiar" (para.141). It also cited contradictory evidence from defence witnesses and school records [which testimony and documents themselves are inconsistent] to the effect that P-250

was in school during the period that he said he was a member of the militia (paras.142-159).⁶ The Chamber also was troubled that other Prosecution witnesses did not corroborate P-250's testimony as to his membership in the militia and presence in the area (para. 154), though at the same time it rejected the corroborative evidence of P-28, who testified that P-250 was an insider member of the militia, based on its speculation that P-28 and P-250 may have had an opportunity to collude (para.154-155).

25. **P-279** testified for nine days. He testified that he was part of the Bedu-Ezekere militia and participated in the battle at Bogoro. He provided details about training; identified Ngudjolo as the person responsible for three training camps; testified that Katanga came to the Zumbe camp to speak with Ngudjolo about the Bogoro attack; testified that Ngudjolo gave the order to attack and, afterwards, to bury the corpses; and described seeing Katanga and Ngudjolo enter a school building together at the end of the fighting (paras.162-167). The Chamber appeared satisfied as to certain parts of P-279's evidence, in particular his descriptions of the use of fetishes (para.170), but was troubled by inconsistencies in his chronology and in other aspects of his testimony. For example, he was confused and gave contradictory evidence about the year of his birth and "was very reluctant to join in the efforts, during the hearing, to determine his exact age" (para.178; also para.161); he testified that he had been a bodyguard for the wife of a commander, whereas his previous statement said he was the commander's bodyguard (para.175); he provided two different explanations for his ability to identify Katanga; it was unclear from his testimony which school he saw the two Accused enter after the massacres, the Bogoro Institute or the Kavali School (significant because it was impossible to see the

⁶ The Chamber appears to have discounted the Prosecution's objection that inconsistencies in the defence evidence as to P-250's schooling diminished the credibility of the defence assertion that P-250 had been a student and not a soldier, suggesting instead that the Prosecution should have confronted the witness with the inconsistencies in the defence documents (para. 150).

Bogoro Institute from the witness's location), a point the Chamber said the Prosecution should have clarified during its questioning (paras.176-177); he denied having known P-280, leading the Chamber to suspect that the two witnesses colluded (paras.180-183); and he stayed silent and made no effort to explain when confronted with his contradictions (para.183).

26. **P-280**, who testified for eight days, described the military structure of the Bedu-Ezekere groupement, the Lagura training camp, Ngudjolo's residence, and the battle of Bogoro. The Chamber rejected his evidence as well, finding "contradictions and inconsistencies" in his testimony that, to the Chamber, "raise great doubt that he was present in Zumbe and [...] Bogoro" (para.202). The Chamber was particularly troubled by a map the witness drew in court, indicating the location of an airport in Zumbe, because its own site visit confirmed that the airport was not located where the witness's hand-drawn map signified (para.208-209). Since, in its view, the drawing instead looked like a schematic drawing of Aveba, it concluded that the witness in fact may not have been in Zumbe and used his memory of Aveba to provide the details he added on the Zumbe map (paras.212-213).
27. The Chamber dismissed as not probative the confession that Ngudjolo made to **P-317**. While the Chamber credited her testimony that Ngudjolo took credit for the Bogoro attack, it found (para. 434) that

"[d]espite giving some indications as to what the accused's involvement may have been in the preparation of the attack on Bogoro, the statements by P-317 appear to generalise too much for us to draw any definitive conclusions as to what the status and the role of the accused were within Bedu-Ezekere groupement. Moreover, on this same issue, even if this theory were to be cautiously considered, Ngudjolo, like other actors in Ituri at the time, may possibly have wanted to claim responsibility for

organising an attack just to be recognised as a senior ranking officer in the event of joining the regular Congolese army."

28. Finally, the Prosecution introduced the **"Soap Letter"**, a document that was written on 4 January 2003 and signed by both D03-66 and Martin Banga, on behalf of *"the Zumbe delegation at Aveba"*. This document corroborated the testimony of key witnesses P-250 and P-28 that (a) Ngudjolo sent a Zumbe delegation to meet Germain Katanga in Aveba (located in Walendu-Bindi) a few weeks before the Bogoro attack, to organize the attack and bring supplies back from Walendu-Bindi; and (b) the Bedu-Ezekere militia was a structured organization headquartered in Zumbe and aligned with the FRPI in Walendu-Bindi (as indicated by the fact it was referring to itself as "FRPI"). The Chamber declined to give this letter any weight because D03-66, a Defence witness who agreed that he wrote and signed the letter, stated that a stamp on the face of the letter did not appear to be legitimate. The Chamber declined to place any weight on this evidence (para.374).

C. OVERVIEW OF THE APPEAL

29. The Prosecution is bringing three grounds of appeal before the Appeals Chamber. In its First Ground of Appeal, the Prosecution argues that the Trial Chamber erred in law in its application of Article 66(3). The Chamber misinterpreted the legal standard of "guilt beyond a reasonable doubt", and effectively required demonstration of guilt beyond *any* doubt by the Prosecution. It rejected evidence on hypothetical and fanciful grounds that are completely unsupported in the record. When facts were contested, the Chamber was unable to resolve the inconsistencies with confidence, and thus found reasonable doubt. As a result of this legal error, the Chamber entered defective factual findings that

no reasonable trier of fact would have reached, thereby also committing a factual error.

30. The Prosecution's Second Ground of Appeal involves an error of law regarding the application of Article 74(2), since the Trial Chamber failed to consider the totality of the evidence and facts in its decision-making process. It found reasons to reject portions of almost every witness' evidence and then concluded that credibility as to heavily corroborated facts was open to doubt. No evidence rejected in some part on credibility grounds could be trusted to corroborate other evidence. As a consequence of its piecemeal approach, the Trial Chamber declined to find facts that were proven by multiple sources of consistent and corroborating evidence, made erroneous assessments of the credibility of the Prosecution's evidence and reached unreasonable factual conclusions, thereby also erring in fact.
31. Finally, the Prosecution's Third Ground of Appeal involves a procedural error regarding the proper application of Article 64(2). In the instant case, the Chamber received clear and conclusive information in the form of Registry reports on Ngudjolo's communications from the detention centre that indicated his on-going efforts of witness interference and evidence tampering. The Chamber, however, failed to take any meaningful action to deal with the situation. It refused the Prosecution's request for full access to the material so it could inquire into the seriousness and scope of what appeared to be a tangible threat to the integrity of the trial and the lives and well-being of witnesses. It also denied the Prosecution the ability to use the redacted versions of the reports in cross-examination of the relevant witnesses. In addition, when assessing the credibility of evidence, the Chamber ignored this body of evidence, and in particular failed to consider information showing the concrete possibility that a key Prosecution witness who recanted earlier statements that civilians were killed in Bogoro – a matter not reasonably open to dispute -- might have been

intimidated by threats against his family. The Chamber's decisions and omissions unfairly prejudiced the right of the Prosecution to a fair trial.⁷

32. The Prosecution is seeking a reversal of the Decision. It is also seeking a factual finding from the Appeals Chamber pertaining to Ngudjolo's position of authority and a re-trial confined to the remaining components of the charges, or, if the Appeals Chamber does not accept the request for a factual finding, a full re-trial.

D. STANDARD OF REVIEW

33. For *legal errors*, the Appeals Chamber "will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law."⁸ The Appeals Chamber will therefore articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.⁹
34. The Appeals Chamber has stated that there is an *error of fact* when the Trial Chamber misappreciated facts, disregarded relevant facts or took into account facts extraneous to the *sub judice* issues.¹⁰ The Appeals Chamber has set out a standard of reasonableness in the review of appeals judgments on interim release that equally applies to purported errors in the Trial Chamber's appreciation of evidence in a final appeal:

⁷ The Appeals Chamber is free to depart from the characterisation of the errors proposed by the Prosecution and to apply the appropriate standard of review.

⁸ ICC-02/05-03/09-295OA, para.20.

⁹ The ICTY Appeals Chamber has held that in cases of an incorrect legal standard, the Appeals Chamber, after identifying the correct standard, will apply it to the evidence contained in the trial record and determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant. *D. Milosevic* Appeal Judgment, paras.13-14 and authorities cited therein.

¹⁰ ICC-01/05-01/08-631-Red OA2, para.66.

“The Appeals Chamber will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber.”¹¹

35. If a *procedural error* relates to the Chamber's alleged defective exercise of its discretion, then the Appeals Chamber will review that error “with some deference”, it does “not conduct[...] a *de novo* review [...]. Rather, the Appeals Chamber will intervene only if the exercise of discretion amounts to an abuse of discretion”.¹² If an error entails a defective interpretation and/or application of a non-discretionary procedural provision,¹³ this closely relates to an error of law and the appropriate standard of review should accordingly be applied.
36. An appellant is obliged not only to set out the alleged error, “but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.¹⁴ This does not require an appellant to demonstrate with a degree of certainty that the appealed decision would have come to a different conclusion. Rather, the appellant must demonstrate that the “error was critical to

¹¹ ICC-01/04-01/10-283 OA, para.17. A standard of reasonableness is also applied by the ICTY Appeals Chamber in the review of purported errors of fact in a final appeal. *Gotovina*, Appeal Judgment, para.13 and authorities cited therein.

¹² ICC-01/09-01/11-336 OA, para.15; ICC-01/09-02/11-342 OA, para.15.

¹³ C. Staker, commentary to Article 81 in O. Triffterer (ed.): *Commentary to the Rome Statute of the International Criminal Court*, Baden-Baden, 1999, at p. 1019.

¹⁴ Article 83(2); ICC-02/04-01/05-408 OA3, para.80; ICC-01/05-01/08-962OA3, paras.102.

the verdict reached by the Trial Chamber”¹⁵ or that the error has “the potential to cause the impugned decision to be reversed or revised”.¹⁶

E. THE PROSECUTION’S GROUNDS OF APPEAL

1. First Ground of Appeal: The Trial Chamber misapplied the criminal standard of proof

A. Overview of the First Ground of Appeal

37. The Trial Chamber correctly found that “in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”.¹⁷ The Prosecution also accepts the finding of the Trial Chamber that the standard of “beyond reasonable doubt” applies to establishing the elements of the crime and the mode of liability, as well as to findings regarding the existence of the facts that are indispensable to enter a conviction.¹⁸
38. However, the Trial Chamber deviated from these principles when it entered factual findings. A number of key findings in the Judgment demonstrate a pattern whereby the Trial Chamber concluded that facts alleged by the Prosecution had not been established beyond reasonable doubt based on a possible alternative or competing inference or on other grounds. But, neither the competing inferences nor the other grounds purportedly establishing a reasonable doubt are based on evidence, logic, reason or common sense. At best, they establish a hypothetical alternative reading of the evidence. This demonstrates that the Trial Chamber, rather than applying the standard of proof

¹⁵ *Prosecutor v. Rutaganda*, ICTR-69-3-A, Judgment, 26 May 2003, para.20.

¹⁶ *Prosecutor v. Rutaganda*, ICTR-69-3-A, Judgment, 26 May 2003, para.23.

¹⁷ Judgment, para.34, relying on Article 66(3).

¹⁸ Judgment, para.35.

beyond reasonable doubt, effectively required proof of the relevant facts to a degree of absolute certainty (i.e. beyond *any* doubt).

39. The Trial Chamber erred in law by applying an incorrect standard of proof under Article 66(3). In addition, based on the analysis presented below, the Prosecution also submits that the Trial Chamber erred in fact because no reasonable trier of fact could have found that the evidence does not establish beyond reasonable doubt that Ngudjolo was the leader of the Lendu combatants of the Bedu-Ezekere who attacked Bogoro on 24 February 2003.

B. The law on the standard of proof

40. Article 66(3) provides that the “[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”.
41. According to the practice of national and international courts, at the end of the case, the accused is entitled to the benefit of the doubt as to whether his guilt has been proved.¹⁹ However, this does not imply that any doubt – no matter how fanciful - shall be weighed in favor of the accused. *“it does not mean a mere possible doubt or a speculative, imaginary or forced doubt, because everything relating to human affairs is open to some possible or imaginary doubt”*.²⁰ Hence, the standard does not require proof “beyond a shadow of a doubt”, “beyond all possible doubt”,²¹ or “absolute certainty” or “moral certainty”.²²

¹⁹ *Prosecutor v. Delalic et al.*, IT-96-21-T, Judgement, 16 November 1998, para.601.

²⁰ *United States v. Muckenstrum*, 515 F2d 568 (5th Cir. 1975) (emphasis added).

²¹ *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeals Judgement, 26 May 2003, para.488; *Victor v. Nebraska*, 511 US 1 (1994); BGH, (Federal Court of Justice, Germany), Second Senate for criminal affairs, Judgment in the case of 2StR.42/50 of 28 November 1951, NJW 1951, 122 Nr.16; New York State Court System, Criminal Jury Instructions.

²² *R. v. Lifchus*, [1997] 3 S.C.R. 320, para.31; *Cage v. Louisiana*, 498 US 39 (1990); *Victor v. Nebraska*, 511 US 1 (1994); The Judicial Studies Committee, Scotland: Jury Manual, Chapter 2, para.17.

42. Reasonable doubt means that any competing inference to a finding of guilt must be founded on logic, reason and common sense (i.e. it must be reasonable) and be based on evidence adduced at the trial (or lack thereof).
43. The Appeals Chamber of the UN ICTR ruled that "the reasonable doubt standard in criminal law [...] must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence."²³ A Trial Chamber of the UN ICTY specified that any competing reasonable inference other than guilt must be based on "evidence admitted at trial".²⁴
44. Similarly the Supreme Court of Canada found that "[a] reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. While more is required than proof that the accused is probably guilty, *a reasonable doubt does not involve proof to an absolute certainty. Such a standard of proof is impossibly high.*"²⁵ The Ontario Court of Appeal upheld the instruction given by a trial court to the jury that "reasonable doubt is an honest doubt, a fair doubt, a doubt based upon reasons and common sense. It is a real doubt, not some imaginary or frivolous doubt."²⁶
45. The Supreme Court of the United States repeatedly defined a reasonable doubt as one "based on reason which arises from the evidence or lack of evidence."²⁷ The Supreme Court also approved an alternative definition of reasonable doubt as "a doubt that would cause a reasonable person to hesitate to act".²⁸

²³ *Prosecutor v. Rutaganda*, ICTR-96-3-A, Appeals Judgement, 26 May 2003, para.488.

²⁴ *Prosecutor v. Blagojevic et al.*, IT-02-60-T, 17 January 2005, para.18.

²⁵ *R. v. Lifchus*, [1997] 3 S.C.R. 320 (emphasis added).

²⁶ *Regina v. Tuckey, Beynham and Walsh*, (1985) 20 C.C.C. (3d) 502 (Ont. C.A.), paras.8-10.

²⁷ *Johnson v. Louisiana*, 406 U.S. 356 (1972), 22 May 1972; See also *United States v. Johnson*, 343 F.2d 5, 6 n. 1 (2d Cir. 1965).

²⁸ *Holland v. United States*, 348 U.S. 121, at 140 (1954); cf. *Hopt v. Utah*, 120 U.S (1887)., at 439-441.

46. The High Court of Australia defines reasonable doubt as “not a mere conjectural, visionary doubt, or a doubt arising from the bare possibility of [the accused’s] innocence, but a real doubt created by the operation of the circumstances before them upon their reason and common sense”.²⁹
47. Model jury instructions articulate the same principle. For instance, the Jury Manual issued by the Judicial Studies Committee of Scotland defines reasonable doubt as: “*a doubt, arising from the evidence, based on reason, not on sympathy or prejudice, or on some fanciful doubt or theoretical speculation.* It’s the sort of doubt that would make you pause or hesitate before taking an important decision in the practical conduct of your own lives. Proof beyond reasonable doubt is less than certainty, but it’s more than a suspicion of guilt, and more than a probability of guilt.”³⁰ In the United States, recommended jury instructions follow a similar line: “The law recognizes that, in dealing with human affairs, there are very few things in this world that are known with absolute certainty. Therefore the law does not require the People to prove a defendant’s guilt beyond all possible doubt. ... A reasonable doubt is an honest doubt of the defendant’s guilt for which a reason exists based upon the nature and quality of the evidence. *This is an actual doubt, not an imaginary doubt*”.³¹
48. The Federal Court of Justice of Germany similarly found that “it is necessary, but also sufficient for conviction, that a degree of certainty is reached which common sense tells us to be sufficient, and which leaves no reasonable doubt. *The mere abstract, theoretical possibility that the accused was not the perpetrator cannot prevent his conviction. Since such a possibility can never be excluded given the shortcomings of human cognition, judges could otherwise never come to a conclusion about the truth*”.³²

²⁹ High Court of Australia, *Brown v R* (1913) 17 CLR 570 at 596.

³⁰ Judicial Studies Committee, Jury Manual, Chpt.2, para.17 (emphasis added).

³¹ New York State Court System, Pattern Criminal Jury Instructions (emphasis added).

³² BHG, (Federal Court of Justice, Germany), Second Senate for criminal affairs, Judgment in the case NJW 195, 122 (unofficial translation) (emphasis added).

In separate judgments the same Court reiterated that competing inferences to a criminal conviction must be reasonable, taking into consideration experience of life,³³ and they must be based on evidence adduced at trial.³⁴

49. Although the Appeals Chamber of this Court has not yet pronounced itself on the interpretation of the beyond reasonable doubt standard, its jurisprudence on the Article 58(1)(a) standard for “reasonable grounds to believe” may be of assistance to determine the meaning of “reasonable” within the context of Article 66(3). Accordingly, the requirement of “reasonableness” mandates that the Chamber’s evidentiary inquiry be firmly grounded on the facts placed before the Chamber – and not on purely subjective impressions.³⁵
50. The authorities cited above demonstrate that the “beyond reasonable doubt” standard (a) does not require that guilt be established beyond any conceivable doubt; and (b) only leads to an acquittal if the doubt in question is a truly “reasonable” one that is supported by the trial record and consistent with logic and common sense. The task of a Trial Chamber is to scrutinize the record and determine whether the evidence before it gives rise to a “reasonable doubt” favouring the accused. However, the standard does not allow the Chamber to artificially create “doubts” that find no support in the trial record – much less when in addition they defeat logic or common sense.

³³ Paraphrasing BGH, (Federal Court of Justice, Germany), First Senate for criminal affairs, Judgment in the case 1 StR 443/03 of 16 March 2004, p.5.

³⁴ BGH, (Federal Court of Justice, Germany), Second Senate for criminal affairs, judgment in the case 2 StR 325/03 of 12 November 2003, p.6; The Judicial Studies Committee, Scotland: Jury Manual, Chapter 2, para.17.

³⁵ ICC-01/04-01/07-572 OA6, para.18: For grounds to believe to be “reasonable” they “must be founded upon grounds such as to warrant its reasonableness. Suspicion simplicity is not enough. Belief denotes, in this context, acceptance of a fact. The facts placed before the Chamber must be cogent to the extent of creating a reasonable belief that the person committed the crimes.”

C. Factual findings and arguments

51. It is easy to articulate the appropriate standard, but harder to apply it in practice.

The Prosecution recognizes that there is considerable and necessary deference to the fact-finder's conclusions as whether evidence meets the requisite beyond reasonable doubt test, in part because those conclusions require credibility assessments that are difficult to second-guess and in part because the line between reasonable and unreasonable doubt is rarely precise.

52. That said, "everything relating to human affairs is open to some possible or imaginary doubt"³⁶ and the boundary, however difficult, nonetheless must be drawn between possible/imaginary doubt and reasonable doubt. The Prosecution submits that in this case the pattern of findings by the Trial Chamber in fact demonstrates that the Chamber misdrew that line. Consistently, the Chamber was consumed by "mere possible doubt or a speculative, imaginary or forced doubt"; it repeatedly cited "possible" alternative explanations and thus found itself unable to reach firm conclusions about any contested matters.

53. The following factual findings of the Trial Chamber are indicative of its misapplication of the criminal standard of proof. These findings show a consistent pattern in the analysis of the evidence, whereby the Trial Chamber effectively entertained *any* doubt - including doubt not based on evidence, reason, logic or common sense.

Witness P-317 (paras.284-296, 434)

54. Witness P-317 was a UN worker in the DRC, with MONUC's human rights section.³⁷ In that capacity, between 24 March and 7 April 2003, she carried out an

³⁶ *United States v. Muckenstrum*, 515 F2d 568 (5th Cir. 1975).

³⁷ Judgment, paras.284-295.

investigation on the 24 February 2003 Bogoro attack.³⁸ She was told by UPDF officials that the forces based in Bogoro were under the command of Ngudjolo.³⁹ Therefore, on 4 April 2003, P-317 met with Ngudjolo, who admitted to her that he had organized the attacks on Bogoro and on Mandro,⁴⁰ but insisted that Bogoro was a legitimate military target and that there were no civilians living at Bogoro at the time.⁴¹

55. The Trial Chamber found that P-317 was credible and that it could rely on her testimony.⁴² It accepted that on 4 April 2003, less than eight weeks after the Bogoro attack, Ngudjolo admitted to P-317 that he had organized the attack.⁴³ The Trial Chamber expressly referred to this admission being made after Ngudjolo joined the FNI-FRPI alliance on 22 March 2003.⁴⁴ The Chamber also accepted that this confession linked Ngudjolo to the preparation of the attack.⁴⁵ However, the Trial Chamber refused to rely on the evidence of P-317, either in whole or in part, to establish the position of authority of Ngudjolo in the context of the attack on Bogoro on 24 February 2003. It did so, *inter alia*, because in its view it could not be excluded that Ngudjolo lied to the witness and that he “may possibly have wanted to claim responsibility” to enhance his career⁴⁶ – an explanation that was never offered by Ngudjolo himself (he denied having ever met P-317 or that he made the statement and instead insisted that the witness lied)⁴⁷ and that ignores that he did not have to confess to criminality to show his importance since, at the time Ngudjolo made the statement, he was already well

³⁸ Judgment, para.85.

³⁹ Judgment, para.286.

⁴⁰ Judgment, paras.288, 434 ; See also Mr Ngudjolo's statement to P-317 as to the reasons why Bogoro was attacked, which bolsters the reliability of his admission (P-317, T.228-ENG, pp.51-52).

⁴¹ P-317, T.228-ENG, p.52-l.1-8.

⁴² Judgment, paras.292, 295, 434.

⁴³ Judgment, para.434.

⁴⁴ Judgment, para.434.

⁴⁵ Judgment, para.434.

⁴⁶ Judgment, para.434.

⁴⁷ D03-707, T-328-CONF-ENG ET, p. 71, ll. 5-9 ; p. 73, ll. 6-17; see also Judgment, para.290.

recognized as “a senior ranking office”. Before he met with P-317, Ngudjolo joined the FNI-FRPI Alliance (on 22 March 2003) as the FRPI chief of staff,⁴⁸ one of the highest military positions within the FNI/FRPI. Moreover, on 18 March 2003, he had signed a peace agreement on behalf of his militia.⁴⁹

56. The finding that an Accused admitted to having committed the alleged crime, when the admission is independently supported by corroborating evidence, is ordinarily considered sufficient to overcome reasonable doubt. The Prosecution’s research has not uncovered any case in which judges agreed that a person confessed and that the confession was knowingly and voluntarily made, but refused to credit the confession because of a speculative explanation -- unsupported by the record and never proffered by the defence-- that the person had a “possible” reason to lie. More particularly, the Prosecution stresses that in this case there is no evidence that Ngudjolo exaggerated his role in the attack on Bogoro.

57. The Trial Chamber’s finding that Ngudjolo exaggerated his role in the attack is also against logic and common sense. The Trial Chamber found that the admission of Ngujolo to P-317 provided some indications as to what Ngudjolo’s role prior to the attack on Bogoro could have been.⁵⁰ Therefore, the Chamber accepted that Ngudjolo was truthful when referring to P-317 about his involvement in the preparation of the attack. This is in contradiction with the Trial Chamber’s blanket conclusion that Ngudjolo exaggerated his role in the attack when talking to P-317 – which must logically assume the untruthfulness of his account to P-317. The Trial Chamber’s finding is also logically incompatible with its other conclusions and in particular its rejection of the Defence’s theory

⁴⁸ Judgment, paras.434, 474-475.

⁴⁹ Judgment, para.467. See also para. 484. The Chamber observes that Ngudjolo also signed the final report of the Ituri Pacification Commission on 14 April 2003.

⁵⁰ Judgment, para.434.

that Ngudjolo was an imposter who succeeded in duping all the senior figures in Ituri whom he met during the events there,⁵¹ and that he obtained a senior military rank through a combination of luck and career opportunism.⁵² In addition, Ngudjolo's admission to P-317, if read in its context, clearly indicates that he was not trying to bolster his involvement in the attack, but that he was trying to defend himself by stating that Bogoro was a legitimate military target and that there were no civilians living at Bogoro at the time.⁵³

58. The Trial Chamber posed two other lesser justifications for refusing to credit Ngudjolo's admission. First, it found his admission to be too general to permit the Court to find definitively his status and role within the Bedu-Ezekere *groupement* at the time of the attack.⁵⁴ Of course, that does not diminish the probative value of the admission; if anything, it means that the Chamber could not rely on that alone to find that he was the leader of the Lendu combatants that attacked Bogoro on 23 February 2003. The Chamber also concluded that Ngudjolo's admission was inconsistent with another admission he made several weeks later to a Congolese public prosecutor, admitting then that he had led the attack on Bunia on 6 March 2003 while saying nothing about other battles in the region.⁵⁵ The Trial Chamber's conclusion is predicated on the unreasonable assumption that Ngudjolo would have and should have made identical

⁵¹ Judgment, para.494.

⁵² Judgment, para.495.

⁵³ P-317, T.228-ENG, p.52-1.1-8.

⁵⁴ Judgment, para.434.

⁵⁵ Judgment, para.497, see also para.456 and Transcript of interview on 17 June 2004 (DRC-OTP-0039-0059). Notably, the Chamber also refused to find that Ngudjolo was responsible for the Bunia attack, despite his admission to the Congolese prosecutor, apparently on the ground that the Prosecution failed to corroborate the confession by additional evidence proving its truthfulness beyond a reasonable doubt. Judgment, para. 456.

confessions at different times to different investigators, thus if the confessions were not fully symmetrical they were necessarily unreliable.⁵⁶

Witness D02-176 (paras.431-433)

59. Witness D02-176, a combatant on the opposing side at Bogoro, testified that “he knew very well” that Ngudjolo was the “number one” military leader in Zombe and commander of operations during the attack on Bogoro. He unequivocally recognized Ngudjolo as one of the Lendu commanders at Bogoro on 24 February 2003.⁵⁷ He added that this was a truth known by everyone. The witness further specified that Ngudjolo was the Chief of Staff of the FNI, the umbrella militia to which the Lendu combatants at Bogoro belonged.⁵⁸

60. The Trial Chamber accepted that D02-176 was a captain and company commander of the UPC at Bogoro and he had participated in the defence of Bogoro,⁵⁹ and indeed accepted that he was particularly suited to specify the military positions of the enemy with which he had repeatedly engaged previously.⁶⁰ Nonetheless, the Trial Chamber declined to credit D02-176’s description of Ngudjolo’s position of authority because it was unable to exclude the possibility that D02-176 might have confused Ngudjolo’s status within the FNI in March 2003 with his earlier status and position prior to the attack on Bogoro.⁶¹ But again, the Trial Chamber’s competing inference is not based on any evidence on the record. To the contrary, the witness’s testimony did not leave

⁵⁶ The Chamber can also no draw an inference from the fact that Mr Ngudjolo has not admitted to P-317 his role in the Bunia attack, when the Chamber itself has rejected that the he played a role in that attack, Judgment, para. 456.

⁵⁷ T-257, p.5 l.12 – p.8. l.11 ; see also T-256, p.9 l.8 – p.12 l.9; T-256, p.27 l.15 – p.28 l.5.

⁵⁸ Judgment, para.431.

⁵⁹ Judgment, para.431.

⁶⁰ Judgment, para.432.

⁶¹ Judgment, para.433. This conclusion, it explained, was derived from the witness’s statement, though it did not identify any portion of the evidence to support it.

open the possibility that he was confused and had mistaken when Ngudjolo held the relevant position of command.⁶²

Attack on Bunia on 6 March 2006 (para.456)

61. It was uncontested that on 6 March 2003, the UPDF Lendu combatants attacked Bunia.⁶³ On 17 June 2004 Ngudjolo admitted to a Congolese public prosecutor that he “led the operation on 6 March 2003 in Bunia”.⁶⁴ The Chamber did not doubt in any way the authenticity of the document transcribing this admission,⁶⁵ found that Ngudjolo gave this statement to the Congolese public prosecutor,⁶⁶ and noted that Ngudjolo did not deny having made this admission.⁶⁷ It also expressly rejected the credibility of Ngudjolo’s testimony explaining the admission - he denied having participated in the battle of Bunia and claimed that his statement to the Congolese prosecutor was merely intended to explain how he came to hold the position of Chief of Staff of the FNI-FRPI.⁶⁸

62. Having reviewed all this and having made reliability findings, however, the Trial Chamber concluded that it could not reach any factual conclusions regarding Ngudjolo’s position of authority two weeks after Bogoro, because of the competing factual explanations. It stated that “it cannot dismiss the possibility that [Ngudjolo] led Bedu-Ezekere’s Lendu combatants during the Bunia operation; however it cannot conclude this beyond all reasonable doubt”.⁶⁹ It explained that (a) despite Ngudjolo’s acceptance of overall responsibility for the operation, other evidence led to the conclusion that the offensive on Bunia was carried out by the UPDF and the Lendu combatants; (b) Ngudjolo does not

⁶² T-257, p.5 l.12 – p.8. l.11 ; see also T-256, p.9 l.8 – p.12 l.9; T-256, p.27 l.15 – p.28 l.5.

⁶³ Judgment, paras.452, 456.

⁶⁴ Judgment, para.455.

⁶⁵ Judgment, para.497.

⁶⁶ Judgment, para.456.

⁶⁷ Judgment, para.455.

⁶⁸ Judgment, paras.455-456.

⁶⁹ Judgment, para.456.

identify which troops he supposedly led in Bunia; and (c) Ngudjolo did not also mention having participated in the battles of Bogoro and Mandro.⁷⁰ These reasons are inadequate to establish *reasonable* doubt that Ngudjolo truthfully accepted responsibility for leading the Lendu combatants of the Bedu-Ezekere during the attack on Bunia. Instead, this is another example that the Trial Chamber effectively required proof beyond *any* conceivable doubt.

63. First, the Trial Chamber speculated that Ngudjolo claimed exclusive overall responsibility over the operation, even after having found that Ngudjolo told the Congolese public prosecutor that he “only led the operation on 6 March 2003 in Bunia”.⁷¹ However, there is no evidence that Ngudjolo ever claimed to have led the UPDF, which together with Lendu combatants attacked Bunia. Perhaps mindful of this, the Trial Chamber did not enter a finding that Ngudjolo had claimed overall responsibly, but merely stated that he seemed [*semble*] to have done so. A speculative and impressionistic assertion of this kind, supported by no evidence, cannot be sufficient to draw any inference or to establish reasonable doubt.

64. Second, the Chamber noted that the attack on Bunia was carried out by the UPDF and the Lendu combatants,⁷² which included combatants from Bedu-Ezekere,⁷³ but also gave significant consideration to the fact that Ngudjolo in his admission to the Congolese prosecutor did not expressly state which of those troops he led in Bunia. The Trial Chamber effectively required specification from Ngudjolo as to whether he had led the UPDF (the armed forces of the State of Uganda) or the Lendu combatants of Bedu-Ezekere (the fighters representing Ngudjolo’s ethnicity and place of residence) in order to give appropriate weight

⁷⁰ Judgment, para.456.

⁷¹ Judgment, para.455.

⁷² Judgment, para.456

⁷³ Judgment, paras.351-352, 356, 456.

to his admission. In the context of the facts of this case, this requirement was plainly unreasonable: there was no basis to accept even as a possibility that Ngudjolo could have led the UPDF during the attack. In fact, the Chamber itself took note of the Defence's admission that on 6 March 2003, the UPDF contingent that was based in Dele, a suburb of Bunia, was commanded by Captain Kiza.⁷⁴ On the other hand, it also accepted that by the end of 2002, Ngudjolo was "quite an important person *within the Bedu-Ezekere groupement*", owing, among others to the military training that he had received at the *Garde Civile*.⁷⁵ Having determined that (a) the UPDF was led at the time of the attack by a different person than the accused, and (b) that the accused had a position of authority at the relevant time in a different group (the Lendu combatants), there was no basis to expect that any admission by Ngudjolo would have had to specify the group that he was leading. Once more, the Chamber is artificially creating a doubt based on speculation and disconnected from the facts of the case.

65. Third, the Trial Chamber found reasonable doubt that Ngudjolo led the Lendu combatants of Bedu-Ezekere during the Bunia operation because in his admission to the Congolese public prosecutor he did not mention having participated in the battles of Bogoro or Mandro.⁷⁶ Once more, it was unnecessary for the Chamber to expect that an admission by the accused of one attack would necessarily have to mention the accused's involvement in *other* attacks.

Overall conclusions (para.500)

66. As part of its overall conclusions on the role and function of Ngudjolo in the Bedu-Ezekere *groupement* during the attack on Bogoro,⁷⁷ the Trial Chamber stated: "*one cannot necessarily and totally exclude, from the political and military*

⁷⁴ Judgment, para.445.

⁷⁵ Judgment, para.491 (emphasis added); see also para.501.

⁷⁶ Judgment, para.456; see also para.497.

⁷⁷ Judgment, pp.164, 199.

context at the time, that Ngudjolo was able to impose himself as a soldier and as an indispensable interlocutor after the battle of Bogoro and after that only. In addition, the Chamber is of the view that his appointment to a high position within the FNI/FRPI alliance does *not inevitably* show that he was already an important leader before, including on 24 February 2003.”⁷⁸

67. This unambiguously reflects that the Trial Chamber misunderstood the meaning of proof beyond reasonable doubt and applied an incorrect standard of proof to an absolute certainty. Beyond reasonable doubt does *not* require that the Chamber “necessarily and totally” [*nécessairement et totalement*] exclude an alternative possibility – that Ngudjolo was not a senior combatant on 24 February 2003 but instead was a nurse on that date, and that he became a senior militia commander shortly after the attack on Bogoro. *Necessary and total* exclusion is not required; according to the standard articulated by Article 66(3), the relevant question is whether such a scenario can *reasonably* be excluded. Similarly, the Chamber was concerned that Ngudjolo’s appointment to a high position within the FNI/FRPI alliance did not “inevitably” [*obligatoirement*] show that he was already an important leader before, and including on 24 February 2003. But, like *necessary* and *total*, *inevitability* is not the standard.
68. In any event, while the Trial Chamber excluded the certainty that Ngudjolo was a leader prior to Bogoro, it failed to indicate any factual or evidentiary basis for its competing inference that Ngudjolo might have imposed himself as a soldier, leader, and indispensable interlocutor only afterwards. The Prosecution recalls that a Trial Chamber must, at a minimum “indicate [...] with sufficient clarity the basis of the decision [and] identify which facts it found to be relevant in coming to its conclusion.”⁷⁹ No such facts are identified, and in light of other findings of the Chamber, this competing inference appears also to be unsupported by logic

⁷⁸ Judgment, para.500 (emphasis added).

⁷⁹ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

or common sense. The Trial Chamber accepted, for example, that by the end of 2002, Ngudjolo was “quite an important person within the Bedu-Ezekere *groupement*”, due, *inter alia*, to the military training that he had received at the *Grade Civile*.⁸⁰ The Chamber further noted that Ngudjolo’s speeches showed that he had in-depth knowledge of what was happening in Ituri and that his speeches were not written by a poorly informed mere nurse⁸¹ – as Ngudjolo attempted to portray himself. In addition, based on an admission by the Defence, the Chamber found that as of 22 March 2003, Ngudjolo held the position of chief of staff within the newly formed FNI-FRPI Alliance.⁸² The Chamber also rejected the Defence’s theory that he was an imposter who succeeded in duping all the senior figures in Ituri whom he met during the events there,⁸³ or that he obtained a senior military rank through a combination of luck and career opportunism.⁸⁴ In sum, since the Chamber accepted that already prior to the attack on Bogoro Ngudjolo was an important person within the Bedu-Ezekere *groupement* with military background, and at the same time rejected the possibility that Ngudjolo’s appointment as the Chief of Staff of the FNI-FRPI Alliance on 22 March 2003 came out of nowhere, it is mystifying how the Chamber reached the hypothetical inference that Ngudjolo – whom it found was an important figure in the militia both before the attack and after it -- might not have held a senior military position within the Bedu-Ezekere *groupement* on the day of the Bogoro attack.

⁸⁰ Judgment, para.491; see also para.501.

⁸¹ Judgment, para.493.

⁸² Judgment, paras.475.

⁸³ Judgment, para.494.

⁸⁴ Judgment, para.495.

D. The error materially impacts on the Judgment

69. The error described under the First Ground of Appeal materially impacts on the appealed Judgment. The correct application of the standard of proof to establishing the relevant facts of the case and the guilt of the accused is a key pillar of the proper adjudication of a case. If the Trial Chamber erred by applying an incorrect standard of proof and unreasonably required the evidence to exclude any doubt, then its Judgment cannot be sustained. In particular, the overall conclusion that it cannot be established beyond reasonable doubt that Ngudjolo was the leader of the Lendu combatants who participated in the attack on Bogoro on 24 February 2003,⁸⁵ as well as its underlying factual findings will be unreliable. As a result, this error materially affects the very basis for the Trial Chamber's judgment that Ngudjolo is not guilty of the crimes charged.
70. The four examples of the Chamber's elevated and unrealistic standard of proof illustrate and explain its inability to find beyond reasonable doubt that Ngudjolo had authority over the Lendu combatants at Bogoro on 24 February 2003. Each of them, even if viewed separately, significantly affects the Judgment and because of the demonstrable errors in articulating and assessing reasonable doubt, each individually and cumulatively demonstrate that the Judgment must be reversed.

⁸⁵ Judgment, para.503.

2. Second Ground of Appeal: The Chamber erred by failing to consider the totality of the evidence and facts for its decision-making

A. Overview of the Second Ground of Appeal

71. The Trial Chamber rightly stated that under Article 74(2), the Judgment must “be based on its evaluation of the evidence and the entire proceedings”.⁸⁶ The Trial Chamber also said that it had “assessed the credibility of all relevant evidence [...] in light of all other relevant evidence on the record”⁸⁷ and that it had determined whether the evidence relied upon by the Prosecution established the alleged facts, notwithstanding any evidence to the contrary.⁸⁸ It specifically mentioned that in order to determine whether the alleged facts were proven, it relied on all the relevant evidence on the trial record,⁸⁹ and said that it was not precluded from relying on circumstantial evidence⁹⁰ and anonymous hearsay evidence (the probative value of the latter assessed by considering the context and conditions in which the evidence was obtained).⁹¹
72. However, the Judgment reveals that the Trial Chamber incorrectly applied these principles and adopted a wrong approach at each of the three different stages of the decision-making process, when it (a) assessed the credibility of the evidence; (b) made factual findings; and (c) reached its final decision on the guilt of Ngudjolo. Throughout the three phases of its decision-making process, the Chamber erred by failing to consider the totality of the evidence. In particular, the Chamber committed a legal error when it failed to assess individual items of evidence or specific facts in light of the entire record and in the context of other

⁸⁶ Judgment, para.43.

⁸⁷ Judgment, paras.45, 52-53.

⁸⁸ Judgment, para.46.

⁸⁹ Judgment, para.47.

⁹⁰ Judgment, para.71.

⁹¹ Judgment, para. 56.

key relevant corroborating evidence (including circumstantial and hearsay evidence) or other key facts found by the Chamber.

73. Further, the Prosecution also submits that the Trial Chamber erred in fact because no reasonable trier of fact could have found that the evidence together with the factual findings entered by the Trial Chamber falls short of establishing beyond reasonable doubt that Ngudjolo was the leader of the Lendu combatants of the Bedu-Ezekere who attacked Bogoro on 24 February 2003.

B. The standards and procedures applicable to evidentiary decision and the different stages of the fact-finding process

- (i) *Law on the obligation to consider all relevant evidence at each stage of the decision-making process pursuant to Article 74(2)*

74. Article 74(2) states that “[t]he Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings”. This requires the Chamber to take into consideration for its decision-making the totality of the evidence “submitted and discussed before it at the trial”.⁹²

75. Following the practice of the UN *ad hoc* Tribunals, as well as national courts, the Prosecution submits that the fact-finding process inevitably is conducted in three stages: First, the Chamber must assess the credibility and reliability of the proffered evidence.⁹³ Second, based on the totality of the evidence that it

⁹² Article 74(2).

⁹³ Importantly, this assessment of credibility and reliability of all the evidence is different than, and inevitably will postdate, the assessment of admissibility of evidence under Article 69(4), a process wherein evidence is considered individually. See *Prosecutor v. Seselj*, IT-03-67-T, Decision on Prosecution Motion for Certification to Appeal the Decision of 7 January 2008, 21 May 2008 para.26; *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.15; *Prosecutor v. Milutinovic et al.*, IT-05-87-T,

determines is credible and reliable, the Chamber must find whether the facts alleged by the Prosecution are established. And third, the Chamber must determine whether all of the constitutive elements of the crime and the form of responsibility alleged against the accused have been proven beyond a reasonable doubt.⁹⁴

First stage: Standards and procedures for assessing the credibility of evidence

76. Under existing international case-law, at the first stage,

“the Trial Chamber has to assess the credibility of the relevant evidence presented. This *cannot be undertaken by a piecemeal approach*. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed *in the light of the entire body of evidence adduced*. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.”⁹⁵

77. Accordingly, “*a tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when*

Decision on Ojdanic Motion to Exclude Testimony of Patrick Ball, 15 February 2007, para.3; *Prosecutor v. Fofana*, SCSL-04-14-AR65, Fofana – Appeal Against Decision Refusing Bail, 11 March 2005, para.26.

⁹⁴ *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision, 7 July 2006, para.174 *Prosecutor v. Halilovic*, IT-01-48-A, Decision, 16 October 2007, para.125; see also national authorities referred to under this section.

⁹⁵ *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision, 7 July 2006, para.174 *Prosecutor v. Halilovic*, IT-01-48-A, Decision, 16 October 2007, para.125 (emphasis added).

considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case....".⁹⁶

78. It is well-established that a Chamber may find evidence credible and reliable on some aspects, while finding it unreliable on other aspects.⁹⁷ A Chamber must primarily assess the reliability of the portions of the evidence that go to the facts that are essential to enter a conviction.⁹⁸ Nevertheless, when rejecting part of the evidence, a Chamber may consider whether its finding against the reliability of one part of the evidence affects the reliability of other parts.⁹⁹

Second stage: Standards and procedures for making factual findings

79. Having analysed all the relevant evidence, "the Trial Chamber [must] determine whether the evidence upon which the Prosecution relies should be accepted as

⁹⁶ *Prosecutor v. Musema*, ICTR-96-13-A, Appeals Decision, 16 November 2001, para.134 (emphasis added); *Prosecutor v. Duško Tadić*, Case No.IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, para.92.Also, see *Attorney General of Hong Kong v. Wong Muk Ping* [1987] 2 All ER 488, PC; *Charles Villeneuve Kyoto Securities Limited v Joel Gaillard G Holdings Limited*, Privy Council Appeal No 0025 of 2009, from the Court of Appeal of the Commonwealth of the Bahamas, Decision Delivered by Lord Walker on 9th February 2011 paras.65-67; Court Of Criminal Appeal 165/07, *The People v. James Cronin*, [2008] Iecca 94, 23 June 2008, pp.3-5; see further the Opinion of Lord Steyn in *Smith New Court Securities v. Scrimgeour Vickers* [1996] UKHL 3; [1997] AC 254; [1996] 4 All ER 769; [1996] 3 WLR 1051 (21st November, 1996).

⁹⁷ Decision, para.50; ICC-01/04-01/06-2842, para.104; see also *Setako v. Prosecutor*, ICTR-04-81-A, Appeals Judgement, 28 September 2011, para.48; *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Appeals Judgement, 19 July 2010, para.201; *German Federal Court of Justice*, First Senate for criminal affairs, Case 1StR 278/05, pp.8-9; *German Federal Court of Justice*, Third Senate for criminal affairs, Case 3StR 96/03, p.4.

⁹⁸ *Setako v. Prosecutor*, ICTR-04-81-A, Appeals Judgement, 28 September 2011, para.31, which indicated that the credibility assessment needs to be made in relation to the "facts in question". Similarly, *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Appeals Judgement, 28 September 2011, para.71 refers to the credibility assessment in relation to the "fundamental features of the evidence"; see also *Prosecutor v. Naletilic et al.*, IT-98-34-A, Appeals Judgement, 3 May 2006, para.485; *Prosecutor v. Kupreškić*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 31; US Supreme Court, *Jackson vs. Virginia*, 443 U.S. at 443 U.S. 319. See also Judgment, para.35. In the context of the appealed Decision, it is the question regarding Mathieu Ngudjolo's position of authority over the Lendu combatants of the Bedu-Ezekere at Bogoro on 24 February 2003

⁹⁹ Decision, para.50; ICC-01/04-01/06-2842, para.104; see also *German Federal Court of Justice*, First Senate for criminal affairs, Case 1StR 94/98, principle 2; *German Federal Court of Justice*, First Senate for criminal affairs, Case 1StR 478/04, p. 12.

establishing the existence of the facts alleged, notwithstanding the evidence upon which the Defence relies".¹⁰⁰

80. Also for this stage, the Chamber must look at the totality of the relevant evidence in relation to a specific fact to determine whether the fact is proved to the required standard.¹⁰¹ This does not mean that the Chamber must refer in its analysis to every single item of evidence, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. Such disregard is shown when evidence which is clearly relevant [...] is not addressed by the Trial Chamber's reasoning".¹⁰² Such degree of reasoning is required to comply with Article 74(5) that provides that the judgment "shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions".

¹⁰⁰ *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgment, 7 July 2006, para.174; *Prosecutor v. Halilovic*, IT-01-48-A, Judgment, 16 October 2007, para.125.

¹⁰¹ *R v. Morin* [1988] 2 S.C.R. File No.: 20449, at p.347; *Thomas v. The Queen*, [1972 N.Z.L.R. 34 (C.A.) at p.36; *German Federal Court of Justice*, First Senate for criminal affairs, Case 1StR231/88.BGHSt35, pp.308-318, which described the obligation of the judges in its fact-finding process to evaluate all the evidence cumulatively, by using the key term "*Gesamtwürdigung*"; see also *German Federal Court of Justice*, First Senate for criminal affairs, Case 1 StR 354/03, pp.7-8.

¹⁰² *Prosecutor v. Limaj et al.* IT-03-66-A, Appeals Decision, 27 September 2007, para.86; *Prosecutor v. Kvočka et al.*, IT-89-30/1-A, Appeals Decision, 28 February 2005, para.23; *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Judgment, 23 October 2001, para.39; *Prosecutor v. Nikolic*, IT-02-60/1-A, Judgment on Sentencing Appeal, 8 March 2006, para.96; *German Federal Court of Justice*, Second Senate for criminal affairs, 524/00, 21.02.2001 (principle 2); *German Federal Court of Justice*, First Senate for criminal affairs, 524/02, 27.03.2003 (Principle 1); *German Constitutional Court*, 2 BvR 1439/02, 23.12.2002 (Principle 4); *German Constitutional Court*, StR 392/06, 21.11.2006 (Principle 2); Supreme Court of Canada, *R. v. Harper*, [1982] 1 SCR 2, [1982] SCJ No. 108; and *MacDonald v. The Queen*, 1976 CanLII 140 (SCC), [1977] 2 S.C.R. 665, at p.673; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 SCR 869, at 46; [*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 SCR 3 at 17 and 64; and *R. v. Dinardo*, 2008 SCC 24, [2008] 1 SCR 788, at 27, demonstrate the the same principle is applicable for the assessment of the credibility of evidence]. see also ICC-01/04-01/06-774 OA6, 14 December 2006, para.33: "The reasons for a decision must be comprehensible from the decision itself"; ICC-01/04-01/06-773 OA5, para.20 and ICC-01/04-01/06-774 OA6, paras.30-33: "Such reasoning will not necessarily require reciting each and every factor that was before the respective Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion".

Third stage: Standard and procedures applicable for the final determination of guilt

81. Finally, the Trial Chamber must decide whether all of the constitutive elements of the crime and the Accused's criminal responsibility have been proven. As explained by two judges of the Supreme Court of Canada, the trier of fact "must look at the totality of the evidence and determine whether on the proved facts, i.e. on those facts which survived the scrutiny [at the fact-finding stage], the accused is guilty".¹⁰³ Moreover, although a trial judge is not required to refer to every item of evidence, *"the reasons must be responsive to the case's live issues and the parties' key arguments"*.¹⁰⁴

¹⁰³ *R v. Morin* [1988] 2 S.C.R. File No.: 20449, at p.349 (Judges Lamer and Wilson). See also *R v JMH* [2011] 3 R.C.S. paras.31, 32: citing *R v Morin*, that it is an error of law to subject individual pieces of evidence to the standard of proof beyond a reasonable doubt and the evidence must be looked at as a whole. See also *R v Rudge* [2011] ONCA 791, paras. 47, 55, 65-66. Referring to the error of failing to take into account the totality of the evidence, the Court observed: "[T]he errors here arise from the trial judge's departure from the legally correct approach to the evidence that bears upon the ultimate question of guilt:...The strength of the Crown's case lay in the persuasive effect of the totality of the evidence, but the trial judge never considered whether the doubt he amassed...would survive an examination of those explanations considered in the context of the Crown's case as a whole....[T]he doubt the trial judge refers to at the close of his reasons was drawn from his consideration of each component of the Crown's case without the support of the other evidence, including evidence that presented a serious threat to the position of the defence. Simply put, the persuasive effect of the totality of the evidence- the strength of the Crown's case – was taken out of play" (paras. 65-66). See also German Federal Court of Justice, First Senate for criminal affairs, Case 1 StR 354/03, pp.7-8.

¹⁰⁴ *R v JMH* [2011] 3 R.C.S. para. 32: Although a Chamber is not required to refer to every item of evidence, citing Bonnie J. in *R v Walker* (2008 SCC 34, [2008], 2 S.C.R.245, para.20), Cromwell J observed: "reasons are sufficient if they are responsible to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue." See also *R v Rudge* [2011] ONCA 791 (citing *R v Walker*, *R v JMH*), para.56: "[A] trial judge is not required to record an assessment of every piece of evidence in his or her reasons... However, the reasons must be responsive to the case's live issues and the parties' key arguments".

(ii) *Law on the obligation to consider all relevant evidence at each stage of the decision-making process*

Circumstantial evidence

82. As Sir Richard May (former Judge of the ICTY) observed:¹⁰⁵ “Circumstantial evidence is of particular importance in war crimes trials where there may not be much direct evidence available. However, as stated in one old English case: ‘[i]t is no derogation of evidence to say that it is circumstantial’.¹⁰⁶ The individual items of such evidence may by themselves be insufficient to establish guilt, but taken together may be telling....¹⁰⁷ Circumstantial evidence may give rise to inferences, the drawing of which is mostly an application of common sense”.¹⁰⁸

83. The jurisprudence of the *ad hoc* tribunals makes clear that a Trial Chamber can rely on circumstantial evidence.¹⁰⁹ Indeed, circumstantial evidence has the same intrinsic value as direct evidence and is to be assessed in the same manner and to the same standard as any other evidence.¹¹⁰ The Appeals Chamber of the ICC also recognised that a Chamber may rely on circumstantial evidence.¹¹¹

¹⁰⁵ Judge Richard May and Marieke Wierda, *International Criminal Evidence*, Transnational Publishers Inc., International and Comparative Criminal Law Series, 2002 (“May”), p.111, para.4.44.

¹⁰⁶ *Taylor, Weaver and Donovan* [1928] 21 Cr. App.R.20 and 21 per Lord Hewart C.J.

¹⁰⁷ This effect has been described in another English case: “[i]t has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link of the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord may be insufficient to sustain the weight but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or mere suspicion, but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.” (Exall (1866) 4 F.&F.922, at 929).

¹⁰⁸ May, p.114, para.4.47.

¹⁰⁹ See e.g. *Prosecutor v Bagilishema*, Appeal Judgment, T-95-1A-1, 2 July 2002, para.37; *Prosecutor v Jelacic*, Appeal Judgment, IT-95-10-A, 5 July 2001, para.47. See also *Prosecutor v Gacumbitsi*, ICTR-2001-64-A, 7 July 2006. The Appeals Chamber confirmed that “it is also permissible to rely on circumstantial evidence to prove material facts”.

¹¹⁰ See e.g. *Prosecutor v Brdjanin*, IT-99-36-T, Judgment, 1 September 2004, para.35: the Trial Chambers of the ICTY have “not considered circumstantial evidence to be of less substance than direct evidence.” See also *Prosecutor v Oric*, IT-03-68-T, Judgment, 30 June 2006, para.21; *Prosecutor v Martić*, IT-95-11-T,

84. Accordingly, a Chamber cannot dismiss or reject circumstantial evidence, but must take it into account as part of the totality of the evidence when assessing the facts and making its ultimate conclusion.

Hearsay evidence

85. Hearsay evidence is admitted in international criminal trials, both historic and modern.¹¹² The ICTR Appeals Chamber has stated that “it is well established, that as a matter of law, it is permissible to base a conviction on circumstantial evidence and/or hearsay evidence.”¹¹³ Hearsay evidence has also been accepted as admissible in the ICC.¹¹⁴ The same procedure must be followed to assess its credibility and weight as is used for first-hand evidence: it must be assessed in the context of the totality of the evidence.¹¹⁵

Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, para.10. See also examples from national common law and civil law systems where the same principles have applied: *E.g. Desert Palace, Inc v Costa*, 539, U.S.90, 100 123 S.Ct. 2148, 2154 (US Supreme Court 2003): “The reason for treating circumstantial evidence and direct evidence alike is both clear and deep rooted: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence’; *R v Puttick* (1985) 1 CRNZ 644, 647 (Court of Appeal of New Zealand): “there is no distinction either in law or logic between facts established by direct evidence and those established by inference”; Swiss courts often emphasise that “Der Indizienbeweis ist dem direkten Beweis gleichwertig” (“Evidence by inference has the same value as direct evidence”), *e.g.* Decision of the Schweizerisches Bundesgericht, 6B-297/2007/zga, 4 September 2007; Spanish Supreme Court, STS 1586/1999, 10 November 1999, p.3, referring to circumstantial evidence as the “queen of evidence”.

¹¹¹ *Prosecutor v Al Bashir*, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad al Bashir”, 3 February 2010, ICC-02/05-01/09-73, para.33.

¹¹² May, pp.116-117, paras.4.51-4.54.

¹¹³ *Prosecutor v Gacimbisi*, ICTR-2001-64-A, 7 July 2006, para.115.

¹¹⁴ See *e.g.* ICC-01/04-01/06-1399, paras.26-32, 37, 42; ICC-01/04-01/06-2589, paras.33-34; ICC-01/04-01/06- 2842, *e.g.* paras. 1030-1036 (the Trial Chamber accepted the hearsay evidence of P-112 and P-116); ICC-01/04-01/07-2635, para. 27; ICC-01/04-01/07-2362, paras. 10-12; Oral decision of 12 July 2010, ICC-01/04-01/07-T-170-CONF-ENG, p.4, l.12 – p.5, l.3.

¹¹⁵ ICC-01/04-01/07-717, para.141; *Prosecutor v. Milutinovic et al.*, IT-05-87-T, Judgment, 26 February 2009, paras.35-36; *Prosecutor v. Brima et al.*, Decision on Joint Defence Motion to Exclude all Evidence from Witness TF-277 Pursuant to Rule 89(c) and/or Rule 95, SCSL-04-16-PT, 24 May 2005, para.15.

C. Affected factual findings

86. While the error alleged by the Prosecution concerns the general approach taken by the Chamber in its assessment of evidence and the fact-finding throughout the entire Judgment, the Prosecution will demonstrate the existence of the error on the basis of a limited number of examples at each stage of the decision-making process. All were critical to the Trial Chamber's refusal to find that Ngudjolo led the Lendu combatants of Bedu-Ezekere who attacked Bogoro on 24 February 2003.

First stage: assessment of the credibility of evidence

(1) Assessment of documentary evidence

87. The Trial Chamber correctly referred to the principles applicable for the assessment of documentary evidence.¹¹⁶ However, when the Chamber applied these principles to its assessment of, in particular, the letter written by D03-66 entitled "*Demande d'Aide*" ("the Soap Letter"),¹¹⁷ it failed to properly consider, before implicitly rejecting its authenticity, the totality of the author's testimony and other corroborating evidence that supported the authenticity and reliability of the evidence.

The Soap Letter

88. The Soap Letter was written on 4 January 2003 by D03-66 and signed by both him and Martin Banga, on behalf of "*the Zumbe delegation at Aveba*". It requested financial assistance from "Opérateur Oudo" to buy soap.¹¹⁸ The author of the Soap Letter, defence witness D03-66, testified that he wrote the letter on 4

¹¹⁶ Judgment, paras.57-58.

¹¹⁷ EVD-OTP-00025.

¹¹⁸ EVD-OTP-00025. Judgment, paras.373-375. Bedu-Ezekere groupement is located in Walendu-Tatsi collectivity.

January 2003, identifying his own handwriting;¹¹⁹ [REDACTED] Martin Banga signed it as "President of the delegation";¹²⁰ and that both men went to Walendu-Bindi.¹²¹ D03-66 testified, however, that the letter's contents were not true and that it bore a stamp that he (as author) did not put on the letter.¹²²

89. The Soap Letter was found in an FRPI camp Mehdu in Walendu-Bindi (i.e. outside Bedu-Ezekere)¹²³ by UN MONUC forces on 23 September 2004 and given by MONUC to the Prosecution on 21 October 2004.¹²⁴ The letter was a critical piece of documentary evidence as it indirectly corroborated testimony of key witnesses P-250 and P-28 that (a) Ngudjolo sent a Zombe delegation to meet Germain Katanga in Aveba (located in Walendu-Bindi) a few weeks before the Bogoro attack, to organize the attack and bring supplies back from Walendu-Bindi; and (b) the Bedu-Ezekere militia was a structured organization headquartered in Zombe and aligned with the FRPI in Walendu-Bindi (as indicated by the fact it was referring to itself as "FRPI"). And, conversely, the other consistent evidence also served to corroborate the letter's authenticity.

90. For example, the Soap Letter referred to the Zombe delegation being present at "Aveba", "Aveba Mukubwa", or "Bolo"¹²⁵ (which D03-66 confirmed all refer to the same place).¹²⁶ The presence of the Zombe delegation in Aveba¹²⁷ is

¹¹⁹ D03-66-T-296-ENG-p. 42-I. 26-28, p. 43-I.2-3; T-297-FRA-p.8-II.7-15/T-297-ENG-p.9-II.9-17; T-298-FRA-p.28-II.5-15/T-298-ENG-p.31-I.23-p.32-I.8.

¹²⁰ D03-66-T-296-ENG-p. 42-I. 14-15.

¹²¹ D03-66-T-296-ENG-p. 28-II. 5-15.

¹²² [REDACTED]; T-296-FRA-p.42-I.22-p.43-I.2/T-296-ENG-p.47-II.16-23.

¹²³ See e.g. Judgment, paras.3, 5. The Chamber acknowledges that Walendu-Tatsi (in which Bedu-Ezekere is located) and Walendu-Bindi are different collectivities.

¹²⁴ D03-66-T-297-FRA-p.30-I.16 – p.31-I.8/T-297-ENG-p.33-I.23-p.34-I.18. See also T-95-p.75-I.14 –p.77-I.25/T-95-ENG-p.72-I.19-p.75-I.15; T-206-FRA-p.52-I.14–p.55-I.3/T-206-ENG-p.55-I.22-p.55-I.7.

¹²⁵ EVD-OTP-00025.

¹²⁶ D03-66-T-297-FRA-p. 26-I. 4-7/T-297-ENG-p.29-II.2-6.

¹²⁷ EVD-OTP-0025. References to a Zombe delegation include: "[n]ous membres de la délégation Zombe", and reference to a smaller delegation of 15 travelling to the Tatu market if a favourable response was received to their request for money. [REDACTED] Martin Banga signed as "Président de la délégation".

corroborated by P-250 and P-28.¹²⁸ Several witnesses, including Germain Katanga,¹²⁹ as well as documentary evidence¹³⁰ confirmed that Aveba (or Aveba Mukumbwa, or Bolo) was Katanga's military headquarters. The letter also referred to the Zumbe delegation having left the Bedu-Ezekere *groupement* three weeks before (4 January 2003) "*pour mission de service à la collectivité des W/Bindi plus précisément à Aveba*";¹³¹ and that they received a warm welcome in Aveba; all of which was corroborated by P-250 and P-28.¹³² P-250 also testified that the group's civilian leaders included Martin Banga and D03-66 (which was partly corroborated by D03-66)¹³³ and that the two men served these respective functions (a fact additionally confirmed by D03-88).¹³⁴

91. Other references in the Soap Letter to FRPI militia were also corroborated by trial witnesses. D03-66, the author, admitted that "Opérateur Oudo" (to whom the letter is addressed) was a combatant,¹³⁵ that the markets were managed by the

¹²⁸ P-250-T-92-FRA-p.28-II.1-25, p.27, II.22-25, p.57-I.11-p.59-I.3, p.65-II.13-25, p.66-II.1-14, p.67-II.13-15/T-92-ENG-p.25-I.19-p.26-I.23, p.25-II.18-19, p.54-I.12-p.55-I.24, p.61-II.21-15, p.62-II.1-23, p.63-II.22-24; T-93-FRA-p.24-I.19-p.26-I.2, p.30-II.8-24/T-93-ENG-p.24-I.10-p.25-I.23, p.29-I.20-p.30-I.7; P-28-T-217-ENG-p.40-I.1-6, 9-12, p.44-II.8-20, p.45-II.3-16; T-223-ENG-p.30-II.17-22.

¹²⁹ See e.g. D02-300-T-315-ENG-p.62-I.14-p.64-I.17, p.65, II.8-21; T-324-FRA-pp.67- 1.27- p.68-I.6/T-324-ENG-p.74-II.7-13; P-28-T.216-ENG-p.71-II.19-25, p.72-I.25- p.73-I.14 ; T-221-ENG-p.42-I.8-p.45-I.9.

¹³⁰ FRPI letter, EVD-OTP-00278.

¹³¹ EVD-OTP-00025.

¹³² P-250-T-92-FRA-p.28-II.17-25, p.57-II.11-25, p.58-II.1-11, II.20-25, p.59-II.1-3, p.65-II.13-25, p.66-II.1-14, p.67-II.13-15/T-92-ENG-p.26-II.13-23, p.54-II.12-21, p.54-II.22-25, p.55-II.1-5, II.16-24, p.61-II.21-25, p.62-II.1-23, p.63-II.22-24; T-93-FRA-p.24-II.19-25, p.25-II.1-25, p.26-I.1-2, p.30-II.8-24/T-93-ENG-p.24-II.10-25, p.25-II.1-25, p.26-I.1-2, p.29-II.20-25, p.30-II.1-7; T-95-FRA-p.12-I.25, p.13-II.1-25, pp.14-15-I.7/T-95-ENG-p.10-II.3-25, pp.11-13-I.21; T-101-FRA-p.63-II.19-25, p.64-II.1-6/T-101-ENG-p.65-II.15-25, p.66-II.1-3; P-28-T-217-ENG-p.40-II.1-6, 9-12, p.44, II.8-20, p.45, I.3-p.47-I.3; T-217-FRA-p.34-I.26-p.35-I.9/T-217-ENG-p.40-II.1-12; T-221-ENG-p.79-I.24-p.80-I.8; T-223-ENG-p.30-II.17-22, p.31-II.11-21.

¹³³ [REDACTED]; T-93-FRA-p.24- II.19-25, p.25-II.1-18/T-93-ENG-p.22-II.14-25, p.23-II.1-12.

¹³⁴ [REDACTED]; Martin Banga Dheji (Martin Komani, Martin Cobra); (D03-88-T-301-ENG-p.23-II.7-18, p.25-II.4-5, p.36-II.7-15; T-304-FRA-p.25-II.14-21/T-304-ENG-p.27-II.20-25, p.28-II.1-2) was President of the youth committee in charge of security; See also P-250-T-104-p.63-II.8-16/T-104-ENG-p.67-II.18-25, p.68-I.1. [REDACTED].

¹³⁵ D03-66-T-296-ENG-p.42-II.6-10, p.43-II.7-20; T-297-FRA-p.39-II.1-13/T-297-ENG-p.43-II.20-25, p.44-II.1-6.

combatants, and that Oudo was the chief in control of the market in Tatu.¹³⁶ Concerning the note on the letter "*C.C.I le colonel Matata Cobra*", D03-66 identified Cobra Matata as a military commander and Oudo's hierarchical superior.¹³⁷ Witnesses confirmed that both Oudo and Cobra Matata were FRPI commanders based in Walendu-Bindi.¹³⁸ P-250 and P-28 confirmed that the Zumbe delegation met with the FRPI delegation in Aveba;¹³⁹ and P-250 stated that a smaller delegation travelled to meet FRPI commander Opérateur Oudo, as the letter mentions.¹⁴⁰ The Soap Letter was further authenticated by another UN-seized letter dated 9 February 2003 addressed to the President of the movement (i.e. FRPI) at Aveba Mkubwa, which has a very similar confirmation of receipt on the bottom left corner as the Soap Letter (with the same name and handwriting and similar formula used for confirming receipt).¹⁴¹

92. Notwithstanding the testimony of a Defence witness admitting that he wrote it, as well as all these corroborative and corroborated indicia of authenticity, the Trial Chamber declined to find the Soap Letter was authentic and to accord it any probative value. Part of its decision was based on its concern about the presence of a particular stamp on the letter itself, and part was based on its belief

¹³⁶ D03-66-T-297-FRA-p.30-ll.1-12/T-297-ENG-p.33-ll.7-17; T-298-FRA-p.45-ll.9-14/T-298-ENG-p.52-ll.3-9.

¹³⁷ D03-66-T-297-FRA-p.29-l.10-21/T-297-ENG-p.32-ll.14-24. *See also* T-296-FRA-p.38-ll.1-4/T-296-ENG-p.42-ll.9-12.

¹³⁸ *See e.g.* (Oudo Mbafale) D02-300-T-320-ENG-p.69-l.2-p.70-l.2; T-325-FRA-p.48-l.27-p.49-l.26, p.51-l.16-p.52-l.4 /T-325-p.55-ll.9-25, p.56-ll.1-11; T-324-FRA-p.78-ll.16-21, 24-26/T-324-ENG-p.86-ll.15-25, p.87-l.1; D02-148-T-281-p.13-l.27-p.14-l.24/T-281-ENG-p.16-ll.17-25, p.17-ll.1-18; P-250-T-96-FRA-p.18-ll.21-25, p.19-ll.1-3/T-96-ENG-p.18-ll.9-16; T-102-FRA-p.19-ll.2-9/T-102-ENG-p.19-ll.11-18; (Cobra Matata) D02-300-T-320-ENG-p.69-ll.18-25; T.325-FRA-pp.2-3, p.49-ll.14-23/T-325-ENG-p.55-l.25, p.56-ll.1-10; D02-148-T-279-FRA-p.8-l.20-p.9-l.28/T-279-ENG-p.9-ll.21-25, p.11-ll.1-7; T-280-FRA-p.9-ll.8-25/T-280-ENG-p.10-ll.20-25, p.11-ll.1-12; P-250-T-92-FRA-p.73-ll.6-18/T-92-ENG-p.69-ll.12-25, p.70-l.1; T-102-FRA-p.19-l.2-6/T-102-ENG-p.19-ll.11-15; T-104-FRA-p.61-ll.9-18/T-104-ENG-p.65-ll.16-23.

¹³⁹ P-250-T-92-p.28-ll.17-25/T92-ENG-p.26-ll.13-23; P-28-T-217-ENG-p.40-l.1-12, p.34-l.26-p.35-l.9, p.46-l.18-p.47-l.3; T.223-ENG-p.30-ll.17-22.

¹⁴⁰ P-250-T-96-FRA-pp.18-19; p.25, ll.1-12/T-96-ENG-pp.17-18, p.23-ll.22-25, p.24-l.1-8; T-104-FRA-pp.61-62/T-104-ENG-p.65-ll.6-25, p.66, p.67-ll.1-9. They travelled from Aveba to Medhu (where the Tatu market is located).

¹⁴¹ EVD-OTP-00278. Cited in the Prosecution's closing brief, ICC-01/04-01/07-3251-Conf, paras. 244, 534.

that P-250 was not a credible witness and therefore his testimony could not corroborate the Soap Letter or any other evidence.

93. The Soap Letter bore a stamp "*FRPI in Ituri, Staff headquarters, Tatsi-Zumbe*". The Chamber concluded that the stamp was not authenticated because (a) its author, D03-66, said he did not place the stamp on the letter, that the stamp looked "deformed" and was different than the one used by the group at the time;¹⁴² (b) the letter was the only document in evidence bearing this stamp; and (c) no other evidence – apart from the testimony of P-250, whom the Chamber declined to believe – established that the FRPI was based in Zumbe as early as 4 January 2003.¹⁴³
94. There is substantial reason to reject the Chamber's assessment that the stamp was not authentic, namely: its author confirmed that a stamp did exist (although he claimed it was different to the one used);¹⁴⁴ the chain of custody shows that there was no evidentiary basis for D03-66's claim that a false stamp was placed on the letter as the letter was with the FRPI in a different collectivity (Walendu-Bindi) until it was seized by UN MONUC forces before legal proceedings;¹⁴⁵ the

¹⁴² Decision, para.374. Citing D03-66-T-297-FRA-pp.47-54/T-297-ENG-pp.52-60. See also T-296-FRA-p.42-I.22 - p. 43-I.2/T-296-ENG-p.47-II.16-23. The Chamber relies on D03-66's testimony that he did not use the stamp on the Soap Letter and that it was not the one that was used at the time (he claimed the letter was "deformed" in that he did not use the stamp or the additional annotations at the bottom of the letter), even though the Chamber acknowledges that his "*words ought to be considered with restraint*".

¹⁴³ Decision, para.374.

¹⁴⁴ D03-66-T-296-FRA-p.39-I.21-p.40-I.6/T-296-ENG-p.44-II.9-20.

¹⁴⁵ D03-66-T-297-FRA-p.32-I.13-p.33-I.13/T-297-ENG-p.36-I.2-p.37-I.3; T-296-ENG-p.42-II.12-17. See also D03-66-T-297-FRA-p.48-I.11- p.49-II.11; p.50-II.4-20/T-297-ENG-p.53-I.24-p.55-I.4, p.56-II.11-12. The Prosecution pointed out to D03-66 that it was implausible that somebody from a different collectivity could use another collectivity's stamp. He provided no explanation as to why someone would place a forged stamp on the letter and/or who would do it, other than suggesting it may have been for political reasons and done by whomever provided the letter to the Prosecution (in this instance the UN MONUC). The letter remained with the FRPI of Walendu-Bindi (i.e. outside Bedu-Ezekere) until it was seized by UN forces at the request of the Tribunal de Grande Instance de Bunia on 23 September 2004, namely well before legal proceedings were instigated against the accused and the Prosecution obtained the original Soap Letter directly from the UN [REDACTED]. See also T-95-FRA-p.75-I.14-p.77-I.25/T-95-ENG-p.72-I.19-p.75-I.15; T-206-FRA-p.52, I.14-p.55-I.3/T-206-ENG-p.55-I.22-

references in the letter itself to FRPI militia confirm that the Bedu-Ezekere and Walendu-Bindi militia groups were aligned;¹⁴⁶ evidence from several witnesses (and the UN Special Report), not just P-250, indicate that Zumbe was the headquarters for the Bedu-Ezekere *groupement*;¹⁴⁷ and P-250 who saw the letter for the first time when testifying, further authenticated the stamp saying who made the stamp, when, where and why.¹⁴⁸

p.56-l.7. The Prosecution's application for a warrant of arrest against Germain Katanga and Mathieu Ngudjolo was made under seal on 25 June 2007 (ICC-01/04-348-US-Exp, ICC-01/04-35-US-Exp). The warrant of arrest against Mathieu Ngudjolo was issued under seal on 6 July 2007 (ICC-01/04-02/07-1-US). Mathieu Ngudjolo was arrested on 6 February 2008 and transferred to the Court on 7 February 2008 (ICC-01/04-02/07-10; ICC-01/04-02/07-T-3-ET, p.10, l.11).

¹⁴⁶ EVD-OTP-00025: The request for financial assistance addressed to FRPI commanders (presuming a favourable response) refers to the Bedu-Ezekere militia group's 'mission de service' in Aveba (i.e. Katanga's FRPI headquarters). See also e.g. D02-228-T-249-FRA-p. 45-l.16-p. 46-l.3/T-249-ENG-p.50-l.11-p.51-l.4, T-250-FRA-p. 51-l. 27-p. 52-l. 9/T-250-ENG-p.56-l.1-10; EVD-D02-00063: FRPI Manifesto referring to "Aveba-Kpandroma" (Lendu/Ngiti based in Aveba, and northern Lendu based in Kpandroma). See also P-250 at footnote 148 below: P-250 explained why the Tatsi-Zumbe group temporarily used the "FRPI" name.

¹⁴⁷ P-250-T-96-FRA-p.19-l.22-25, p. 20-l.1-24/T-96-ENG-p.19-l.8-p.20-l.10; T-100-FRA-p. 4, l. 15-19, p. 33, l. 4 – 8/T-100-ENG-p.4-l.20-24 ; T-102-FRA-p. 23, l. 21/T-102-ENG-p.24-l.4-7; P-280-T-157-p.5-l.22-23, p.6-l.2-4/T-157-ENG-p.5-l.22-23, p.6-l.2-4; P-279-T-144-ENG-p.55-l.18-19, p.56-l.1-20 ; T-146-ENG-p. 47-l.22-23. See also P-373-T-128-p.23-l.16-23/T-128-ENG-p.23-l.14-21; DRC-OTP-1036-0528, para.72 (EVD-OTP-00073); T-127-FRA-p.21, l.16-19/T-127-ENG-p.21-l.21-24: P-373 a photographic journalist travelling to Zumbe in early July 2003 to meet Lendu chiefs (including Ngudjolo) at the military camp Zumbe confirmed it was reputed to be the "sanctuaire des Lendu" and place to meet Lendu military leaders. Other evidence indicates Zumbe was the headquarters: the UN Special Report states Zumbe was used for military training (Judgment, para.511.Citing EVD-OTP-00285: MONUC's Special Report on the Events in Ituri ("UN Special Report"), para.147); and other witnesses confirmed Lendu from Zumbe were primarily implicated in the Bogoro attack (See e.g. D02-176-T-256-FRA-p. 8-l.13-15/T-256-ENG-p.9-l.5-7; D02-148-T-280-p.20-l.19- 27/T-280-ENG-p.23-l.25, p.24-l.1-8; P-268, T-107-ENG-p.26-l.2-8, 11, 17, 21: who confirmed that Lendu from Zumbe attacked Bogoro. See also P-161-T-111-FRA-p.22-l.5-7/T-111-ENG-p.22-l.25,p.23-l.1-3;T-113-FRA-p.30-l.6-9/T-113-ENG-p.30-l.12-15: P-161 heard intercepted communications between Ngiti of Walendu-Bindi and Lendu from Zumbe discussing the Bogoro attack. See also D02-176-T-256-FRA-p. 24-l.4 – p.25- l.2/T-256-ENG-p.27-l.6-p.28-l.5; T-257-FRA-p.5-l.3-p.6-l.12, p.6, l.14-p.7, l.12/T-257-ENG-p.5-l.8-p.7-l.8-p.8-l.11: D02-176 conceded this included Ngudjolo, who was the most senior commander based at Zumbe and organised the operations for the attack. See also P-166-T-227-FRA-p.15-l.20-28 ; p. 16, l. 1- 16, p. 17, l. 19-28, p. 18, l.1-12/T-227-ENG-p.17-l.18-p.18-l.14, p.20-l.1-10, p.20-l.11-22: Similarly P-166 learnt that Ngudjolo was the leader of the Zumbe, Lendu-Tatsi, group).

¹⁴⁸ P-250-T-96-FRA-p.19-l.22-25, p.20-l.1-24/T-96-ENG-p.19-l.8-p.20-l.10; T-104-FRA-p.65-l.17-25, p.66-l.1-7, p.67-l.12-19/T-104-ENG-p.70-l.3-17, p.70-l.18-p.71-l.24. P-250 explained that the reference "Bureau d'état-major, siège: Tatsi-Zumbe" was used so that their group had its own name. See also Judgment, para.52, 58. P-250 further explained that the FRPI Tatsi-Zumbe base existed as the Tatsi collectivity was empty at that time as all were seeking refuge in Zumbe. See footnote 164 below. As

95. Even if the stamp itself were inauthentic, however, the remaining circumstances overwhelmingly established that the *letter* itself was authentic and reliable.
96. Though the Chamber made no finding on the letter's authenticity, it implicitly accepted D03-66's claim that the letter's contents were not true. However, in doing so, the Chamber failed to consider the following evidence and facts relevant to assessing that witness' testimony: (a) he could not explain why a so-called "cover" letter required such a high level of detail; (b) he was evasive about Oudo's function, denying he was a commander; (c) the Chamber found he gave near-rehearsed testimony to avoid prejudicing the accused, on the issue of child soldiers. In that context, the Chamber failed to consider that both letter and stamp were highly incriminating against the accused, therefore D03-66 had an interest in lying.¹⁴⁹
97. The Prosecution agrees that the Trial Chambers have broad latitude in assessing evidence, so long as its assessment is not "undertaken by a piecemeal approach. Individual [...] documents admitted into evidence, have to be analysed in the

explained, P-250 was shown the Soap Letter and stamp for the first time when testifying in Court, so that his spontaneous explanations for the stamp are another indicia of the reliability of his testimony on this issue.

¹⁴⁹ Judgment, para.515; D03-66-T-296-ENG-p.42-II.6-10, 26-28, p.43, l. 2-3, 7-20; p.27, l.9-14; T-297-FRA-p.25-I.14 – p.26-I.14, p.30-I.24 – p.31-I.6; p.39-I.1-13, p.44-I.4 – p.45-I.16, p.47-II.14-21/T-297-ENG-p.28-I.8-p.29-I.6, p.34-II.6-14, p.43-I.20-p.44-I.6, p.49-I.11-p.50-I.12, p.53-II.1-7. D03-66 denied there was a Zumbe delegation, that they were in Aveba, and claimed he wrote this as a "cover" at Oudo's request to justify financial payment; but could not explain why a 'cover' letter required such detail as references to a Zumbe delegation, in Aveba, receiving a warm welcome, a smaller number of 15 travelling to Tatu, being there for three weeks by 4 January 2003, [REDACTED] Martin Banga as President. See also D03-66-T-295-ENG-p. 41-I.18-23, p. 42-I.7-p.43-I.14; T-297-FRA-p. 63-I.5-p.65-I.18/T-297-ENG-p.70-I.22-p.73-I.20. He denied having ever heard of the Bogoro attack of 24 February 2003 (only admitting knowledge of the prior 2002 attack). He lied about DRC-D03-0001-0328 (EVD-D03-00093) claiming it was drafted in about 2001 (T-295-ENG-p.57-II.2-6; see also T-295-FRA-p.56-II.10-12/T-295-ENG-p.57-II.4-6), when it was pointed out to him that it refers to the base committee being in existence until July 2003, had written on it a note "2009", and was addressed to Ngudjolo's Defence counsel (T-295-Conf-ENG-p.57-I.23-p. 60-I.11; T-296-FRA-p.63-I.13-p.67- I.13/T-296-ENG-p.70-I.10-p.74-I.22). [REDACTED].

light of the entire body of evidence".¹⁵⁰ In this instance, the concession by a defence witness that he wrote and signed the letter, along with the numerous factors corroborating its authenticity, clearly sufficed to establish that the Soap Letter was what it purported to be and that the stamp on that letter was authentic. In either failing to take into consideration relevant corroborative evidence or demanding more corroboration – and dismissing the weight of the author's corroboration that he wrote the letter -- the Trial Chamber exceeded its reasonable latitude and committed clear error. The error is highly significant, since it impacted on the Chamber's ability to correctly assess these two key witnesses' accounts regarding Ngudjolo's authority.

98. Moreover, the Chamber dismissed the value of the letter because it had separately determined, on slim bases, that it would not credit the two Prosecution witnesses whose evidence corroborated the letter and in turn was corroborated by it. This method of reasoning is itself singularly circular and thus suspect; the determination of the witnesses' credibility and the Soap Letter should have been made on the basis of all the evidence, and thus, the corroborative value of each with respect to the other should have been considered, not ignored. Nor, in any event, was it appropriate to reject not simply witnesses it did not believe but all other independent evidence – without regard to the other indicia of reliability – because the evidence corroborated discredited witnesses.

(2) Assessment of credibility of Prosecution witnesses

99. In its Judgment, the Trial Chamber stated that it had considered the circumstances of each of the witnesses' testimonies in light of all of the evidence in the record, including whether it was possible to establish that the witness were

¹⁵⁰ *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Decision, 7 July 2006, para.174 *Prosecutor v. Halilovic*, IT-01-48-A, Decision, 16 October 2007, para.125.

physically present where they said they were at the relevant time during their testimony.¹⁵¹ Further, the Trial Chamber said that when assessing the reliability of witnesses, they considered the entirety of their accounts; the possibility of pressure, influence or collusion with other witnesses; and contradictions with other witnesses.¹⁵²

100. However, when assessing the credibility of Prosecution witnesses the Trial Chamber erred by not analyzing their testimony in light of relevant corroborating evidence. Moreover, the Chamber failed to make any assessment on the credibility of the core parts of the key witnesses' (P-250, P-279, P-280) evidence (or that of Prosecution witnesses P-28, P-219, P-12 or P-160) regarding Ngudjolo's role as leader of the Bedu-Ezekere militia that attacked Bogoro.

101. As an example of this error, and due to its importance for the case, the Prosecution focusses mainly on the Chamber's assessment of the credibility of witness P-250. As to the others, the Prosecution provides examples of the manner in which similar errors were made by the Chamber in its assessment.

Witness P-250¹⁵³

102. The Trial Chamber concluded that P-250 was not a militiaman based in Zumbe, as he claimed, but a student at school in Kagaba (in a different collectivity), in the period 2002 to 2003.¹⁵⁴ The process was erroneous and the result unreasonable.

103. First, the Chamber identified real or apparent contradictions within P-250's evidence, but failed to fully consider relevant evidence and facts when assessing those contradictions.¹⁵⁵ It also determined that, even as to matters on which it

¹⁵¹ Judgment, paras.52, 58.

¹⁵² Judgment, para.53.

¹⁵³ Judgment, paras.127-156.

¹⁵⁴ Judgment, paras.157-159, 374.

¹⁵⁵ See e.g. Judgment, para.138. The Chamber comments that his testimony regarding Ngudjolo's authority "*was particularly wavering*", but did not assess his core evidence regarding Ngudjolo's

found the evidence credible and corroborated, it declined to rely on the credible part of the witness's evidence because it believed the witness lied on other matters. The Chamber thus rejected his key evidence, along with other corroborative evidence, that together established Ngudjolo's authority in Bedu-Ezekere, in particular that Ngudjolo became the leader when the group "*became serious*", that he sent the Zumbe delegation to Aveba to plan the Bogoro attack, and that he was a militiaman in Zumbe and was at the Bogoro attack. Finally, because it felt compelled to reject the witness's evidence altogether, it failed to consider how that evidence related to, and would undermine, defence witness evidence.

1. Evidence that corroborates P-250's account regarding Ngudjolo's authority

104. The core of P-250's testimony regarding Ngudjolo's authority was that Ngudjolo was the leader of the Bedu-Ezekere *groupement* when it "*became serious*" (i.e. more organised). This evidence was substantially corroborated by other express factual findings of the Chamber and other evidence, all of which the Chamber failed to take into account.

105. First, the Chamber made positive factual findings affirming the credibility of P-250's own account of Ngudjolo's leadership, in particular regarding P-250's information on the Bedu-Ezekere military structure and Ngudjolo's authority.¹⁵⁶

The Chamber found P-250 provided a clear account regarding the military

authority, that Ngudjolo became the leader when the group "*became more serious*" (Judgment, para.128, citing P-250-T-91-FRA-p.30 (T-91-ENG-pp.30-31), instead providing an example of a so-called contradiction or exaggeration in P-250's testimony regarding Ngudjolo's role as leader: saying that P-250 said no ordinary soldier had the right to go and see Ngudjolo of his own accord, but later said an ordinary soldier could give information or report to the accused. However, the Chamber does not fully quote P-250: as he said no ordinary soldier could provide information directly (such as report his injury to Ngudjolo), but agreed that he would be obliged to give an important report in person (P-250-T-92-FRA-p.30-ll.7-15, p.33-ll.21-p.34-l.25/T-92-ENG-p.28-ll.2-8, p.31-l.9-p.32-l.15). (See also P-250-T-92-FRA-p.31-ll.17-18/T-92-ENG-p.29-ll.8-10: There was also some confusion as "*reports*" was being wrongly interpreted as "*orders*").

¹⁵⁶ See arguments under the second phase of the fact finding process, below.

structure and commanders at the helm of each group [REDACTED],¹⁵⁷ and a rather precise description of the militia group's disciplinary code, the commanders who enforced it and the way in which the Zumbe military tribunal operated.¹⁵⁸ Additionally, P-250's information regarding the Bedu-Ezekere militia structure, including its commanders, was also corroborated by several witnesses.¹⁵⁹ D03-100 corroborated P-250's account, that [REDACTED] were commanders (and confirmed that [REDACTED]); by confirming his evidence, D03-100 also inferentially confirmed that P-250 (similar to P-28) in fact had been within the militia's inner circle, since he was able to provide information regarding its command structure.¹⁶⁰ Additional factual findings by the Chamber regarding Ngudjolo's position of authority, as described below at paragraphs 127 to 129, corroborate P-250's account. Moreover, as further detailed below at paragraphs 132 to 136, the Chamber wrongly excluded from its consideration evidence confirming that Ngudjolo was the leader of the Bedu-Ezekere militia group that attacked Bogoro.¹⁶¹

¹⁵⁷ Judgment, para.130.Citing P-250-T-91-FRA-pp.46-58, 72-74 (T-91-ENG-pp.46-48, 70-72). *See also* Judgment, para.137. Citing *e.g.* P-250-T.91-FRA-pp.33-36, 71-72 (T-91-ENG-pp.33-37, 69-70); T-101-FRA-pp.13-14 (T-101-ENG-pp.13-14); T-104-p.54 (T-104-ENG-pp.57-58).

¹⁵⁸ Judgment, para.137.

¹⁵⁹ Judgment, paras.378-389, 404.. Citing *e.g.* D02-01, D03-100, P-323, D03-55, D03-66, D03-88, P-373. The Chamber said it was a fact that several witnesses described the positions occupied by the self-defence groups as "camps' or self defence groups, composed of combatants, soldiers or self-defence members. The Chamber concluded that combatant groups existed and were present more or less permanently before 24 February 2003 in fixed military positions in Bedu-Ezekere groupement, such as at Lagura, Ladile and Zumbe under the authority of well-known people, including Commander Kute at Lagura, Commander Boba Boba at Ladile, and Commander Nyunye at Zumbe.

¹⁶⁰ D03-100-T-310-ENG-p. 21-II.16-25 – p.22-I.1-22, p.49-I.7-14; *See also* [REDACTED]. *See also* EVD-D03-00004 in [REDACTED]. *Compare*, P-250-T.92-FRA-p.78-I.18-25, p. 79, I. 1-7/T-92-ENG-p.74-I.24-p.75-I.15.

¹⁶¹ *See*, for instance, evidence from UN staff member P-317; witnesses who gave hearsay evidence; Ngudjolo and Katanga's admissions to P-12 and P-160, and P-219; and Ngudjolo's admission to the public prosecutor that he led the Bunia operation just two weeks after the Bogoro attack.

2. Evidence that corroborates P-250's account of being a militiaman and present at the Bogoro attack

106. Ultimately, the Chamber was not satisfied that P-250 was truthful in testifying that he had been in the militia at the relevant time and was present at the Bogoro attack, relying on evidence proffered to show that he had instead been a student.¹⁶²

(i) P-250's detailed account of the Bedu-Ezekere militia

107. When assessing that, contrary to his testimony, P-250 was not a militiaman, the Chamber ignored (a) its own specific finding that during his testimony, he had answered with precision the great majority of questions put to him;¹⁶³ (b) another of its specific findings that P-250 provided a clear account regarding the military structure, commanders at the helm of each group, the disciplinary process and the manner in which the Zumbe's military tribunal operated (which means that he could provide details regarding the inner-workings of the Bedu-Ezekere militia in Zumbe at the relevant time period); (c) his detailed account of the Zumbe delegation that left in late 2002 to travel to Aveba and the warm welcome the delegation received, testimony additionally corroborated by the Soap Letter (and given before he was shown the letter);¹⁶⁴ and (d) his detailed account regarding the Walendu-Bindi FRPI, also mentioned in the Soap Letter.¹⁶⁵

108. Moreover, the Chamber dismissed the corroborative evidence of P-28, which supported P-250's account that he was a member of the Zumbe delegation to

¹⁶² Judgment, paras.157-159.

¹⁶³ P-250-T-98-ENG-p.20.

¹⁶⁴ Corroborated by the Soap Letter. Bearing in mind he was never shown the Soap Letter before he testified. P-250 was first interviewed by the Prosecution [REDACTED]: P-250, *see e.g.* T-102-ENG-p. 27-1.12 -19; June 2007: T-106-ENG-p.40-1.22-25, p.41-1.1. P-250 was interviewed, [REDACTED] (P-250-T-102-ENG-p.42-1.20-22). The Soap Letter remained confidential under Article 54(3)(e) until 26 January 2009, namely after P-250 was interviewed regarding events in Ituri. *See* T-95-ENG, p.72, 1.19-p.74, 1.2.

¹⁶⁵ *See e.g.* P-250-T-96-FRA-p.18-11.21-25, p.19-11.1-3, p.25-11.1-12/T-96-ENG-p.18-11.9-17, p.23-1.22-p.24-1.8; T-104-FRA-p. 61-11.21- 22, p.62-11.22/T-104-ENG-p.66-11.1-p.67-1.6.

Aveba. The Chamber rejected the corroboration on the basis of evidence that “might suggest that Witnesses P-28 and P-250 were able to liaise with each other [in 2009 and 2010] before coming to testify”.¹⁶⁶ However, even disregarding that there was no evidence that the witnesses “colluded” to give false evidence, each witness separately gave statements to the Prosecution regarding the Zumbe delegation in Aveba well before 2009, the dates of the speculated liaison.¹⁶⁷

(ii) P-250's detailed account of the Bogoro attack

109. The Chamber failed to consider that P-250 provided a detailed and corroborated account of the attack, *inter alia*: (a) the start of the attack about half-past five;¹⁶⁸ (b) burial of corpses under Ngudjolo's orders for hygiene reasons, corroborated by victim P-249 and P-279 (and also consistent with Ngudjolo's medical background);¹⁶⁹ (c) the commanders' meeting under the mango trees near the UPC camp after the attack, corroborated by P-28 and P-219;¹⁷⁰ and (d) the strategy employed to win the battle and details about routes followed by various commanders.¹⁷¹ On that latter point, the Chamber did not take into account the corroboration of P-250's testimony that the aim was to surround and block off all

¹⁶⁶ Judgment, para.155.

¹⁶⁷ P-250 first gave information regarding the delegation to the Prosecution during his interview conducted [REDACTED] (P-250, *see e.g.* T-102-ENG-p.27-l.12 -19; P-28 first gave information regarding this delegation in his second statement, which was given in February 2007 (P-28-T-223-ENG-p. 24-l. 4-p.30, l. 12, p. 31-l. 24 -p.32-l.4).

¹⁶⁸ Judgment, para 322. The Chamber confirms the attack started between four and five in the morning. Citing P-268-T-107-FRA-p.14 (T-107-ENG-pp.14-15); P-233-T-83-FRA-p.66 (T-83-ENG-p.54-l.12-p.55-l.4); P-323-T-117-p.23 (T-117-ENG-p.23-l.19-p.24-l.24); V-2-T-231-FRA-p.28 (T-231-ENG-p.31-l.23-p.32-l.25); V-4-T-233-FRA-p.68 (T-233-ENG-p.77-l.7-p.78-l.2). Compare to P-250: Judgment, para.132. Citing P-250-T-94-FRA-p.83 (T-94-ENG-p.79-l.13-p.80-l.6), T-103-FRA-p.30 (T-103-ENG-p.30-l.18-p.31-l.20).

¹⁶⁹ P-279- T-145-ENG- p. 34, l. 25, p. 35, l. 1-6; T-144-ENG-p. 49-ll.18-21 ; T-145-ENG- p. 27-l. 17-19, p.28-l. 6-23, p.31-ll.14-15, p.34-l.25, p.35-l.1-6 ; P-249- T-135-ENG-p. 43-ll. 20-24, p. 63-l.10-19. *See* D03-707-T-333-ENG-p.17-ll.20-23: In cross-examination, Ngudjolo himself recognized that burying the bodies would have been the right thing to do in medical terms (agreeing that it was not possible to leave corpses in the open air because if bodies decompose they can cause illness).

¹⁷⁰ Judgment, para.134. Citing P-250-T-94-FRA-pp.52-55, 69 (T-94-ENG-p.50-l.5-p.53-l.25, p.66, l.5-p.67-l.6).

¹⁷¹ Judgment, para.133.Citing EVD-OTP-00022: Sketch drawn by P-250; P-250-T-94-FRA-pp.4, 8-9, 15-17/T-94-ENG-p.3-l.18-p.4-l.19, p.7-l.20-p.9-l.19, p.14-l.12-p.17-l.11.

exit routes to Bogoro,¹⁷² as well as the routes taken by the different groups and the identity of the commanders leading them, namely: (i) Walendu-Bindi forces of Dark moving from Kagaba via the Gety route towards Diguna; (ii) Walendu-Bindi forces of Oudo and Cobra Matata moving from Medhu, via Mount Waka; (iii) Bedu-Ezekere forces led by Bahati de Zumbé coming from Zumbé, and Kpadhole coming from Katonie, moving via the Bunia route; and (iv) Bedu-Ezekere forces under Kute coming from Lagura, and Nyunye coming from Zumbé, moving via the Kasenyi route.¹⁷³ Indeed, though rejecting the witness himself as not credible, the Chamber's findings largely accepted – based on other evidence in the record -- the facts recounted by the witness. It found that the attackers came from all directions and in large numbers,¹⁷⁴ mainly along the Mt. Waka and Gety roads¹⁷⁵ leading to Walendu-Bindi collectivity¹⁷⁶ as well as along the Zumbé and Lagura roads¹⁷⁷ leading to the Bedu-Ezekere *groupement*.¹⁷⁸ The Chamber also accepted as proven that Commander Dark participated in the

¹⁷² P-250-T-93-FRA-pp.57-61, p. 65-1.15-19/T-93-ENG-p.55-1.9-p.60-1.9, p.63-1.7-p.64-1.12-22; T-94-FRA-p.15-1.6-25/T-94-ENG-p.14-1.12-p.15-1.12.

¹⁷³ Judgment, para.133.Citing EVD-OTP-00022: Sketch drawn by P-250; P-250-T-93-FRA-pp.57-64/T-93-ENG-p.55-1.9-p.63-1.5; T-94-FRA-pp.4, 8-9, 15-17/T-94-ENG-p.3-1.18-p.4-1.19, p.7-1.20-p.9-1.19, p.14-1.12-p.17-1.11.

¹⁷⁴ Judgment, paras.322, 326. Citing P-268-T-107-FRA-p.26 (T-107-ENG-p.25-1.19-p.26-1.16); T-108- FRA-p.85 (T-108-ENG-p.86-1.8-p.87-1.9); V-2-T-231-FRA-p.41 (T-231-ENG-p.46-1.23-p.47-1.2); V-4-T-233-FRA-p.69 (T-233-ENG-p.78-1.5-p.79-1.5); T-234-FRA-p.9 (T-234-ENG-p.10-1.15-p.11-1.14); P-323-T-117-FRA-pp.27-30, 36 (T-117-ENG-p.28-1.3-p.32-1.10, p.37-1.15-p.38-1.12).

¹⁷⁵ Judgment, para.326.Citing P-268-T-108-FRA-p.43 (T-108-ENG-p.44-1.8-p.45-1.4); P-323-T-117-FRA-pp. 28-29, 36, 73 (T-117-ENG-pp.29-30, p.37-1.15-p.38-1.10, p.74-1.16-p.75-1.15).See also V-4-T-233-FRA-pp.68-69 (T-233-ENG-p.77-p.79-1.5).

¹⁷⁶ Judgment, para.326.Citing EVD-D02-00217: Map on which Germain Katanga drew the borders of the Walendu-Bindi collectivity; D02-300-T-314-p.45 (T-314-ENG-p.51-1.1-p.52-1.8).Citing Annexe D.

¹⁷⁷ Judgment, para.326. Citing P-323-T-117-FRA-pp.28-29, 36, 73 (T-117-ENG-p.20-1.1-p.31-1.4, p.37-1.15-p.38-1.10, p.74-1.16-p.75-1.15); P-317-T-228-FRA-pp.32-36 (T-228-ENG-p.37-1.7-p.43-1.4); EVD-OTP-00285: MONUC report on the events in Ituri, para.65; P-268-T-107-FRA-p.26 (T-107-ENG-p.25-1.19-p.26-1.17); EVD-D03-00010: Map on which P-268 indicated the locations of Zumbé and Katonie; P-268-T-108-FRA-pp.59-62 (T-108-ENG-p.59-1.24-p.63-1.19); EVD-OTP-00273: Sketch by D03-88 showing the borders of Bedu-Ezekere groupement; See also V-4-T-233-FRA-pp.68-69 (T-233-ENG-p.77-1.1-p.79-1.5).

¹⁷⁸ Judgment, para.326. Citing D02-44-T-292-FRA-pp.9-11 (T-292-ENG-p.8-1.16-p.11-1.17); EVD-OTP-00273: Sketch showing the borders of Bedu-Ezekere groupement by D03-88; D03-88-T-303-FRA-p.37 (T-303-ENG-p.41-1.23-p.42-1.22). Citing Annexe D.

Bogoro attack;¹⁷⁹ and referred to two Prosecution witnesses who also identified Commander Kute at the attack.¹⁸⁰ In other words, it found substantial relevant parts of the witness's testimony to be proven by other evidence, yet disregarded that evidence as corroborative of P-250 in assessing P-250's credibility. Indeed, the Chamber failed to weigh that P-250's detailed account was corroborated even by defence witnesses present during the Bogoro attack, including D02-148 (FRPI officer)¹⁸¹ and D02-176 (UPC Captain).¹⁸²

3. Whether P-250 was a student in Kagaba or a militiaman in Zumbe during the relevant period

(i) D03-100's corroboration of P-250's account

110. The Chamber relied in large part on documentary evidence, purported school records that showed that P-250 was a student in Kagaba in 2002-2003 (which records, the Defence stated, [REDACTED]), along with the in-court testimony of D03-100 [REDACTED], to conclude that P-250 was not a militiaman but a student in Kagaba-Gety in 2002-2003.¹⁸³ This finding was critical: if P-250 was not a militiaman at the time, his first-hand account of militia activities predating and during the Bogoro attack could not be believed. However, in weighing the competing versions in the testimony and the school records, the Chamber appears to have first concluded that the records were reliable without

¹⁷⁹ Judgment, para.460.

¹⁸⁰ Judgment, para.329. Citing P-323-T-117-FRA-pp.31-33 (T-117-ENG-p.30-l.10-p.35-l.12); P-268-T-107-FRA-pp.37, 63 (T-107-ENG-p.37-l.9-p.38-l.9, p.64-l.8-p.65-l.7); T-108-FRA-pp.12-13 (T-108-ENG-p.12-l.7-p.14-l.12).

¹⁸¹ D02-148-T-281-FRA-p.19-l.2 -14/T-281-ENG-p.22-l.25-p.23-l.12. D02-148 (an FRPI officer), who confirmed that Bahati de Zumbe (from Zumbe) and Kute (from Lagura) were amongst the Lendu commanders coming via the Zumbe route to assist the Ngiti attackers in the attack and he saw both Bahati and Kute near the UPC camp at the round-about during the attack.

¹⁸² D02-176-T-256-FRA-p8-l.8-15, p.10-l.19 – p.11-l.10/T-256-ENG-p.8-l.25-p.9-l.7, p.11-l.10-p.12-l.18; T.257-FRA-p.6-l.14-p.7-l.12/T-257-ENG-p.7-l.7-p.8-l.11. D02-176 confirmed the attackers surrounded Bogoro and came from all sides including Ngiti from the Gety, Kasenyi, Medhu and Bunia routes, and Lendu from Zumbe, including Kute. He further confirmed the presence of Lendu commanders Besto, Ndjabu, Mbiti and Ngadjole.

¹⁸³ Judgment, paras.147, 157.

considering the testimonial challenges, including testimony from [REDACTED], defence witness D03-100, that corroborated P-250's account of being a militiaman.

111. First, D03-100 confirmed that on P-250's return [REDACTED] in 2010 he was in a bad mental state and was rather aggressive; [REDACTED] and testified that "[i]t seemed as if he had become probably a soldier".¹⁸⁴

112. Second, D03-100 largely corroborated P-250 on the places and times when he was a student, contradicting the 1999-2004 school reports (namely EVD-D03-0006 to EVD-D03-0009)¹⁸⁵ that the Defence said [REDACTED].¹⁸⁶ D03-100 further confirmed that [REDACTED] when P-250 changed schools.¹⁸⁷ Accordingly, the Chamber should have taken into account D03-100's testimony on P-250's school years, notwithstanding that they contradicted the school reports. In particular, the Chamber should have considered the following aspects of D03-100's testimony that corroborated P-250's evidence regarding his schooling to assess D03-100's contradictory statements that P-250 was a student in 2002 to 2003 and to assess the authenticity and reliability of the school reports:

- First, D03-100 corroborated P-250's testimony that he completed his primary school education [REDACTED].¹⁸⁸
- Second, D03-100 corroborated P-250's testimony that he first attended secondary school [REDACTED], then in Songolo after the war broke out in 2000;¹⁸⁹ and only after that did P-250 first attend Kagaba school, where he started his second year of secondary school in 2000 and completed his second

¹⁸⁴ [REDACTED].

¹⁸⁵ Judgment, para.150, citing Prosecutor's oral submissions, T-340-FRA-p.42 (T-340-ENG-p.37-l.11-p.38-l.11)

¹⁸⁶ T-105-ENG-p.78-l.21-p.79-l.3; T-106-ENG-p.62-l.13-21.

¹⁸⁷ [REDACTED].

¹⁸⁸ [REDACTED]; P-250-T-92-FRA-p.78-l.8-10/T-92-ENG-p.74-l.16-18; T-105-FRA-p.51-l.24-25, p.52-l.1-21/T-105-ENG-p.52-l.7-p.53-l.12. P-250 believed he finished his last year in 1996, whilst [REDACTED] stated he finished his primary schooling in 1999. EVD-OTP-0005 indicates P-250's final school year was in 1998-1999.

¹⁸⁹ [REDACTED]; P-250-T-100-ENG-p.25-l.11-23; T.105-FRA-p.57-l.1-8/T-105-ENG-p.56-l.18-p.57-l.3

year of secondary school in 2001.¹⁹⁰ D03-100's testimony contradicts (a) school report EVD-D03-0006, which stated that P-250 started his first year level of secondary school at Kagaba, in 1999; and (b) school report EVD-D03-0007 that stated that P-250 completed his second year of secondary school in 2002.¹⁹¹

- Third, D03-100's testimony undermines key school reports for the 2002-2004 period. P-250 testified that he completed his third year at school in 2002, before he went with his family for their vacation to Bunia and then fled to Zombe in mid-August 2002 when Bunia fell to UPC forces.¹⁹² P-250 stated that he did not start his fourth year of schooling, which was in Gety, until UN Uruguayan peacekeepers arrived (namely in 2003).¹⁹³ In contrast, D-03-100 said that P-250 was doing his third year of secondary schooling at Kagaba in 2002¹⁹⁴ and claimed that P-250 completed his fourth year of studies at Kagaba-Gety in 2003.¹⁹⁵ However, both their testimonies contradict (a) the key school report EVD-D03-00008 upon which the Chamber relies, which instead purports that P-250 completed his third year of secondary school in 2003 (therefore after the Bogoro attack); and (b) school report EVD-D03-00009, which purports that P-250 completed his fourth year of secondary school in 2004.

¹⁹⁰ D03-100-T-309-ENG-p.20-ll.23-28, p.21-ll.6-7; P-250-T-100-ENG-p.25-ll.20-25

¹⁹¹ There is also an unexplained loss of a school year 2000 to 2001 in the school records provided by Defence, as EVD-D03-0006 indicates a year of study from 1999 to 2000, whilst the next sequential school record (EVD-D03-0007) indicates a year of study from 2001 to 2002.

¹⁹² P-250-T-100-ENG-p.28-ll.42-25, p.29-ll.1-p.30-l.12.

¹⁹³ P-250-T-100-ENG-p.26-ll.9-21, p.30-ll.13-25, p.31-ll.1-12. See also P-250-T-100-ENG-p.26-ll.9-25, p.27-ll.1-9. P-250 confirms that he completed his fifth year of study in 2006 [REDACTED]. The Prosecution observes that the Uruguayan UN peacekeepers arrived in Ituri in May 2003. The Prosecution further observes that in Ituri the normal school year ran from September to early July each year.

¹⁹⁴ D03-100-T-309-ENG-p.21-ll.8-11; P-250-T-100-ENG-p.26-ll.9-13. Although in contrast to P-250, D03-100 claims P-250 also studied in Gety in 2002.

¹⁹⁵ D03-100-T-309-ENG-p.21-ll.8-14; p.23-ll.24-25, p.24-ll.1-2, 11-13.

(ii) Failure to consider evidence of lack of proper authentication of records

113. The Chamber also failed to take into account evidence that there was no proper foundation laid for authenticating the school records through P-250:¹⁹⁶ (a) P-250 said in relation to two of the school reports that they were from Kagaba school, but did not agree that they were his reports;¹⁹⁷ (b) the years of the reports were not brought to his attention when they were shown to him;¹⁹⁸ and (c) he confirmed that he never requested these documents and never had them in his possession.¹⁹⁹ Moreover, Defence said that [REDACTED] would come and testify, so it was assumed he would authenticate them. The Chamber said when it admitted the reports into evidence that D03-100 when he testified could confirm whether they [REDACTED] and where they came from.²⁰⁰ However, D03-100 was never questioned about the reports by the Defence so did not confirm that the school reports [REDACTED].

(iii) Failure to consider evidence relevant to the reliability of Defence witnesses' testimony regarding P-250

114. When assessing the credibility of Defence witnesses and reliability of their accounts that P-250 was not a militiaman but was just a student, the Chamber failed to take into account essential relevant evidence and facts.

¹⁹⁶ See P-250-T-105-ENG-p.76-l.5-p.77-l.24: The Prosecution objected to the reports being admitted into evidence, *inter alia*, on the basis of the lack of proper foundation when seeking to admit them through P-250. For instance, as he only recognised two of the reports, and the dates were not brought to his attention, See also T-106-ENG-p.62-l.13-21.

¹⁹⁷ See EVD-D03-0006: P-250-T-105-ENG-p.64-l.15-24. P-250 responded that "[Y]es, it is a report card from the Kagaba Institute...I didn't ask for report cards, but to my great surprise its here. And I see this report card which shows this school where I studied." See EVD-D03-0007: P-250-T-105-ENG-p.66-l.19- p.68-l.23: "That is correct. It is a report card from the Kagaba Institute".

¹⁹⁸ P-250-T-105-ENG-p.67-l.2-20. See also T-105-ENG-p.76-l.5 – p.77-l.24.

¹⁹⁹ P-250-T-106-ENG-p.34-l.9-23.

²⁰⁰ See T-105-ENG, p.78, l.21-p.79, l.3; T-106-ENG, p.62, l.13-21. See also See also T-106-ENG, p.62, lines 13-21. The Chamber when admitting the school reports into evidence noted that [REDACTED] were coming to testify and it would be possible to confirm their provenance and that they were the ones in possession of those documents.

115. The Chamber acknowledged that D03-100 admitted that his family had been in conflict with the family of Ngudjolo because of [REDACTED] with the Prosecution and that he decided to testify (for the defence) because Ngudjolo's family threatened his own family with death.²⁰¹ The Chamber indeed wondered whether the threats adversely affected D03-100's testimony²⁰² and asked the witness directly whether he had told the whole truth during his testimony.²⁰³ Notably, however, the witness refused to give a direct response to defence repeated questions as to whether his testimony that P-250 was not a combatant with Ngudjolo was unaffected by the conflict with Ngudjolo's family.²⁰⁴

116. Moreover, in finding that four other Defence witnesses supported D03-100's version that P-250 was not a militiaman, the Chamber failed to take into account the following relevant evidence and facts. As regards D03-66 and D03-55, the Chamber failed to consider its own finding in relation to these two Ngudjolo witnesses, on the issue of child soldiers, that they responded in "*in the same near-rehearsed way*" and that the Chamber concluded "*that these witnesses were trying not to prejudice the accused.*" Bearing in mind the Chamber found P-250 was a key witness against Ngudjolo,²⁰⁵ it is not surprising that Ngudjolo's witnesses would suggest that he was a student and not a militiaman in 2002-2003. Even so, their testimony that they heard that P-250 was a student in Gety (rather than Kagaba) contradicts the school reports that P-250 was a student in Kagaba in 2002-2003.

117. The Chamber also relied on the testimony of two Katanga witnesses, D02-160 and D02-161,²⁰⁶ that P-250 was a student. The Chamber did not assess and presumably did not assume witness bias, presumably because the witnesses

²⁰¹ Judgment, para.151.

²⁰² Judgment, para.157.

²⁰³ D03-100-T-310-ENG-p. 65-II.10-21.

²⁰⁴ D03-100-T-310-ENG-p.61-I. 14-p.65-I.2.

²⁰⁵ Judgment, para.124.

²⁰⁶ Judgment, paras.152-153.

were not called by Ngudjolo. However, P-250 was also a key witness in the case against Germain Katanga,²⁰⁷ and thus it was clearly also in the interest of Katanga to discredit his evidence. The Chamber acknowledged in its Judgement that P-250 gave the following information relevant to Germain Katanga: P-250 testified that the Bedu-Ezekere delegation met with Katanga to discuss the upcoming Bogoro attack, after which the delegation returned to Zumbe with ammunition supplied by Katanga; that his FRPI troops jointly attacked Bogoro using communications provide by the FRPI and he saw Katanga (as well as Ngudjolo) after the attack receiving commanders' reports.²⁰⁸

118. Accordingly, the Chamber's rejection of P-250's evidence that Ngudjolo became the leader of the Bedu-Ezekere militia and that P-250 was a militiaman based in Zumbe is, from its own description, based on criteria that purported to be objective but were, on balance, unfairly skewed against the Prosecution. As the Chamber acknowledges, P-250 was a key witness, so its errors in assessing this witness materially impacted on its overall conclusion as to Ngudjolo's authority.

Other Prosecution Witnesses

119. The Chamber's failure to take into account relevant evidence and facts when assessing credibility was systemic and also affected other Prosecution witnesses. It would be excessive to list every single relevant fact or finding that the Chamber did not take into consideration, but the following examples further demonstrate the systematic nature of the error:

120. The Chamber found that P-28 contradicted himself as he first told the Prosecution that he arrived in Aveba after Katanga's wedding, but testified that he attended Katanga's wedding (making it unclear when he arrived in Aveba). However, the Chamber failed to consider (a) P-28 clarified that he arrived in

²⁰⁷ Judgment, paras.131-134.

²⁰⁸ Judgment, paras.131-134.

Aveba after Katanga's engagement; (b) P-28's account of when he arrived in Aveba was supported by Defence witnesses, in particular D02-161 corroborated P-28's account that P-28 was in Aveba from September 2002; and (c) P-28 provided a detailed account regarding Katanga's trip from Aveba to Beni end of 2002, which was corroborated by Katanga and D03-88, indicating P-28's presence in Aveba at that time; and provided a detailed account regarding the Zumbe delegation's trip to Aveba before the Bogoro attack which was corroborated by P-250 and the Soap Letter.

121. The Chamber acknowledged that P-219 provided a detailed account of life in Aveba prior to the Bogoro attack but nonetheless relied largely on Defence witnesses to conclude that P-219 was not in Aveba prior to the Bogoro attack, but only after May 2003. In so doing, the Chamber failed to take into account the following evidence that corroborates that P-219 was present before the Bogoro attack and went there after the attack: first, P-219 did not contradict Defence witnesses but confirmed (i) that he moved together with his family to Aveba from Bunia in May 2003, and his family remained in Bunia from August 2002 to May 2003 when he left Bunia in August 2002; and (ii) P-219 did not state that he was permanently based in Aveba from August 2002, but instead said that from August 2002 until April 2004, he was often based in Aveba but would usually come and go. Second, he provided details regarding events after the attack, including the meeting of commanders under the mango trees by the UPC camp, corroborated by P-250 and P-28.²⁰⁹ Third, the Chamber rejected P-219's account of conversations that he had with Ngudjolo, Katanga, Commanders Bahati de Zumbe and Commander Yuda regarding the attack but failed to take into account relevant evidence corroborating those accounts, including as set out in paragraphs 122, 127 to 130 and 135 to 136 below; and the fact that several

²⁰⁹ P-219-T-205-FRA-p.62-l.4-p.63-l.1/T-205-ENG-p.61-l.21-p.62-l.1; P-250-T-94-FRA-p.52-ll.10-p.53-l.7/T-94-ENG-p.50-ll.24-25, p.51-l.1-10; P-28-T-218-ENG-p. 23-ll. 7-16.

witnesses confirm Bahati and Yuda's participation in the attack, including Defence witnesses.

Second stage: fact-finding

A) Ngudjolo's admission to P-317

122. The Chamber found that P-317 was a credible witness²¹⁰ and that she had a conversation with Ngudjolo during which he admitted he had organized the attacks on Bogoro and Mandro and provided reasons.²¹¹ However, and as already advanced, when assessing the probative value of her evidence the Chamber found that Ngudjolo's statements were too general for the Chamber to make a finding, based on his own admission, as to his status and role within *Bedu-Ezekere groupement*,²¹² and also that it could not exclude the possibility that he had inflated his responsibility to augment his position should he later join the regular Congolese army.²¹³ The Chamber further noted that Ngudjolo's confession was inconsistent with a later admission to the Congolese public prosecutor, to whom he claimed only to have led the operation on Bunia of 6 March 2003.²¹⁴ Both prongs, separately and combined, reflect the Chamber's unfair and illogical analysis.

123. The Prosecution has addressed the significance of the Chamber's failure to apply the beyond reasonable doubt standard when it speculated as to alternative explanations for Ngudjolo to have confessed. But the decision to not give weight to Ngudjolo's confession also illustrates its failure to properly assess the probative value of evidence in its context. In particular:

²¹⁰ Judgment, paras.289-296, 434, 397.

²¹¹ Judgment, paras.292, 434, 497. P-317-T-228-p.44- l.9-18/T-228-ENG-p.51-l.22-p.52-l.5.

²¹² Judgment, paras.434, 451.

²¹³ Judgment, para.434.

²¹⁴ Judgment, para.497.

- The Chamber disregarded that even Ngudjolo did not claim he lied in order to bolster his stature, he denied having met P-317 and admitting that he organized the attack.²¹⁵
- The Chamber's conclusion that Ngudjolo may have been motivated to inflate his leadership role also failed to consider other evidence that established that he was already a known and recognized leader by then. Indeed, the Chamber elsewhere found that by 4 April 2003 (a) Ngudjolo was recognized as a person of authority by the UPDF (which requested his permission for the UN to access Bogoro²¹⁶ and invited him to key meetings such as the 6-11 March 2003 meeting),²¹⁷ senior UN officials involved in the peace process,²¹⁸ and others within the militia (including Commander Dark, in charge of Bogoro and the FNI President who nominated him to his role within the FNI-FRPI alliance);²¹⁹ (b) using the title "Colonel", he had signed, the 18 March 2003 peace agreement on behalf of the Lendu of Djugu community;²²⁰ (c) he was Chief of Staff (and deputy chief of staff of operations) of the FNI-FRPI alliance²²¹ and Commander of the FRPI division;²²² and (d) he was responsible for security in Bunia and all main roads in Ituri.²²³

124. Similarly, the Chamber's conclusion that Ngudjolo's admission to P-317 was not truthful because he did not also confess to the Bogoro and Mandro attacks in his admission to a Congolese public prosecutor²²⁴ failed to take into account that (a) P-317 was a UN human rights investigator investigating the particular attacks on

²¹⁵ D03-707-T-328-ENG-p.71-ll.5-9, p.73-ll.6-17.

²¹⁶ Judgment, paras. 286-287, 476.

²¹⁷ Judgment, paras.459, 463, 474, 475. Ngudjolo also participated in a 21-22 March 2003 meeting with UPDF General Kayihura and many other people, notably the Lendu leaders.

²¹⁸ Judgment, paras. 286-287, 476.

²¹⁹ Judgment, para.494.

²²⁰ Judgment, paras.467, 484.

²²¹ Judgment, paras.97, 469, 475.

²²² Judgment, para.481.

²²³ Judgment, para.477.

²²⁴ Judgment, para.434, 456, 497.

Bogoro and Mandro,²²⁵ so in that context, it made sense for him to discuss those attacks with her; and (b) Ngudjolo's statement to a Congolese war crimes prosecutor that he "only led the 6 March 2003 operation on Bunia" was, in context, not an admission but an attempted denial, an acceptance of responsibility for what arguably was a legitimate battle albeit with collateral damage to civilians, while avoiding responsibility for other events that were reasonably viewed as war crimes (including attacks against civilians in Tchomia,²²⁶ by Lendu militia led by Ngudjolo²²⁷).

125. Finally, in yet another twist, the Chamber rejected Ngudjolo's admission to the Congolese Prosecutor, on the basis that Ngudjolo "*seems to claim overall responsibility for the operation*" when in fact it was a joint UPDF-Lendu operation.²²⁸ When reaching this conclusion, the Chamber failed to take into account the testimony of Defence witnesses that the UPDF and Lendu, although allied, maintained their separate groups. Ngudjolo's confession confirmed that he led the Lendu combatants,²²⁹ a fact also proved by other relevant evidence including evidence acknowledged by the Chamber, that several witnesses and the UN report stated that Lendu from Bedu-Ezekere participated in the operation and assisted the UPDF in ousting the UPC from Bunia.²³⁰ Defence witness D03-88 expressly confirmed that Ngudjolo participated in the 6 March 2003 Bunia

²²⁵ Judgment, paras.284-285; P-317-T-228-FRA-p.9-1.3-5, p.21-1.24-p.22-1.3/T-228-ENG-p.10-11.5-7, p.25-11.14-23.

²²⁶ See EVD-OTP-00283. The public prosecutor first asked Ngudjolo about the July 2003 operation in Tchomia by forces of whom he was chief of staff; and when Ngudjolo denied any knowledge, he was asked if he was involved in any military operations to which he said he "only" led the Bunia operation of 6 March 2003.

²²⁷ See EVD-OTP-00283. The public prosecutor asked Ngudjolo about the July 2003 operation in Tchomia carried out by forces of whom he was chief of staff. See also e.g. P-12-T-196- ENG-p. 29-1. 14-24, p.31-1 2 -p. 34-1.15, p.36-1.1-23, p. 42-1.13 - p.43-1.1, p.79-1.23 - p.80-1.9; T-197- ENG-p.30- 1.25 - p.31-1.21; UN Special Report (EVD-OTP-00285, paras. 84-87, 89-90, 149-150. Ngudjolo's militia group was being accused of organising attacks against civilians in Tchomia and Kasenyi.

²²⁸ Judgment, para. 456. See also First Ground of Appeal.

Judgment, paras.452, 454. Citing witnesses D02-129, D03-88, D03-66.

²³⁰ Judgment, paras. 452, 454.

operation,²³¹ contradicting Ngudjolo's denial of participation.²³² Additionally, shortly after the joint UPDF-Lendu Bunia operation, Ngudjolo was invited by UPDF General Kayihura to attend the 6-11 March 2003 meeting and was treated at that meeting as being a senior authority by both the UPDF and FRPI commander Dark.²³³

(ii) Ngudjolo organised the Bogoro/Mandro attacks and had authority to do so

126. The Chamber fails to consider key relevant evidence and facts that should have led it to conclude that Ngudjolo's admission to P-317 was accurate: he organized the attacks on Bogoro and Mandro,²³⁴ and had the authority to do so. In particular, the Chamber failed to consider its own factual findings and other corroborating evidence.

(a) Chamber's relevant factual findings

127. The Chamber first failed to take into account the following factual findings:

Bedu-Ezekere combatants attacked Bogoro and Mandro

128. First, the Chamber found that Lendu attackers from the Bedu-Ezekere *groupement* participated in the Bogoro attack.²³⁵ By the time of the Bogoro attack, the Bedu-Ezekere militia was not just a self-defence movement as Defence claimed,²³⁶ but were an organized group comprised of at least 500 Lendu combatants,²³⁷ which gathered at permanent positions under military commanders.²³⁸ Leaders of the Bedu-Ezekere committee did not lead the Lendu

²³¹ Judgment, para.454,

²³² Judgment, para.455.

²³³ Judgment, para.463.

²³⁴ P-317-T-228-FRA-p.44, l.9-18/T-228-ENG-p.51-l.22-p.52-l.5.

²³⁵ Judgment, paras. 512

²³⁶ Judgment, para.404.

²³⁷ Judgment, paras.376-377.

²³⁸ Judgment, para.404. See also paras. 396 and 403. The Chamber also found the group was capable of offensive warfare and initiated attacks; and had other indicators of its level of organisation, including inter-camp communication capabilities.

fighters as the Defence claimed, but only had at most some influence within the Bedu-Ezekere *groupement*. D03-88, Chief of the Bedu-Ezekere *groupement*, only had relative control over some notable combatants.²³⁹

Ngudjolo was the leader of the Bedu-Ezekere combatants

129. Second, the Chamber failed to assess P-317's evidence in light of the following factual findings that indicated that Ngudjolo was the leader of the Bedu-Ezekere combatants at the time of the Bogoro and Mandro attacks:

- By the end of 2002 Ngudjolo was already an important person within the Bedu-Ezekere *groupement* owing to his family's status in Ituri, his studies, and the military training he received.²⁴⁰ Before the Bogoro attack, he already had some military experience.²⁴¹ Further, nor would the fact that he was a nurse exclude his ability to have had a position of authority within the Bedu-Ezekere combatants.²⁴²
- Ngudjolo was dealing with many senior figures within Ituri, as a person of senior military rank. Indeed, the Chamber rejected Ngudjolo's claims that he obtained his rank of Colonel by chance or career opportunism, and was an imposter duping senior figures, such as Commander Dark (who led some of the forces at the Bogoro attack), UPDF General Kayihura (who was chief of the UPDF in Ituri and occupying force at the time), or senior members of MONUC involved in the pacification process.²⁴³ Ngudjolo's speeches in March 2003 indicated that he had an in-depth knowledge of what was happening in Ituri.²⁴⁴ The UPDF viewed him as a person of authority, as reflected, for

²³⁹ Judgment, paras.368, 370.

²⁴⁰ Judgment, para.491.

²⁴¹ Judgment, para.428.

²⁴² Judgment, para.492. See also paras. 420, 423. The Chamber rejected Defence witnesses' claims that Ngudjolo worked the whole day as a nurse on 24 February 2003.

²⁴³ Judgment, paras.494-495.

²⁴⁴ Judgment, para.493.

instance, in their request addressed to him for permission for the UN to access Bogoro on 26 March 2003.²⁴⁵

- Shortly after the Bogoro attack, Ngudjolo attended the small 6-11 March 2003 meeting convened by the UPDF for those the UPDF considered could contribute to the peace process.²⁴⁶ The Chamber concluded that the fact that Ngudjolo attended in military uniform, introduced himself as a “military man”, was asked by UPDF General Kayihura to “remain on his territory”, and Commander Dark (responsible for attackers who remained in Bogoro after the attack)²⁴⁷ showed him deference, were “*all signs of just how important the accused was at a date so close to the Bogoro battle.*”²⁴⁸
- On 18 March 2003, Ngudjolo was one of four officials representing Lendu from Djugu territory (in which Bedu-Ezekere *groupement* is located),²⁴⁹ who signed the cessation of hostilities agreement. He signed as Colonel, which “*showed he laid claim to and carried out duties associated with that rank*”.²⁵⁰ It would have been odd indeed that he would sign, without any status, when individuals the Defence claimed led the Bedu-Ezekere militia instead of Ngudjolo and who were allegedly more senior than him, did not.²⁵¹ He also participated in meetings of the Ituri pacification commission and the *comité de*

²⁴⁵ Judgment, para.493.

²⁴⁶ Judgment, para.459. Only representatives of FRPI, MONUC, UN and the Hema community attended.

²⁴⁷ Judgment, para.459, 461.

²⁴⁸ Judgment, para.463.

²⁴⁹ Judgment, para.467. *See e.g.* D03-707-T-327-ENG-p.62-ll.20-22: Djugu is one of the five territories of Ituri province; D03-707-T-328-ENG-p.69-ll.7-11. Bedu-Ezekere is one of the *groupements* of Djugu territory.

²⁵⁰ Judgment, para.467. The Chamber concludes he had sufficient authority to represent his community at the ceremony and sign.

²⁵¹ Judgment, para.467. The Chamber observes that for example Commander Boba Boba, Martin Banga and D03-88 did not sign. *See also* para.97. Ngudjolo signed this agreement even before he was made chief of staff of the FNI-FRPI alliance, which the Defence claim was his first senior role.

concertation des groupes armés in April 2003 in military uniform and signed the final report of the IPC on behalf of FNI-FRPI.²⁵²

- On 22 March 2003, he was appointed as Chief of staff (and deputy chief of staff of operations) of the FNI-FRPI alliance.²⁵³ The Chamber considered that his appointment within the alliance showed that FNI President (D03-11) recognised Ngudjolo as a person of real influence militarily as well as someone who was sufficiently capable to occupy the post.²⁵⁴ On 21 and 22 March 2003, Ngudjolo was invited to another meeting with UPDF General Kayihura, amongst other “*Lendu leaders*”, at which the General asked those “*commanders*” to “*stop attacking the villages and to live in harmony with other ethnic groups.*”²⁵⁵
- By the end of March 2003, in televised broadcasts Ngudjolo confirmed he was responsible for security in Bunia and along main roads, and gave orders to the commander at Bogoro to allow access to the town. He also stated that he was chief of staff and commander of the FRPI division, and introduced Dark as commander of Bogoro operations.²⁵⁶

(b) Other corroborating evidence

130. The Chamber also did not take into account the following relevant evidence to assess the probative value of Ngudjolo’s admission to P-317:

- First, and as dealt with in more detail below, the Chamber wrongly excluded from its consideration the testimony of several other witnesses who confirmed that Ngudjolo was the leader of the Bedu-Ezekere militia that attacked Bogoro, including: (a) Ngudjolo’s admission to P-219 that he responded to Katanga’s

²⁵² Judgment, paras.483-485.

²⁵³ Judgment, paras. 97, 469.

²⁵⁴ Judgment, para.471.

²⁵⁵ Judgment, para.474.

²⁵⁶ Judgment, paras. 477-479, 481. He continued to introduce himself as “Colonel”; and confirmed he was a well-trained military man and not “fully trained in just two weeks”.

request for his Lendu forces to assist in attacking Bogoro;²⁵⁷ (b) Katanga's admission to P-12 and P-160 that he sought Ngudjolo's assistance for his Lendu forces to assist in attacking Bogoro;²⁵⁸ (c) Ngudjolo's admission to P-12 that he had killed many Hema (which indirectly supports the statement made by Ngudjolo to P-317 that no Hema were civilians, including women and children, as they were all armed);²⁵⁹ (c) P-28's evidence that Ngudjolo was the leader of the Zumbe forces that attacked Bogoro and Mandro, and his corroboration of P-250's account that Ngudjolo sent a Zumbe delegation to Aveba to plan the Bogoro attack;²⁶⁰ (d) other witnesses who stated Ngudjolo was the leader of the Lendu forces that attacked Bogoro, whose evidence was dismissed in turn as being of low probative value as hearsay, but again viewed only in isolation.²⁶¹

- Second, there were aspects of video evidence led at trial that were not relied upon by the Chamber in its assessment of the probative value of Ngudjolo's admission to P-317: first, according to that evidence, by late March 2003, when Ngudjolo introduced Dark as commander of Bogoro operations, he referred to him as his "opérateur", making it explicit that Dark was his subordinate;²⁶² second, when UPDF General told Ngudjolo at the 6-11 March 2003 meeting to remain in *his* territory, he did so after specifically referring to the attack at Bogoro (as well as two other places), and when denying UPDF involvement in

²⁵⁷ Judgment, paras.263, 281-283.

²⁵⁸ Judgment, para.441.

²⁵⁹ Judgment, para.436, 225-226. *See also* footnote 1019. The Chamber refers to P-12's mistake in dates as to when Ngudjolo made this admission to him. P-12 said the exchange with Ngudjolo occurred in May-June 2004, but this was when Ngudjolo was in detention. However, as the Prosecution explained although P-12 said the wrong year, he was accurately describing events that took place in 2005. Although P-12 said he met Ngudjolo in 2004, he clarified that his meeting with Ngudjolo took place the same year the MRC was created, which was in 2005. Ngudjolo confirmed the MRC was created in 2005. *See* ICC-01/04-01/07-3251-Conf-Corr, paras.496-498.

²⁶⁰ Judgment, para.436, 225-226.

²⁶¹ *See* paragraphs 132-134 below.

²⁶² EVD-OTP-00175 at 01:23:11; (Translation DRC-OTP-1019-0237 at 0267, line 1123); P-2-T-186- FRA-p.62-II.20-25/T-186-ENG-p.72-I.21-p.73-I.6.

the Bogoro attack pointed towards Ngudjolo;²⁶³ third, Dark himself indirectly corroborated the truth of what Ngudjolo admitted to P-317 when he confirmed that Lendu-Ngiti forces attacked Bogoro²⁶⁴ and gave the same strategic reasons as Ngudjolo for the joint attack on Bogoro, namely to dislodge the UPC that was attacking their communities (and to ensure the Walendu-Tatsi/Walendu-Bindi allies could freely access one another).²⁶⁵

131. Third, and last, the Chamber failed to take into account, the testimony of several witnesses, the UN report, and video evidence of Dark's statements that confirm Bedu-Ezekere militia did attack Mandro.²⁶⁶

B) Exclusion of hearsay evidence

132. The Chamber wrongly excluded relevant evidence of six witnesses (including three Defence witnesses) who testified that Ngudjolo was the most senior military leader of the Lendu combatants that attacked Bogoro.²⁶⁷ The Chamber did not find that the six witnesses were lying regarding Ngudjolo's role, but

²⁶³ EVD-OTP-00164, P-2-T-185-FRA-p. 68-l.5-69-l.24/T-185-ENG-p.73-l.14-p.75-l.16; See also EVD-OTP-00165, P-2-T-185-p.76-l.20-25, pp.77-78, p. 79-l.5-8/T-185-ENG-p.83-l.2-6, p.83-l.7-p.85-l.16; T-186-FRA-p.10-l.13-p.11-l.3/T-186-ENG-p.13-l.2-p.14-l.4.

²⁶⁴ EVD-OTP-00167, P-2-T-186-FRA-p.21-l.11-19/T-186-ENG-p.25-l.21-p.26-l.5; EVD-OTP-00167/Transcript DRC-OTP-0145-0027, l. 1157 to 1176, until minute 1:32. See also EVD-OTP-00175 à 2' 46'', EVD-OTP-00173 à 02' 31''. See also comments by Kayihura regarding Lendu-Ngiti implication in attack: EVD-OTP-00165, P-2-T-186-FRA-p.15-l.11-20/T-186-ENG-p.18-l.23-p.19-l.9.

²⁶⁵ EVD-OTP-00167, P-2-T-186-FRA-p. 21-l.11-19/T-186-ENG-p.25-l.6-9. Compare P-317-T-228-FRA-p.44-l.9-18/T-228-ENG-p.51-l.22-p.52-l.5. Ngudjolo stated that he organised the attacks for strategic reasons referring to UPC bombardment of Lendu villages near Bogoro and the UPC military camp at Mandro.

²⁶⁶ Judgment, paras.450. Although the Chamber acknowledges that several witnesses and the UN report confirm Zumbe combatants attacked Mandro, the Chamber makes no factual finding on this and did not assess P-317's testimony in light of this other evidence. See e.g. EVD-OTP-00175 à 2' 53''. See also UN Report, paras. 71-72; D02-148-T-279-FRA-p. 21-l.25-28/T-279-ENG-p.24-l.16-19; P-250-T-98-FRA-p.58-l.15-23/T-98-ENG-p.58-l.1-11; T-99-FRA-p.22-l. 22-p. 24-l.8/T-99-ENG-p.23-l.10-p.24-l.24; P-28, T-218-ENG-p.26-l.21- p.27-l.11.

²⁶⁷ Judgment, paras.431-442. The Chamber discounted the direct evidence of witness P-317, as previously discussed; the "hearsay" evidence of witnesses D02-176, P-28, D03-340, D02-161, V-2, V-4, and D02-129; the testimony of witnesses P-12 and P-160 who gave evidence based on a statement by co-accused Germain Katanga; and D02-129's confirmation that Ngudjolo was a soldier in Zumbe before joining the FARDC.

accorded their evidence low probative value because it was hearsay and lacked detail regarding Ngudjolo's role. However, once more the Chamber assessed the testimony of each witness in isolation and without considering their testimony in light of the totality of evidence. The Chamber should have assessed whether and how their hearsay evidence was corroborated by other evidence before determining whether it was reliable, and then conclude what weight it could give to it. This is not, however, what the Chamber did.

133. For example, the Chamber wrongly rejected D02-176's evidence, that it was "well known" that Ngudjolo organized the Bogoro attack, as "anonymous hearsay", even though, as the Chamber acknowledged, he was not an uninformed bystander: he was a UPC Captain involved in the defence of Bogoro during the attack and had knowledge and expertise to identify the military commanders of enemy groups, especially as the UPC forces, including from Bogoro, had repeatedly attacked the Bedu-Ezekere *groupement*.²⁶⁸ The Chamber discounted the evidence of D02-176 and other "hearsay" witnesses, however, because they were not from Zumbe and also because they might have confused Ngudjolo's position at the time of the Bogoro attack with his later position within the FNI-FRPI alliance from 22 March 2003,²⁶⁹ yet another speculative finding with no identifiable support in the record.

134. The Chamber failed to assess their evidence in light of the totality of the relevant evidence and facts, including, *inter alia*, the following:

- D02-176 had direct knowledge of Bedu-Ezekere Lendu commanders, some of whom he went to school with in Bogoro.²⁷⁰ His UPC forces based at Bogoro also attacked Zumbe, before the Bogoro attack of 24 February 2003.²⁷¹

²⁶⁸ Judgment, para.432.

²⁶⁹ Judgment, para. 433, 437-439, 442, 496.

²⁷⁰ D02-176-T-256-FRA-p.50-l.17-p. 51-l.16/T-256-ENG-p.59-l.18-p.60-l.24.

- In fact, Ngudjolo was widely regarded as a leader, including by member of his own forces, he was seen as a significant authority within Bedu-Ezekere by the end of 2002;²⁷² and shortly after the Bogoro attack he was shown on Ituri news as a senior military authority at critical meetings, was deferred to by Commander Dark, and signed the 18 March 2003 cessation of hostilities agreement on behalf of the Lendu of Djugu.
- The Chamber also failed to assess the core of D02-176's evidence (that it was well-known that Ngudjolo organized the Bogoro attack), in light of the following relevant evidence: Ngudjolo admitted to P-317 that he had organized the Bogoro and Mandro attacks.²⁷³ There was additional evidence confirming that Ngudjolo played a role in organizing the Bogoro attack including: his admission to P-219 that Katanga asked for his assistance; and a similar admission that Katanga made to P-12 and P-160 that he asked for Ngudjolo's assistance, for the attack.²⁷⁴ Moreover, by admitting to a Congolese public prosecutor that he led the Bunia operation of 6 March 2003, which included Lendu Bedu-Ezekere combatants involved in the Bogoro attack,²⁷⁵ Ngudjolo was admitting he had the ability to organize a key military operation just two weeks after the Bogoro attack.
- Ngudjolo's role in organizing the Bogoro attack is further evidenced by the fact that just two weeks later, FRPI Commander Dark (in charge of operations at Bogoro and the person responsible for the attackers that remained in

²⁷¹ See e.g. UN Special Report, EVD-OTP-000285, para.23. See also D03-88-T-302-ENG-p.29-II.2-21.

²⁷² See paragraph 129 above.

²⁷³ Judgment, para.434. The Chamber acknowledged that her evidence gave some indications as to what his involvement may have been in the preparation of the Bogoro attack.

²⁷⁴ See paragraphs 135-136 below.

²⁷⁵ See paragraph 124 above.

Bogoro), showed him deference. Ngudjolo even referred to him as "*mon opérateur*" on 30 March 2003.²⁷⁶

- The Chamber said that because the 'hearsay' witnesses did not live in Zumbe it could not accord much probative value to their evidence that Ngudjolo was the leader of the Lendu combatants who attacked Bogoro. However, the Chamber failed to take into account that although not from Zumbe, all of the 'hearsay' witnesses lived in close proximity,²⁷⁷ and UPC Captain D02-176 and victim witnesses V-2 and V-4, like all Bogoro residents, had an interest in knowing who led their enemies.²⁷⁸ The Chamber found Lendu combatants had also attacked Bogoro in the past.²⁷⁹

C) Admissions to P-219, P-12 and P-160

135.P-219 testified that Ngudjolo admitted that Germain Katanga had asked him to assist in the attack at Bogoro. The Chamber rejected this. In so doing, it also refused to consider, for other reasons, evidence that corroborated P-219's testimony, including that Katanga made similar statements about having sought Ngudjolo's help, to P-12 and P-160,²⁸⁰ and that in fact the Ngiti needed support to take over Bogoro.²⁸¹ With respect to P-12 and P-160, it noted that because of their relationship [REDACTED], it could not exclude the possibility that they had

²⁷⁶ EVD-OTP-00164, P-2-T-185-FRA-p. 68-69/T-185-ENG-p.73-l.14-p.75-l.16; See also EVD-OTP-00165, P-2-T-185-FRA-p.76 -l. 20-25, pp. 77-78, p. 79 l.5-8/T-185-ENG-p.83-l.2-p.85-l.24; T-186-FRA-p.10-l.13 - p.11-l.3/T-186-ENG-p.12-l.2-p.13-l.20.

²⁷⁷ Judgment, paras. 431, 438, 439. The Chamber observes that these three witnesses lived in Bogoro. See Judgment, para.3: The Chamber refers to the location of Bogoro south of Walendu-Tatsi collectivity.

²⁷⁸ These witnesses confirmed Bogoro had been attacked in the past by Lendu from Zumbe: See e.g. D02-176-T-256-FRA-p.5-l. 4 – 8, p. 26-l. 25- p. 27-l. 5, p. 29, l. 26- p. 31, l. 9/T-256-ENG-p.5-ll.14-18, p.30-l.11-17, p.34-l.2-p.35-l.19. D02-176 [REDACTED] in these prior attacks (e.g. D02-176, T-256-FRA-p.12-l.8-15, p. 27-l.22-p.28-l.15/T-256-ENG-p.13-ll.16-23, p.31-l.7-p.32-l.4); V-2-T-232-FRA-p. 21-l.18 –p.24-l.6, p.34-l.8 - 28 [REDACTION, l. 14-15], p. 35, l.1 – 4/T-232-ENG-p.25-l.14-p.28-l.12, p.39-l.13-p.40-l.14.

²⁷⁹ Judgment, paras. 400-404.

²⁸⁰ Judgment, para.441.

²⁸¹ See e.g. D02-300-T-317-ENG-p. 59-l.10-22; T-318-ENG-p.24-l.8-22 ; D02-176-T-255-FRA-p.25-ll.12-27, p.35-ll.2-19/T-255-ENG-p.25-ll.11-25, p.35-ll.2-17; T-257-FRA-p.13-l.14-20, p.17-l.11-27/T-257-ENG-p.15-ll.5-10, p.19-l.13-p.20-l.7.

colluded before coming to testify,²⁸² even in the absence of any actual indication that they concocted consistent false evidence and without considering that other evidence corroborated the testimony of [REDACTED] witnesses. And finally, the Chamber was unable to rely on the evidence that Katanga had sought Ngudjolo's help because Katanga testified and denied it, creating an irreconcilable conflict in accounts that made it impossible to find one version to be true beyond reasonable doubt.

136. Finally, P-12 testified that Ngudjolo admitted that he had killed many Hema. The Chamber discounted this evidence because as not relevant to Ngudjolo's authority and because it was "too vague and blurred".²⁸³ However, the Prosecution recalls that when asked by P-317 why so many civilians were killed at Bogoro and Mandro, Ngudjolo responded that no Hema were civilians, including women and children, as they were all armed.

Third stage: final assessment of all facts and evidence to determine guilt or innocence

137. The Chamber found Ngudjolo not guilty of all charges, because it was not satisfied beyond reasonable doubt that Ngudjolo was the leader of the Lendu combatants who participated in the attack on Bogoro on 24 February 2003.²⁸⁴ As a result of the errors described in the preceding section, the Chamber failed to take into consideration all the relevant evidence and its own factual findings. Its ultimate conclusion on the guilt or innocence of Ngudjolo was therefore vitiated by the legal and factual errors discussed above.

²⁸² Judgment, para.441.

²⁸³ Judgment, footnote 1019.

²⁸⁴ Judgment, para.503.

D. The error materially impacts on the Judgment

138. The Prosecution adduced examples of the Chamber's failure to consider the totality of evidence and facts when assessing key evidence and facts at the very heart of the case. Although the Chamber was not obliged to refer to every item of evidence, its reasons were not *"responsive to the case's live issues and the parties' key arguments"*,²⁸⁵ in that the Chamber failed to consider key corroborative evidence or facts relevant to Ngudjolo's authority. This error impacted on its conclusion that it was not established beyond a reasonable doubt that Ngudjolo was the leader of the Lendu combatants who participated in the attack on Bogoro on 24 February 2003, which in turn led to its overall conclusion that Ngudjolo was not guilty of the crimes charged.²⁸⁶

139. If the Appeals Chamber agrees that the Trial Chamber erred in its truncated consideration of the evidence and its failure even to properly weigh the value of its own evidentiary findings, it must then conclude that the Chamber's Judgment is flawed and not reliable. As a consequence, it must annul and correct the findings included in the portions of the Judgment referred to above and assess the corrected findings in relation to the entirety of the evidence and in the context of other relevant factual findings entered by the Trial Chamber. This process would necessarily lead to a conclusion beyond a reasonable doubt that Ngudjolo was the leader of the Lendu fighters of the Bedu-Ezekere who attacked Bogoro on 24 February 2003.

²⁸⁵ *R v JM* [2011] 3 R.C.S, para. 32: Although a Chamber is not required to refer to every item of evidence, citing Bonnie J. in *R v Walker* (2008 SCC 34, [2008], 2 S.C.R.245, para.20), Cromwell J observed: *"reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue."* See also *R v Rudge* [2011] ONCA 791 (citing *R v Walker*, *R v JM*), paras.56: *"[A] trial judge is not required to record an assessment of every piece of evidence in his or her reasons... However, the reasons must be responsive to the case's live issues and the parties' key arguments"*.

²⁸⁶ Judgment, para.503.

3. Third Ground of Appeal: The Trial Chamber infringed the Prosecution's right to a fair trial under Article 64(2)

A. Overview of the Third Ground of Appeal

140. The Chamber committed critical errors in its management of the trial that materially affected the Prosecution's right to present and prove its case thereby violating the Prosecution's right to a fair trial under Article 64(2). The Chamber's error concerns first, its failure to take more than minimal steps to protect the integrity of its own process in instances of evidence tampering and witness interference and, second, the Chamber's refusal to allow the Prosecution to challenge Defence evidence and rehabilitate its own witnesses on the basis of information that Ngudjolo and persons acting on his behalf disclosed the identity and the evidence of protected Prosecution witnesses, orchestrated a consistent line of defence evidence and that third persons acting on his behalf improperly exerted pressure over witnesses.²⁸⁷

141. The Registrar alerted the Chamber to Ngudjolo's efforts, by telephone conversations from the detention center, to have the evidence of Defence witnesses changed and his disclosure of confidential information related to protected witnesses to third unauthorized parties. The Trial Chamber made little and unsubstantiated efforts to put a permanent stop to these efforts and took no action to ascertain the veracity of this information. Moreover, it denied the Prosecution's access to the recorded conversations and rejected the Prosecution's request to use the Registrar's reports (analysing the conversations) to cross-examine the two accused and a Defence witnesses. When witness P-250, whom

²⁸⁷ The Prosecution submits that the Trial Chamber should have considered not only possible instances of coercion, threats and other flagrant acts of intimidation but also other improper indirect acts or contact designed to dissuade or discourage a witness from testifying or from telling the truth which have the same compelling effects. This is particularly relevant in cases such as the instant scenario of closed and small communities. See Recommendation N. R (97) 13, prepared by the Committee of Experts on Intimidation of Witnesses and the Rights of the Defence, para.51.

the Prosecution believed was subject to external pressures related to his testimony before the Court, recanted on certain topics in his testimony, the Chamber rejected the Prosecution's request to refresh his memory with his prior statements and use leading questions to explore his sudden contradictions contradictions.²⁸⁸

142. The Prosecution submits that the Trial Chamber erred in procedure by refusing the Prosecution's persistent requests and by failing to exercise its own powers to ensure the fairness of the trial proceedings, and that this error violated the Prosecution's right to a fair trial under article 64(2).²⁸⁹ The Chamber's decisions and omissions materially impacted on the Article 74 Judgment.

B. Ngudjolo's Telephone Calls from the Detention Facility

143. Under Regulation 174, telephone calls to or from detained persons are subject to "passive monitoring," a process by which they are recorded but not listened to as they occur. Notice of monitoring is prominently displayed in the detention center.²⁹⁰ If there are reasonable grounds to believe that the detained person may be attempting to interfere with or intimidate a witness or interfere with the administration of justice, inter alia, the Chief Custody Officer may engage in active monitoring pursuant to Regulation 175(1). The Registrar alone may also authorise active monitoring for a period of 14 calendar days.²⁹¹

²⁸⁸ The Prosecution does not argue that the Trial Chamber failed on its duties of witness protection under Article 68. The Trial Chamber requested VWU to liaise with the Prosecution to determine whether additional protective measures were necessary.

²⁸⁹ To the extent that these cumulative errors involve a defective interpretation of the scope and breadth of the Chamber's duties under Article 64(2) – and other statutory provisions such as Articles 69(3) or 64(3)(a) or 64(6)(a) or (f) of the Statute – the Appeals Chamber may consider that the error is partially legal in nature.

²⁹⁰ Regulation 174(3).

²⁹¹ Regulation 175(2).

144. In January 2009, the Prosecution told the Chamber that it had received information that persons working on behalf of Ngudjolo were attempting to identify, locate and intimidate Prosecution witnesses. Following an *ex parte* hearing on the measures available,²⁹² on 12 February 2009 the Registrar decided *inter alia* to: (a) listen to all taped and non-privileged telephone calls of Ngudjolo, recorded as of 1 October 2008; and (b) engage in active monitoring of Ngudjolo's non-privileged telephone communications for 14 days and provide regular reports on this monitoring.²⁹³

(a) First Report

145. On 8 June 2009, the Registrar issued a report on the monitoring of Ngudjolo's non-privileged phone calls from 1 October 2008 through 31 January 2009 ("First Report").²⁹⁴ The Registrar concluded that Ngudjolo had disclosed information about witnesses or potential witnesses to third parties and noted that "nobody can guess what use these third parties will make of this information or the initiatives they might take, which might potentially hinder the administration of justice, intimidate witnesses, infringe the rights or liberties of a person or infringe an Order of non-disclosure rendered by the Chamber – if this has not happened already."²⁹⁵ She added that "[i]t would appear that Mathieu Ngudjolo has sought to have testimonies changed, which might affect the veracity thereof and lead to questions about the attitude of Mathieu Ngudjolo regarding the orders of the Chamber and which might possibly constitute contempt of the Court [...]."²⁹⁶ Further, many conversations "reveal[...] that for the purposes of the visit to the

²⁹² See [REDACTED], [REDACTED], [REDACTED].

²⁹³ [REDACTED]. [REDACTED]. [REDACTED], [REDACTED].

²⁹⁴ [REDACTED]. See the redacted version available to the Defence of Mr Ngudjolo: [REDACTED]. On 9 June the Chamber orally authorized the communication of the Report to the Prosecutor. [REDACTED], [REDACTED].

²⁹⁵ First Report, para.24.

²⁹⁶ First Report, para.27.

field by the defence team, Ngudjolo's supporters were 'briefed' or 'coached' on what to tell his team".²⁹⁷

146. In this report, the Registrar provided extracts of some of the monitored conversations. Those extracts establish several instances of, at a minimum, improper conduct:

- i. Ngudjolo communicated the names of protected Prosecution witnesses and the content of their statements to unauthorized third parties*²⁹⁸

147. The Report establishes that the names of [REDACTED] witnesses P-250²⁹⁹ and P-28³⁰⁰ were disclosed in several conversations.³⁰¹ The content of other witness statements was disseminated³⁰² and discussed in so-called "secret meetings" whose participants were chosen by Ngudjolo.³⁰³ According to the Registrar, participants included: Ngudjolo's wife, Pastor or Father Lopa (resource person),³⁰⁴ Chef Manu (Defence witness D-03-88 and chief of the Bedu Ezekere *groupement*), [REDACTED], the director from Djumbe, the doctor from Djumbe, Colonel [REDACTED], Papa [REDACTED], Papa [REDACTED] and

²⁹⁷ First Report, para.7.

²⁹⁸ For the purposes of clarification, the two resource persons of Mr Ngudjolo were Rock Banga Mateso and Pastor/Father Christophe Koli Lopa.

²⁹⁹ First Report, para.10 and fn.18. See also para.12. Conversation N19 of 29 December.

³⁰⁰ First Report, para.19, fn.35. Conversation N 91 of 13 January 2009.

³⁰¹ These two witnesses were in [REDACTED] and the Defence was prohibited from disclosing, to third parties, the identity of these witnesses and information that could lead to their identification ([REDACTED]). A Protocol on investigations in relation to witnesses with protective measures provides that the investigating party should use the names of the protected witnesses in a careful and focused manner and only when necessary. If disclosure of the name is necessary, the fact that the person is a witness should not be disclosed (ICC-01/04-01/07-1956-Anx1).

³⁰² First Report, para.22, fn.39. Conversation N20 of 28 January 2009: "*EP* : "[REDACTED] and [REDACTED] statements were sensational. Some people are hiding terrible secrets." Note that the Registrar believes that [REDACTED] and [REDACTED] could be witnesses 298 and 299. Mr Ngudjolo's wife is [REDACTED]; also referred to as « *EP* » (probably for « *Épouse* ») in the conversations.

³⁰³ First Report, para.10, fn.16 (Conversation N18 of 29 December, N26 of 28 December and N31 of 28 December).

³⁰⁴ Also referred to as Martin, Martin Lopa, Christopher Koli Lopa.

[REDACTED].³⁰⁵ Based on a 29 December 2008 conversation, it appears that a group meeting was held wherein statements made by P-250³⁰⁶ were read out and Ngudjolo was to provide clarification by phone.³⁰⁷

ii. Ngudjolo gave instructions to prepare or "coach" Defence witnesses before they met with his Defence team

148. In a 3 October 2008 conversation between Ngudjolo and a person named [REDACTED] (probably deceased Defence witness D03-33),³⁰⁸ [REDACTED] sought instructions for what to say to the Defence team during their visit to the field in order to be consistent with Ngudjolo's statements. Ngudjolo immediately switched languages:

"[TRANSLATION] [REDACTED]: "Yes, I did get the message. I would like to ask the following in fact: *what should we say so that our statement is not dissimilar to yours and for it to tie in with yours?*" MN:[answers in an unidentified language].³⁰⁹

149. In a 7 December 2008 conversation between Ngudjolo and [REDACTED] (a nurse), reference is made to a "little witness" who reportedly mentioned the names of certain people. Ngudjolo's legal team was due to visit Bunia in January 2009 and it appears the people mentioned by the "little witness" were then "coached" on how to respond to the questions of the Defence legal team by [REDACTED] at Ngudjolo's request:

³⁰⁵ First Report, para.12.

³⁰⁶ [REDACTED]. [REDACTED].

³⁰⁷ First Report, para.10, fn.18. Conversation N 19. Note that the meeting broke off because a friend of P-250 was present in the meeting. MN was upset because persons that he had not picked were present in those meetings.

³⁰⁸ [REDACTED]. Defence witness D03-33 died before he could be called to testify. See T-253- ENG ET, p.4, lns.1-5.

³⁰⁹ First Report, para.3 and fn.8. Conversation N 146 of 3 October 2008. Emphasis added.

"[...][REDACTED];[...] When these people come they will know what to say. *There will be lots of questions and as the little 'witness' had given their names they will know what to reply to all these questions.* The truth remains a truth, you cannot make up the truth".³¹⁰

150. On 18 December 2008, Defence witness D03-88 (Chef Manu, also known as Emmanuel Ngabu or Manu Shachu or Dudjini) began to advise Ngudjolo that he had instructed Ngudjolo's wife about what to tell others to say. Ngudjolo interrupted D03-88 and switched languages.³¹¹

151. On 18 December 2008, Ngudjolo told Pastor Lopa (his resource person) that his wife would transmit information so that Ngudjolo's supporters were briefed or coached on what to tell his Defence team:

[...[**MN:** "No, I've given my wife a recommendation and an instruction. Because our life depends on it." **Martin:** "It's good that your wife was able to visit you. *She has to bring back information which goes beyond the message we get across on the phone. If she comes and says nothing, on the day of the investigations we'll keep quiet too.*" **MN:** "Father, keep calm and sit tight. Don't say much because everything is planned. As soon as my wife arrives you will have other options and you'll know what to do."³¹²

³¹⁰ First Report, para.6 and fn.9. Conversation N 171.

³¹¹ Conversation N 109, First Report, para.7, fn.11. Emphasis added: "**Manu:** "I just wanted to let you know that people here are accusing one another. [REDACTED]. Before your wife left Europe I went to see her and gave her instructions about what to say to [MN interrupts and speaks in a language unknown to the interpreters. Manu gives him a telephone number (...) the conversation continues in the unknown language]"."

³¹² First Report, para.7 and fn.13. Conversation N 109. Emphasis added.

152. In a 22 December 2008 conversation, Ngudjolo instructed his wife to communicate certain information to specific people including Defence witness D03-88 (Chef Manu) and probably deceased Defence witness D03-33.³¹³

153. On 2 January 2010, probably after Ngujolo's wife had returned from DRC, she informed him she had successfully transmitted the information and indicated that the next step was to agree on the answers to give to the Defence team:

*"EP: With regard to this meeting I had plenty of time to explain everything to them and they were taking notes in fact. The thing which we had yet to address was how to channel our ideas and to decide that if we were asked such and such a question, how to answer. Everyone has to know what to say."*³¹⁴

iii. Possible intimidation of witnesses

154. On 28 January 2009, Ngudjolo advised his wife that the witnesses would be too scared to testify against him:

*"MN: "Because even in our case, the Prosecutor was already saying that people were afraid to testify, they have problems." EP: "With witness statements, the others who are taken care of in Kinshasa will be put off. They will be scared."*³¹⁵

155. In the same conversation, Ngudjolo advises that he spoke with a Prosecution witness named "[REDACTED]"³¹⁶ and that the latter was afraid:

"MN: You know, I won't say the name. One of the witnesses who is testifying against us. I spoke to him. He was afraid. He told me that he had nothing

³¹³ Conversation N 88. First Report, para.21, fn.38: "MN: The people I am telling you about, make sure they are informed about all the things that I have told you about. [REDACTED]". EP: "Yes I know all these people". MN: "Arrange to meet them and tell them".

³¹⁴ First Report, fn.38. See Conversation N 201 of 2 January 2009.

³¹⁵ First Report, para.21, fn.37. Conversation N 20.

³¹⁶ [REDACTED]. See below para. **Error! Reference source not found..**

against me. He even gave me his telephone number and told me to call him anytime. He promised to tell me everything.”³¹⁷

iii. Ngudjolo gave instructions to locate Prosecution witnesses and their relatives, in particular witness D03-100, [REDACTED] witness P-250

156. From a conversation referred to in a filing to which the Prosecution has had no access, it appears that Ngudjolo attempted to contact D03-100, [REDACTED] of witness P-250.³¹⁸ On 30 December 2008 Ngudjolo also informed his wife that he had asked that steps be taken to find the [REDACTED] (P-250):

*MN: “Otherwise they’ll do all they can to try to meet [REDACTED]. [REDACTED]. They’re all there. It’s a sister from [REDACTED] family”.*³¹⁹

157. The Registrar noted Ngudjolo actively used third parties, other than his Defence team, to identify Prosecution witnesses.³²⁰ For example, on 30 December 2008 Ngudjolo indicated that he was attempting to identify a Prosecution witness whom he considered “suspect.”³²¹ Similarly, on 31 December 2008, Ngudjolo explained that he was actively trying to locate a person named “[REDACTED]”. The Registrar understood “[REDACTED]” to be the same person referred to as “[REDACTED]” and “[REDACTED]” in other conversations, believed to be witness P-336, a Prosecution witness who was not called.³²²

158. Ngudjolo contacted the witness (believed to be P-336), and spoke with him from the detention center on 2 January 2009. This individual told Ngudjolo about other Prosecution witnesses:

³¹⁷ First Report, fn.33. Conversation N 20 of 28 January 2009.

³¹⁸ First Report, para.11, fn 20. [REDACTED], [REDACTED], [REDACTED].

³¹⁹ First Report, para.12, fn.22. Conversation N10.

³²⁰ First Report, See also para.16.

³²¹ First Report, para.13, fn.23. Conversation No 9.

³²² First Report, para.18. Conversation N 7 of 31 December 2008. Ibid., fn.34. Note that Mr Ngudjolo refers to Prosecution witness 336 as [REDACTED]. See fn.31, para.18(a).

"[REDACTED]: "For your testimony they took another man to Zombe. That man he is here in Bunia, he's a teacher." MN: "What's his name?", [REDACTED]: "He's a headmaster at a primary school here in Bunia, his father is called [REDACTED], he is from [REDACTED]. MN: "[REDACTED] child?", [REDACTED]: "The child of father [REDACTED] who opened a school here, it's like a project and that man is a headmaster there. I believe he's called [REDACTED]." MN: "[REDACTED]", [REDACTED]: "I will do my best to get his number and as soon as I have it I'll give it to you." MN: "That's great.""³²³

159. In another 2 January 2009 conversation, Ngudjolo advised his wife about his conversation with "[REDACTED]" and that they had also located a Prosecution witness named "[REDACTED]" who was "really ashamed" and frightened.³²⁴

160. On 13 January 2009, Ngudjolo asked a colonel to identify a witness called "[REDACTED]" (Prosecution witness P-28), who was believed to be a former bodyguard and likely to implicate Ngudjolo in the attack on Bogoro:

"MN: "And then there's a boy called, yes [REDACTED]. That boy, he's the one who caused problems with regard to the case of our other brother here. This boy said that I planned, that I sent people, that we planned, that I was in Bogoro. He mentioned our names, yours, Cobra, Matata

³²³ Conversation N 200 of 2 January 2009. First Report, para.18 and fn.32.

³²⁴ Conversation No 201 of 2 January 2009 (MN: "I was also looking for [REDACTED] and as I got hold of him that's good. [...] [REDACTED]?" EP: "He's at Yambi. He is also testifying against my colleague. He has been to Kinshasa and back two or three times and he is already recognised. He is really ashamed. You know the woman who gave you the number, that's his wife. She said that if he goes to testify again she will also go and testify against him. It frightens him a lot."). First Report, para.17 and fns. 27 to 28. The Prosecution submits that [REDACTED] is witness P-163. See conversation N 182 of 4 January 2009 (fn.26: MN: "And near Bunia I spoke to a man who had been invited by the investigators. They went with them to the other side of the river bank. To question them about Germain's case. This man is already back in Bunia, he was just starting to give me all the details when the line was cut off."); and Conversation N 169 of 7 January 2009 (fn.31: where MN says that "I spoke to [REDACTED] there").

everybody he mentioned their names. But I don't know that boy. He comes from the south too. It would seem that he was (inaudible) bodyguard but I don't know him." *MN*: "If it's [REDACTED] you'll know him. He studied in Songoro. You're going to help my guys to identify him." *Col*: "OK".³²⁵

161. It is noteworthy that Ngudjolo was aware that his phone calls were being monitored and he was very careful about what he said.³²⁶ On many occasions he interrupted his interlocutors reminding them they were being listened and that they could not say certain things on the phone.³²⁷ Further, and in order to discuss certain matters, Ngudjolo would switch to a language which could not be understood and transcribed.³²⁸ As the Registrar noted, Ngudjolo had "a desire to conceal information, or at the very least, to avoid his answer and the rest of the conversation being understood".³²⁹

162. In addition, the First Report demonstrated that Ngudjolo's wife assisted in transmitting information and giving instructions during a family visit in early December 2008 in The Hague.³³⁰ It also showed that that Ngudjolo regularly communicated with former members of the FRPI and FNI and influential members of the FARDC³³¹ and that he issued instructions to certain persons and groups.³³²

³²⁵ First Report, para.19, fn.35. The Registrar indicates that [REDACTED] may be witness P-28.

³²⁶ Note that regulation 174(3) of the Regulation of the Registry indicates that a detained person has to be informed his calls are being monitored. The Prosecution submits that Mr Ngudjolo's references to "the truth" should be understood in light of his knowledge of the monitoring. See, for example, conversations reproduced in fns. 9 and 13.

³²⁷ See, for example, Conversation N 20 (28 January 2009): "*MN*: You know I won't say the name. One of the witnesses who is testifying against us. I spoke to him. He was afraid...". First Report, fn.33.

³²⁸ First Report, paras. 3, 4, 5, 10 and conversations referred to therein. On one occasion the translator thought that Lendu was used. See fn.23.

³²⁹ First Report, para.4.

³³⁰ First Report, para.21 and conversations referred to in fn.38; see also conversation N 109 in fn.13.

³³¹ First Report, para. 25.

³³² First Report, para. 14.

(b) Second Report

163. On 14 July 2009, the Registrar issued a second report pertaining to the non-privileged phone conversations of Ngudjolo occurring between 31 January and 1 March 2009 ("Second Report").³³³ The Registrar concluded that Ngudjolo was still disclosing information about witnesses to third parties and that it was impossible to predict what those persons would do with such information.³³⁴ The Registrar also noted that she was not in a position to assess which information discussed in the conversations related to the case and that the Trial Chamber, due to its role, was better placed to determine its relevance.³³⁵

164. Unlike the First Report, the Registry only reproduced a limited number of extracts of recorded conversations which was disclosed to the Prosecution with many redactions, which made it virtually impossible to ascertain to which potential witnesses Ngudjolo was referring. Nonetheless, from these conversations it appears that Ngudjolo continued to give instructions about locating Prosecution witnesses and their relatives. For example, in one conversation on 4 February 2009, Ngudjolo instructed a third party (REDACTED) to verify information relating to the identity of witnesses. The other party responded that he needed their coordinates.³³⁶ In another conversation, [REDACTED] said he would contact certain persons who would help him obtain the list of Prosecution witnesses and would try to locate their parents.³³⁷

³³³ [REDACTED]. The report refers to conversations that occurred after 31 January 2009 and does not give an end date. The following Third Report described below covers conversations as of 1 March.

³³⁴ Second Report, para.1.

³³⁵ Second Report, p.5. Note that Lendu dialects were used in some conversations. See para.12.

³³⁶ Second Report, para.6. Conversation 124 of 4 February 2009.

³³⁷ Second Report, para.7, fn.21.

165. In a 3 February 2009 conversation between Ngudjolo and his brother, [REDACTED] or [REDACTED],³³⁸ the latter informed Ngudjolo about his contacts with witnesses' families. Ngudjolo congratulated him and asked him to dig deeper on the issue of child soldiers.³³⁹ On 9 February 2009, Ngudjolo instructed one of his resource persons, Rock Banga,³⁴⁰ to investigate in-depth the details of Prosecution witnesses, presumably child soldiers: "Il faut tout faire pour les dénicher même s'ils ont changé ou embrouillé leur nom. Que nous puissions savoir qui a dit quoi. [EXPURGÉ]." ³⁴¹

166. Ngudjolo also instructed Rock Banga to contact Lubanga's resource person because "il va aussi t'expliquer beaucoup de choses".³⁴²

(c) Third Report

167. On 17 July 2009, the Registrar produced a third monitoring report about Ngudjolo's non-privileged conversations from 1 to 17 March 2009 and 17 to 31 May 2009 ("Third Report").³⁴³ In this report, the Registrar concluded that: (i) Ngudjolo attempted to identify witnesses of the Prosecution through third parties who were not authorised to gain access to this information due to its level of confidentiality;³⁴⁴ and (ii) these third parties had tried to "prepare" defence witnesses before their meetings with counsel for the defence.³⁴⁵ The Registrar also noted that Ngudjolo's behaviour was particularly reprehensible because he was aware of the fact that he was being monitored.³⁴⁶ She reiterated that she could not

³³⁸ Also referred to [REDACTED].

³³⁹ Second Report, para.10, fn. 24: Conversation 140 of 3 February 2009.

³⁴⁰ He is also referred to as Rock Banga Mateso.

³⁴¹ See also Second Report, fn.25: Conversation 80 of 9 February 2009.

³⁴² Second Report, para.5, fn.18.

³⁴³ [REDACTED]. Note that the Prosecution received a redacted version.

³⁴⁴ Third Report, p.4.

³⁴⁵ Ibid., p.5.

³⁴⁶ Ibid., pp.13-14.

assess whether or how the information discussed in the monitored conversations related to the case.³⁴⁷

168. As with the Second Report, the Registrar only reproduced a limited number of extracts of phone conversations and summarised others and four paragraphs under the heading "Identification of witnesses and their relatives" were entirely redacted in the version shared with the Prosecution.³⁴⁸ Even with the information so limited, the Third Report reflected that Ngudjolo again frequently switched from Swahili to Kilendu to discuss issues related to witnesses and requested his interlocutor do the same.³⁴⁹ However, from the available information it appears that Pastor Lopa (a resource person) and other third parties (his brother [REDACTED] and [REDACTED]) were involved in locating and contacting Prosecution witnesses³⁵⁰ and their relatives.³⁵¹

169. Some of the transcribed conversations also appear to reflect that Defence witnesses were prepared or "coached" prior to the arrival of the Defence team. Specifically, it appears that witnesses were given, in advance, a pre-arranged version of the facts which had been consented to by Ngudjolo or his contacts and relatives.³⁵² [REDACTED] and [REDACTED], among others, were involved in the preparation of witnesses on behalf of Ngudjolo.³⁵³ In a 19 May 2009 conversation between Ngudjolo and [REDACTED], Ngudjolo asked whether a witness had

³⁴⁷ Ibid., p.5.

³⁴⁸ Ibid., paras.13-6.

³⁴⁹ See Conversation N 30 of 10 March 2009. Ibid., para.4, fn.14.

³⁵⁰ Third Report, para.7, fn.19 – Conversation 3 of 24 May 2009 (Pastor Lopa). See also fns.20-22 (Pastor Lopa). See para.10, fn.25: Conversation 45 du 18 mai 2009: «[REDACTED] fait rapport a MN de l'evolution du travail de preparation sur terrain et de contacts pris avec certains enfants-soldats cibles par les enqueteurs du Procureur de la CPI. MN le felicite et lui dit de mettre ceux-ci en contact avec le pasteur Lopa ». See also fn.26 ([REDACTED]).

³⁵¹ Ibid., para.11, fns. 30 (Conversation N 38 of 19 May) and 33 (Conversation N 2 of 31 May 2009) and 45 (Conversation 15 of 27 May) ([REDACTED]).

³⁵² Ibid., p.13 (1).

³⁵³ Ibid., paras.9-12.

confirmed the facts they had prepared and indicated that Pastor Lopa should prepare another witness before he met with the Defence team:

"[EXPURGE]/ [REDACTED]: Qui, il ne peut que faire partie de ce groupe. Sinon, ce serait difficile./ *MN*: Lui au moins, nous est-il favorable? *Rapporte-t-il les faits tels que nous l'avons préparé? a-t-il confirme les faits? / [REDACTED]:* Oui, il a confirmé. / *MN*: C'est bien/ [REDACTED]: De ce côté-là, il n'y a pas de probleme./ *MN*: Toi, rencontre le petit. Je ne connais pas l'emploi du temps du le pasteur mais je vais lui dire de tout faire pour te contacter des aujourd'hui ou demain pour qu'ensemble, vous rencontriez ce petit. *Qu'il prenne quelques notes et qu'il le « prépare. » Comme ça, quand ils (les avocats) vont arriver, ils trouveront le terrain déjà préparé.*"³⁵⁴

170. On 22 May 2009, Ngudjolo discussed the "loyalty" of potential witnesses with [REDACTED].³⁵⁵ On 27 May 2009, [REDACTED] assured Ngudjolo that the witnesses would be prepared and ready to meet the defence lawyers.³⁵⁶ On 30 May 2009, and in response to Ngudjolo's question about the witnesses who were to meet his lawyers, [REDACTED] advised that he would make sure the witnesses convinced the lawyers.³⁵⁷ Finally, from several conversations it transpired that Ngudjolo discussed with [REDACTED] the recruitment of witnesses before the arrival of his lawyers.³⁵⁸

³⁵⁴ Ibid., fn.44. Conversation N 38 of 19 May 2009.

³⁵⁵ Ibid., fn.23. Conversation N 12 of 22 May 2009: «[REDACTED] lui dit qu'il a un rendez vous avec MaitreB. [Banga Mateso Rock, personne ressource] et va lui faire le compte-rendu de leur entretien. Ensuite, ils doutent quelque peu de la loyauté du petit « [REDACTED] ». En revanche, Petit «[REDACTED] » serait plus « loyal », aleurs yeux ».

³⁵⁶ Ibid., fn.31. Emphasis added. Conversation N 15 of 27 May 2009: "MN: est-ce que ces petits là, bien, je sais que tu lui as déjà parlé, je crois que ces petits là seront disponibles ?/ [REDACTED]: Qui, oui, le 04, ils seront déjà préparés et seront prêts. Nous allons leur demander de rester dans les environs."

³⁵⁷ Ibid., fn.24. Emphasis added. Conversation N 6 of 30 May 2009: «MN demande des nouvelles au Le pasteur et les informations sur les témoins que vont rencontrer les avocats. [REDACTED], insiste qu'il veillera à ce que ces témoins convainquent les avocats ».

³⁵⁸ Ibid, paras.3-4, fns.13-4. See Conversation N 13 of 13 March 2009 and N 30 of 10 March 2009.

171. Moreover, Ngudjolo chose Pastor Lopa as a resource person due to his position in an NGO where he had more opportunities to “*preparer le terrain*” and discreetly prepare witnesses.³⁵⁹ For example, in the summary of a 20 May 2009 conversation Pastor Lopa told Ngudjolo that an English NGO would implement an awareness campaign on sustainable development which, according to Pastor Lopa, was a good opportunity to better “prepare the field” for Ngudjolo.³⁶⁰ Similarly, on 24 May 2009 Ngudjolo explained to Pastor Lopa that his task was to extract information about the child soldiers, including those approached by the Prosecution, “to test them”, to contact their parents, to discreetly monitor them and to facilitate their meeting with his lawyers.³⁶¹ In a later conversation that same day, Ngudjolo explained to Chef Manu (Defence witness D003-88) that he had appointed Pastor Lopa because of his discretion and his capacity to gain access to witnesses to better “prepare” them.³⁶²

(d) Fourth Report

172. On 11 November 2009, the Registrar submitted a report covering the non-privileged communications of Ngudjolo from 17 March to 17 May 2009, 1 to 30 June 2009 and 20 August to 16 October 2009 (“Fourth Report”).³⁶³ This report, like the Second and Third, was heavily redacted for the Prosecution and contained very few extracts of recorded conversations. Moreover, Ngudjolo often spoke in Kilendu, a language that neither the staff of the detention center nor

³⁵⁹ Ibid., paras.5-6.

³⁶⁰ Third Report, paras.5-6, fn.18: Conversation N 25 of 20 May 2009.

³⁶¹ Third Report, para.5, fn.16: Conversation N 1 of 24 May 2009.

³⁶² Third Report, para.5, fn.17: Conversation N 2 of 24 May 2009.

³⁶³ [REDACTED].

Registry translators master.³⁶⁴ He also instructed some of his interlocutors not to disclose certain information over the phone when discussing the case.³⁶⁵

173. From the few excepted conversations in this report, it appears that Ngudjolo was still actively trying to identify and locate Prosecution witnesses.³⁶⁶ Notably, on 19 June 2009, the day after the Chamber had issued its "Temporary Order", Ngudjolo enquired about Prosecution witness P-28, in apparent violation of the order.³⁶⁷

(e) Fifth Report

174. On 19 February 2010, the Registrar filed a report covering the period of 25 September 2009 until 28 January 2010 ("Fifth Report"), a period during which Ngudjolo's phone conversations were restricted to his wife and children and a limited circle of persons.³⁶⁸ The Registry only listened to some of the conversations, none of which were reproduced in the report provided to the Prosecution. According to the Registrar, they referred to family, private and

³⁶⁴ Fourth Report, paras.28-9. This happened before 19 June 2009 when the Chamber's restrictions were effected. Note that Mr Ngudjolo violated the specific rules in relation to the number of persons he may communicate with in a single phone conversation. See paras.15-16.

³⁶⁵ Fourth Report, fn.41, Conversation N 21 of 14 May 2009: *MN*: « On a donné l'accord pour votre engagement. Je crois que [REDACTED] vous a laissé un message sur votre répondeur »/(...)/ *MN*: « Soyez toujours discret puis que vous êtes chargé des enquêtes » / Le pasteur : [EXPURGÉ]./ *MN*: « C'est très délicat. Vous êtes entre la vie et la mort. Et surtout ne dites à personne tout ce qui me concerne si ce n'est à mon équipe de défense. Vous êtes là pour recueillir les informations et non les divulguer. Il y aura même des informations que vous ne devriez pas me donner au téléphone ».

³⁶⁶ In April 2009, Mr Ngudjolo requested a person called [REDACTED] collect information on witnesses who could potentially cooperate with the Prosecution and requested the coordinates of witness P-314 ([REDACTED]); Ibid, paras.4-5. See also para.29 where [REDACTED] and Mr Ngudjolo refer to a witness who remains loyal.

³⁶⁷ Ibid, para.28. Note that on 18 June 2009 at 12:15 the Chamber ordered the Registry to prohibit any external contact, including telephone calls. See Temporary Order, para.10.

³⁶⁸ [REDACTED].

spiritual matters.³⁶⁹ However, one conversation between Ngudjolo and his brother [REDACTED], appeared to include a coded message.³⁷⁰

(f) First Report in Kilendu

175. On 7 March 2011, the Registrar filed with the Chamber her first report on the non-privileged conversations of Ngudjolo in either Kilendu or another non-identified language from October 2008 until the end of January 2009 ("First Kilendu Report").³⁷¹ The report summarized only the conversations that the Registrar thought might affect the administration of justice and the attached extracts contained heavy redactions, including even the names of the interlocutors.³⁷²

176. The Registrar reiterated that Ngudjolo was aware that he was being monitored and on several occasions reminded his interlocutors that they should be careful about what they said over the phone,³⁷³ and that they spoke in Kilendu to ensure confidentiality.³⁷⁴ This report reveals the following actions of Ngudjolo:

i. Ngudjolo gave instructions to prepare or "coach" Defence witnesses

177. The vast majority of conversations related to the statements that Ngudjolo's witnesses had given or were going to give to his Defence team, and to

³⁶⁹ Fifth Report, para.1. The Registrar only listened post facto to a sample of 38 conversations.

³⁷⁰ Fifth Report, paras.2-8.

³⁷¹ [REDACTED]. The Prosecution received a redacted version of this report on 29 August 2011 after filing an application to the Chamber requesting its disclosure. [REDACTED], [REDACTED].

³⁷² First Kilendu Report, para.5. The Registrar indicated that the translators had encountered problems due to the different dialects used in the conversations. See para.1.

³⁷³ Ibid., para.14, fn.20. Conversation 122 of 11 January.

³⁷⁴ Ibid., para.15, fn.23: [EXPURGE] : C'est bien compris. Je leur avais même dit *qu'ils parlent toujours en langue maternelle quand ils s'adressent à toi*. MN: Vous devez être très vigilants. Ces gens suivent toutes nos conversations et se mettent à les analyser en vue de savoir qu'est ce qu'on a dit, qu'est ce qu'on envisage de faire, quelles sont les influences qu'on a sur le terrain, est-ce qu'on a des richesses, et tout autre choses. Ce faisant, ils veulent s'imprégner de tout ce qui est de la vie du détenu. Il n'y a rien de ce que nous disons qui ne soit pas intercepté. [EXPURGE]: Ça va. J'avais expliqué tout ces aspects à nos gens. (Emphasis added)

Ngudjolo's concern to ensure coherence and avoid contradictions among the witnesses.³⁷⁵ Some conversations appear to confirm that Defence witnesses had been prepared before they met with Defence counsel and, from the detention center, Ngudjolo suggested answers that should be given to the Defence investigators.³⁷⁶

178. For example, in October 2009, Ngudjolo and his interlocutors discussed how they needed to prepare witnesses before the Defence team arrived in the field.³⁷⁷ In a 14 October 2008 conversation, Ngudjolo enquired about the nature of certain documents and decided that the documents had to be given to his Defence team.³⁷⁸ Similarly, in December 2008, Ngudjolo advised that potential witnesses needed to be approached in order to determine their intentions before meeting with the Defence team.

179. In several January 2009 conversations Ngudjolo discussed the preparation of witness statements to be given to his Defence team, in particular, their responses³⁷⁹ and how to better structure them to avoid contradictions³⁸⁰ and ensure coherence.³⁸¹ For example, in a 22 January 2009 conversation, the interlocutor asked Ngudjolo: "*Dis-nous ce que tu avais prévu dire car [EXPURGÉ] les autres ne savent rien de ce qui se passe et ils ne savent quoi faire concrètement.*"³⁸² In a conversation on 10 January 2009 with an unidentified Defence witness, Ngudjolo appears to tell the witness what to say in his statement to his

³⁷⁵ Ibid, para.15. See in particular Conversation N 22 of 28 January.

³⁷⁶ Ibid, para.8 referring to Conversation N 76 of 23 December (Annex [3]) and Conversation N 59 of 23 December (Annex [4]).

³⁷⁷ Ibid, para.6.

³⁷⁸ Ibid, para.6. See Conversation N 65 of 14 October 2008 in the Annex [1].

³⁷⁹ Ibid, para.12. See Conversation N 144 of 22 January (Annex[6]). Note that the date of the conversation is unclear: while the Annex[6] refers to 22 January, the filing refers to 9 or 2 of January (para.12, fn.16).

³⁸⁰ Ibid, para.13. Conversation N 134 and N 136 of 10 January.

³⁸¹ Ibid, para.15, fn.22. Conversation N 22 of 28 January. Annex [9].

³⁸² Conversation N 144 of 22 January -Annex[6], p.7.

lawyers.³⁸³ On 11 January 2009, the interlocutor explained to Ngudjolo that a witness had wanted help in improving his or her upcoming statement to the Defence team. Ngudjolo responded that they should talk carefully over the phone because the conversations are monitored:

*"[EXPURGE] : Nous avons passé longtemps avec [EXPURGE]. Je t'assure qu'il est convaincu maintenant. Présentement, il est en train de faire la rédaction. Il nous a demandé de revenir le mardi [EXPURGE] pour retoucher certains points en vue d'améliorer la rédaction. Il a décidé de brosser le service ce mardi pour parfaire ce travail de rédaction. MN: Tu dois savoir que toutes nos conversations téléphoniques sont toujours enregistrées, d'où les propos téléphoniques à tenir doivent êtres calculés. Je crois que les gens doivent fournir un effort pour comprendre cela. Tout ce qui s'est passé est clair et connu de tout le monde. Ces gens sont matures et peuvent discerner ce qu'on peut ou ne pas dire."*³⁸⁴

180. In a 22 January 2009 conversation Ngudjolo requested clarifications from a witness due to be interviewed by the Defence team.³⁸⁵ In another conversation that same day, a Defence witness called Ngudjolo and recounted what he had told the Defence team.³⁸⁶

³⁸³ Ibid, para.13, fn.18. Conversation N 141 of 10 January (Annex[7]). Note that the Registrar is uncertain on whether Mr Ngudjolo is telling the witness what to say or the witness already knows the facts.

³⁸⁴ Ibid, para.14, fn.20. Emphasis added. Conversation N 122.

³⁸⁵ Ibid, para.14, fn.21. Conversation N 42 of 22 May. In this latter example the Registrar once more speculates that she does not know whether Mr Ngudjolo wants the witness to focus on a certain angle or on an angle which is favourable to him.

³⁸⁶ Conversation N 45 of 22 January.

ii. Ngudjolo gave instructions to locate Prosecution witnesses and their relatives and his wife's role to transmit information

181. Additionally, Ngudjolo continued to actively attempt to locate Prosecution witnesses³⁸⁷ and their families, in particular instructing his interlocutors to contact [REDACTED] of an incriminating witness he considered "hostile" to his defence.³⁸⁸

182. In other conversations Ngudjolo indicated that his wife would transmit information that they could not discuss over the phone:

*"MN: De rien. Alio, [EXPURGÉ]! [EXPURGÉ]: Allo. MN: J'espère que pour tout le reste, tu auras à t'entretenir avec mon épouse ! [EXPURGÉ]: Avec elle? MN: Oui, avec elle. Il faut que tu la rencontres nécessairement. Car, c'est à elle que j'ai expliqué en détails la situation. Tu sais qu'on ne peut pas tout expliquer au téléphone. [EXPURGE] : C'est compris. Si tel est le cas, il me faudra me rendre à son domicile. [...] Comme elle sera à la maison, je passerai la voir pour qu'elle m'explique le contenu de votre entretien. Moi, j'irai donner en détails ces informations [EXPURGE] en les embellissant de ma manière. MN: Ne t'en fais pas. Elle ira contacter [EXPURGE] en personne. Elle les contactera certainement à moins qu'elle ne les trouve pas chez lui."*³⁸⁹

³⁸⁷ Ibid, para.9, fn.13. Conversation N 9 of 30 December.

³⁸⁸ Ibid., para.10, fn.14: Conversation 206 of 2 January 2009. *"MN: Ah ! Aujourd'hui je voudrais qu'il rencontre [REDACTED] de ce petit garçon là ; il faudrait aussi qu'il les aborde et leur parle. Maître : Bien sûr. J'avais appris que [REDACTED] était ici hier. Moi, je ne l'avais pas vu de mes propres yeux. Il était hier à Kotoni, mais il a passé nuit ici aujourd'hui. Je veux me renseigner sur son adresse. MN: Ah! Ah,... Si tu arrivais à le rencontrer, essaye de lui poser certaines questions pour t'imprégner de son opinion sur ce qu'a fait [REDACTED]. Maître : Oui, je le ferai. MN: Parce que je trouve que [EXPURGE]."*

³⁸⁹ Ibid., para.9, fn.12. Conversation 66 of 24 December.

(g) *Second Report in Kilendu*

183. On 15 July 2011, the Registrar submitted a second report on the monitoring of non-privileged conversations of Ngudjolo in Kilendu and other non-identified languages that occurred between February and June 2009 ("Second Kilendu Report").³⁹⁰ Out of the 130 conversations monitored, the Registrar only considered 35 as "pertinent" for the purposes of the report.³⁹¹

184. In many conversations Ngudjolo requested third party assistance in preparing witnesses before they met with the Defence team.³⁹² For example, in an extract of a 16 May 2009 conversation, Ngudjolo's brother, [REDACTED], explained how he had provided guidance to a witness on the structure of his "*propos*". Ngudjolo told [REDACTED] (his brother) to be present at all witness interviews:

[EXPURGÉ] : Oui, je l'ai rencontré ! je lui ai très bien structuré le *propos* qu'il doit tenir. J'ai rencontré aussi [EXPURGÉ] à qui j'ai dit la même chose » MN:
« Dans tous les cas, je te suggère de les accompagner partout où ils seront ! Je souhaite que tu sois présent lors des différentes interviews » !
[REDACTED]: « J'ai planifié de ne pas m'éloigner d'eux. Ainsi, je serai en mesure de vérifier avec qui ils sont et de quoi ils parlent »³⁹³

185. In a conversation on 30 May 2009, Ngudjolo instructed [REDACTED] to prepare a witness who would provide a statement on the crimes in Bogoro:

« As-tu des nouvelles de [EXPURGÉ]? » MN: Mes avocats viendront là-bas pour l'interroger concernant le massacre de Bogoro. Qu'il ne puisse pas

³⁹⁰ [REDACTED]. [REDACTED] contains extracts of the conversations. [REDACTED], [REDACTED]. It was disclosed to the Prosecution on 29 August 2011 with redactions. [REDACTED]: [REDACTED], [REDACTED].

³⁹¹ Ibid, para.1.

³⁹² Ibid, paras. 2 and 19 and footnotes therein. See para.22. In para.2 the Registrar speculates on the legitimacy of these meetings.

³⁹³ Ibid, fn.28. Conversation N 8 of 16 May.

avoir peur. *Veux- tu le preparer pour cela ?* [REDACTED]: « J'ai bien compris ! *Il faudrait convaincre les avocats quand ils seront ici ! Je lui expliquerai, ce qu'il doit dire !* »³⁹⁴

186. Ngudjolo also instructed persons other than his resource persons (such as friends and relatives) to investigate Prosecution witnesses and to locate their relatives.³⁹⁵ Ngudjolo was also in contact with Prosecution witness P-238³⁹⁶ and it appears that he discussed or was interested in Prosecution witnesses P-157,³⁹⁷ P-314,³⁹⁸ and another witness who had initially provided a statement to the Prosecution. The four witnesses ultimately did not testify for the Prosecution.³⁹⁹ In addition, in a 19 June 2009 conversation, Ngudjolo instructed Pastor Lopa to contact [REDACTED] of Prosecution witness P-250 and to take a statement from them.⁴⁰⁰

187. The Registrar further noted that some conversations indicated that Ngudjolo was aware of the Prosecution's practice to move its witnesses to other locations for the purposes of interviewing them.⁴⁰¹ Further, Ngudjolo maintained regular contact with Defence witness D03-088, Chef Manu.

³⁹⁴ Ibid, fn.28. Conversation N 6 of 30 May.

³⁹⁵ Ibid, para.2. Note that the Registrar speculates on the legitimacy of these meetings.

³⁹⁶ Ibid, paras.13-15, p.11. [REDACTED].

³⁹⁷ Ibid, paras.11-12. Note that due to the redactions it is impossible to ascertain whether Mr Ngudjolo talked to this witness or talked about this witness with other persons.

³⁹⁸ Ibid, paras.17-18. As with the prior witness and due to the redactions in the Registrar's report it is impossible to ascertain whether Mr Ngudjolo talked to this witness or talked about this witness with other persons.

³⁹⁹ Ibid, paras.6-7 and Annex.

⁴⁰⁰ Ibid, para.16, fn.23. Conversation N 18 of 19 June 2009.

⁴⁰¹ Ibid, para.3.

C. The Trial Chamber's Decisions in connection with Ngudjolo's monitored conversations

188. On 9 June 2009, the Trial Chamber received the Registrar's First Report and authorised its disclosure to the Prosecution.⁴⁰² On 18 June 2009, at the request of the Prosecution,⁴⁰³ the Trial Chamber temporarily prohibited Ngudjolo from having any contact, pursuant to Regulation 101(3).⁴⁰⁴ The Chamber found that exceptional circumstances existed to require these measures:

...[i]t is clear to the Chamber that, despite being aware, since 12 February 2009, that his conversations other than those with his Defence team could be listened to, *the accused person is likely to have used*, in communicating both with the outside and within the Detention Centre, resorting where necessary to a language not understood by the Registry, *all the means of communication available to him in order to potentially exert influence over testimony*.⁴⁰⁵

(a) First Decision: The Trial Chamber Denied Disclosure of the Recorded Conversations and Ngudjolo's List of Contacts to the Prosecution

189. On 24 June 2009, the Trial Chamber imposed temporary restrictive measures on Ngudjolo ("First Decision"), in particular to: (a) suspend any phone contact with the "contacts" registered by Registry; (b) suspend the possibility to receive mail from or to address mail to any person with the exception of those listed in

⁴⁰² [REDACTED], [REDACTED], [REDACTED].

⁴⁰³ [REDACTED], only available to the Prosecution and VWU. See also [REDACTED]. On 11 June 2009, the Prosecution urgently moved the Chamber to prohibit all external contact by Mr Ngudjolo and to separate him from the other detained persons. The Prosecution also requested the disclosure of the recordings of the conversations referenced to in the Report and in the annex, as well as Mr Ngudjolo's contact list.

⁴⁰⁴ [REDACTED], [REDACTED].

⁴⁰⁵ Ibid, para.8. Emphasis added.

Regulation 169(1) and his wife and children under certain conditions; (c) prohibit all visits; and (d) end daily contact with fellow detained persons.⁴⁰⁶

190. The Chamber also instructed the VWU to liaise with the Prosecution to decide on additional protective measures which may appear justified.⁴⁰⁷ But the Trial Chamber refused to authorise disclosure of Ngudjolo's recorded telephone conversations and his list of contacts to the Prosecution. According to the Chamber, the recordings were authorised by the Registrar pursuant to Regulations 174 and 175 for the sole purpose of ensuring that the communication facilities provided to the accused were being used appropriately and not to gather new evidence in support of his prosecution.⁴⁰⁸ Ngudjolo's list of contacts was seen to relate to his private life and as such could not be separated from the content of the recorded conversations.⁴⁰⁹

191. It should be noted that on 9 December 2009, the Appeals Chamber overturned the First Decision,⁴¹⁰ which denied disclosure to the Prosecution of the recorded conversations and the list of contacts of Ngudjolo. The Appeals Chamber found that the Trial Chamber erred in law when it ruled that the monitored information would be categorically inadmissible. It explained that under Regulation 92(3) of the RoC the Trial Chamber had discretion to withhold or disclose the monitored information and that the Trial Chamber must balance the rights of the accused and the rights of the Prosecution in making such decision.⁴¹¹

⁴⁰⁶ [REDACTED], para.33. These prohibitions did not apply to Mr Ngudjolo's defence team with the exception of two resource persons, Rock Banga Mateso and Christophe Koli Lopa (Father Lopa). See para.34. ("First Decision").

⁴⁰⁷ Ibid, para.44.

⁴⁰⁸ Ibid, para.40.

⁴⁰⁹ Ibid, para.45.

⁴¹⁰ On 14 July 2009 the Trial Chamber granted leave to appeal: [REDACTED], [REDACTED]. The issue certified for appeal was: "ascertaining whether the parties or the Chamber can refer to or use all the information contained in the recordings of telephone conversations made by Mathieu Ngudjolo and in his list of contacts during the hearings on the merits"

⁴¹¹ [REDACTED].

(b) Second Decision: The Trial Chamber Rejected the Disclosure of the Registrar's Reports to Katanga and did not rule on the Request for active monitoring and analysis of phone conversations

192. On 24 July 2009, following the release of the Second Report and Third Report of the Registrar, the Trial Chamber maintained most of the restrictive measures imposed on Ngudjolo,⁴¹² although it allowed him to communicate by phone⁴¹³ and mail⁴¹⁴ with his wife and children (with certain conditions) and relaxed the conditions restricting his contacts within the detention centre.⁴¹⁵ The Chamber stressed the responsibility on Ngudjolo's counsel with respect to the "reprehensible conduct" of the resource person Pastor Lopa who was to refrain from discussing the case and the witnesses with Lubanga's resource person.⁴¹⁶

193. The Chamber rejected the Prosecution's request to reclassify the Registry's reports (and also to disclose them to the Katanga Defence team pursuant to rule 77), holding that "information obtained from conversations recorded for a totally different purpose cannot be used at trial in the present case". It also held that it lacked the authority to instruct the Registrar to conduct active monitoring of Ngudjolo's conversations with family members nor to analyse the conversations between 1 December 2008 and 28 February 2009.⁴¹⁷

⁴¹² [REDACTED], [REDACTED] ("Second Decision").

⁴¹³ Second Decision, para.22, p.12. This relaxation of the phone calls interdiction was suggested by the Registrar in her Second Report.

⁴¹⁴ Second Decision, para.22, p.13.

⁴¹⁵ Ibid., para.22, p.14. Note that these measures did not apply to the defence team, with the exception of the two resource persons, Mr. Rock Banga Mateso and Mr. Christophe Koli Lopa.

⁴¹⁶ Second Decision, paras.24-26. The Chamber further reiterated that the VWU should conduct an in-depth analysis of the information contained in the recorded phone conversations in order to ascertain whether the protective measures needed to be strengthened and liaise with the Prosecution for that purpose. Ibid., para.38.

⁴¹⁷ Ibid., paras.30 and p.21 (6) and (7). See Prosecution's application [REDACTED], [REDACTED].

(c) Third Decision: The Trial Chamber Relaxed Ngudjolo's Restrictions Despite Continued Indications of Possible Interferences with the Administration of Justice

194. On 25 September 2009, despite not having received additional reports since the Second Decision,⁴¹⁸ the Trial Chamber decided to relax a number of the measures imposed in the First Decision.⁴¹⁹ Notably, the Trial Chamber allowed Ngudjolo to communicate under certain conditions by telephone with persons other than his wife and children, including a list of "persons from his immediate family circle or of special interest to him and his family".⁴²⁰ This list included his brother [REDACTED], who had been involved in attempting to locate protected witnesses.⁴²¹

195. In taking this decision, the Trial Chamber relied on Ngudjolo's "'word of honour' that he would no longer seek the assistance of third parties, or give instructions or pass on information that could cause harm to witnesses"⁴²² and required Lead Counsel to ensure Ngudjolo strictly complied with the Chamber's instructions.⁴²³

196. Ngudjolo remained able to communicate with all members of his Defence team, including the resource persons.⁴²⁴ It appears that the Chamber lifted the ban on

⁴¹⁸ Note that the Chamber indicated it was awaiting the reports relating to periods of 17 March to 17 May 2009 and June 2009. Ibid. para.20.

⁴¹⁹ [REDACTED], [REDACTED] ("Third Decision"). In the interim, the Registrar issued two reports which did not assess new phone conversations ([REDACTED] "Report of 20 August 2009 on the implementation of the restrictive measures and on a meeting with Mr Ngudjolo" and [REDACTED] "Report of 10 September 2009"). Neither of these filings are available to the Prosecution. VWU submitted a report on witness security ([REDACTED], "Report of 24 August 2009") which is also not available to the OTP.

⁴²⁰ Third Decision, para.21, p.10.

⁴²¹ Idem. The Chamber also lifted the prohibition on Mr Ngudjolo's right to receive or send mail under certain conditions (para.21, p.11) and allowed Mr Ngudjolo to meet with his fellow detainees daily in the common area in the detention centre (para.21, p.12).

⁴²² Third Decision, para.19. The Chamber noted the Registrar's concern over the mental and physical effects of the restrictive measures.

⁴²³ Third Decision, para.21, p.10 and 13.

⁴²⁴ Third Decision, para.21, p.13.

communications with the resource persons (Pastor Lopa and Rock Banga) subject to conditions, in an ex parte 15 September 2009 decision withheld from the Prosecution.⁴²⁵

(d) Fourth and Fifth Decisions: Status Quo

197. On 4 December 2009, the Chamber maintained measures ordered in the Third Decision and allowed for family and conjugal visits ("Fourth Decision").⁴²⁶ The Chamber noted that the analysis of the conversations between 17 March and 19 June 2009 "demonstrates the gravity of the violations committed by Mathieu Ngudjolo at that time... on a regular basis over an extended period of time" and that "if no new misconduct has been observed, this is a direct result of those restrictions".⁴²⁷ The Chamber also requested VWU to provide, if necessary, any information indicating that witness security was affected.⁴²⁸

198. On 20 January 2010, in response to the Registrar's question whether to carry out random monitoring of Ngudjolo's recorded phone conversations since 25 September 2009,⁴²⁹ the Trial Chamber declined to rule; instead, it stated that it was the responsibility of the Registrar, not the Chamber, to determine whether monitoring was required, citing Regulations 174 and 175 to determine whether there was any cause to conduct the monitoring.⁴³⁰

⁴²⁵ Third Decision, p.13, fn. 29 referring to [REDACTED]. The Prosecution had no access to this decision, but it seems that working meetings of the entire Defence team, including the resource persons, were permitted under the responsibility of the Lead Counsel.

⁴²⁶ [REDACTED], paras.19,22-23 and p.12.

⁴²⁷ Ibid, para.19.

⁴²⁸ Ibid, para.25.

⁴²⁹ [REDACTED], 8 January 2010, para.10. This was an informative report on the implementation of the restrictive measures set out in the Fourth Decision. The Registrar noted that the linguistic barriers between the guards and the inmates hinders the implementation of the restrictions.

⁴³⁰ [REDACTED], para.9 and p.6(1). Note that on 22 January 2010, the Registrar issued a decision ordering the Chief Custody Officer to carry out the non-regular, non-selective and non-systematic monitoring of Mr Ngudjolo's non-privileged communications between 25 September 2009 and 28 January 2010. [REDACTED]. Note that the Prosecution does not have access to this decision.

(d) Sixth Decision: Termination of all Restrictive Measures

199. In its 16 March 2010 decision, the Trial Chamber terminated all of the restrictive measures imposed in the First Decision.⁴³¹ According to the Chamber, Ngudjolo had ceased the misconduct that led to the restrictions on his communication.⁴³² The Chamber did not rule on the Prosecution's request to continue monitoring Ngudjolo's non-privileged telephone conversations, again setting out its view that only the Registry (specifically, the Chief Custody Officer and the Registrar) could authorise the monitoring.⁴³³

200. The Chamber also reiterated that VWU must maintain vigilance and transmit information that suggested a resumption of the activities by Ngudjolo that may affect witnesses.⁴³⁴ It also requested the Registrar to remind Ngudjolo, in the presence of Lead Counsel, that the occurrence of any further incident could lead to a re-imposition of measures to prohibit and/or restrict external communication and his communication within the detention centre.⁴³⁵

(e) Decision, following the Appeals Judgment, rejecting Disclosure of the Recorded Conversations to the Prosecution

201. On 10 June 2010, the Trial Chamber again rejected the Prosecution's application⁴³⁶ to gain access to the monitored conversations.⁴³⁷ According to the

⁴³¹ [REDACTED], para.16 ("Sixth Decision").

⁴³² Sixth Decision, para.16. Note that the Chamber referred to the Fifth Report and to [REDACTED] of 8 January 2010 in which the Registrar informed the Chamber that it had implemented the restrictive measures set out in the Fourth Decision and that it is unknown whether Mr Ngudjolo has infringed the decisions of the Chamber because his conversations have not been listened to. The Registrar requested authorisation to listen to extracts of conversations on a random basis. In a subsequent decision, the Chamber reiterated it was the Chief Custody Officer and not the Trial Chamber who can authorise the monitoring of the conversations. [REDACTED], [REDACTED].

⁴³³ Sixth Decision, para.17.

⁴³⁴ Sixth Decision, para.20.

⁴³⁵ Ibid., para.21.

⁴³⁶ [REDACTED]. [REDACTED].

⁴³⁷ [REDACTED]. Decision pursuant to Appeals Judgment. See [REDACTED] issued on 9 December 2009.

Trial Chamber, the request infringed on Ngudjolo's Article 67 rights, which the Chamber explained outweighed the Prosecution's need to fulfil its duties under Article 54(1)(a), especially since the security of witnesses was not at risk as they were receiving protection from the Court.⁴³⁸ The Trial Chamber was of the view that the Registrar's analysis of the telephone conversations contained the information being sought by the Prosecution which could potentially impact witness safety.⁴³⁹ The Chamber also noted that even if some information was potentially of interest or may be necessary to determine the truth, that did not necessarily require its disclosure.⁴⁴⁰

202. In response to the Prosecution's assertion that the recorded conversations could explain the inconsistencies between the prior written statements and oral evidence, particularly of witness P-250, the Trial Chamber indicated that the transcripts would not provide such explanations and that such discrepancies could also have been the result of the witnesses' trips to The Hague, the formality of the proceedings and the ordeal of cross-examination.⁴⁴¹

(f) Decision Rejecting Reclassification

203. On 19 August 2011, the Chamber granted the Prosecution's request⁴⁴² for disclosure of the two Registry reports of Ngudjolo's conversations in Kilendu in redacted form to the Prosecution.⁴⁴³ The Chamber however rejected the Prosecution's request⁴⁴⁴ to reclassify the Registrar's five reports so that the Prosecution could use them in its cross-examination of the two accused and of

⁴³⁸ Ibid, para.71.

⁴³⁹ Ibid, para.57.

⁴⁴⁰ Ibid, para.61.

⁴⁴¹ Ibid., para 62.

⁴⁴² [REDACTED].

⁴⁴³ [REDACTED], [REDACTED].

⁴⁴⁴ [REDACTED].

Defence witness D03-088.⁴⁴⁵ It held that *"such information [as contained in the reports] does not, to use the words of the Appeals Chamber, seem 'of great importance' to the determination of the truth."*⁴⁴⁶

D. The Chamber's Decisions violated the Prosecution's right to a fair trial under Article 64(2)

204. The Registrar's reports described above demonstrate that Ngudjolo and persons outside the immediate Defence legal team who acted on Ngudjolo's behalf disclosed and disseminated the identity and the evidence of protected Prosecution witnesses, orchestrated a consistent line of defence evidence and that these persons improperly exerted pressure over witnesses. The Chamber's seeming assumption that an accused's efforts to discover protected identities and suborn perjury are privileged communications, protected against evidentiary use in order to protect the accused's privacy rights, is manifestly incorrect. Further, the Chamber's refusal to allow the Prosecution full access to the materials and to permit the use of any reference to Ngudjolo's conversations as evidence, including for the purposes of impeaching witnesses, affected the Prosecution's right to a fair trial and necessarily calls the outcome of the trial into doubt.

205. The Prosecution's right to a fair trial is guaranteed under Article 64(2).⁴⁴⁷ The right to a fair trial obliges the Court to ensure that neither party is put at a disadvantage when presenting its case.⁴⁴⁸ It also means that the Prosecution's

⁴⁴⁵ [REDACTED], [REDACTED].

⁴⁴⁶ Ibid., para.27, emphasis added. The Chamber noted that while the information in the Registry reports was "related" to "the case at hand", such information could be obtained through other (unspecified) material. It found that using the information to prove Chef Manu colluded with Mr Ngudjolo and to demonstrate his bias, was not "related to the case at hand" and of not "great importance". See paras.29,31-32.

⁴⁴⁷ [REDACTED], [REDACTED].

⁴⁴⁸ Aleksovski Appeals Decision on Admissibility of Evidence, para.25; Prlic Appeals Decision on Prosecution Appeal Concerning Reduction of Time for the Prosecution Case, para.14; Martić Appeals Decision Regarding Evidence of Milan Babić, para.13; Tadić Appeals Judgment, para.48. See also: *Rv Sang* (1979) 69 Cr App R 282, 290 and 302 (UK); *Snyder v Massachusetts*, 291 U.S. 97,117 and 122 (1934).

rights as guaranteed by other provisions must be respected.⁴⁴⁹ In particular, the Prosecution must be able to exercise the powers and fulfil the duties listed in Article 54,⁴⁵⁰ and “be granted the genuine opportunity to present [its] case and to be apprised of and comment on the observations and evidence submitted to the Court that might influence its decision”.⁴⁵¹

206. A crucial element of the Prosecution’s right to a fair trial is its right to tender evidence free of any external and/or undue influence⁴⁵² and to question witnesses comprehensively. This is essential for the purposes of the Prosecution’s fulfilment of its duty to establish the truth pursuant to Article 54(1)(a),⁴⁵³ and its ability to prove the guilt of the accused under Article 66(2). Similarly, “fairness” towards witnesses not only implies protection if they are placed at risk on account of their cooperation with the Court, but also entails that their evidence is obtained in a fair manner⁴⁵⁴ and evaluated fairly by the Chamber.⁴⁵⁵ Article 64 grants a Trial Chamber flexibility in managing the trial and grants judges significant discretion to adopt procedures.⁴⁵⁶ In the exercise of this discretion, however, the Chamber must appropriately balance the rights and interests enumerated in Article 64(2)⁴⁵⁷ and take into account the specifics of the case.⁴⁵⁸

⁴⁴⁹ ICC-01/04-141, para. 48; ICC-01/04-135-tEN, para.38.

⁴⁵⁰ ICC-01/04-135-tEN, para.39.

⁴⁵¹ [REDACTED], [REDACTED]. Oric Appeal Decision on Admissibility of the Evidence, para.7: “the Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt”. See also Prlic Appeal Decision on Prosecution Appeal concerning reduction of time for the Prosecution case, para.14. See also *De Haas and Gijssels v Belgium*, Chamber, 24 February 1997, (Application n. 19983/92), para.53; *Dombo Beheer BC v The Netherlands*, Chamber, 27 October 1993 (Application n.14448/88), paras.32-33.

⁴⁵² Dissenting Opinion of Judge Pikis and Nsereko, ICC-01/04-01/07-776OA7, para.18.

[REDACTED], [REDACTED]; ICC-01/04-01/06-1486OA13, para.41.

⁴⁵⁴ *Dombo Beheer BV v The Netherlands*, para.50.

⁴⁵⁵ Article 69(4).

⁴⁵⁶ ICC-01/09-01/11-524, para.27.

⁴⁵⁷ [REDACTED], [REDACTED].

⁴⁵⁸ Haradinaj Appeal Judgment, para.39.

207. As described above, in this case there was clear and probative evidence that Ngudjolo and third persons acting on his behalf had disclosed the identity and the evidence of protected Prosecution witnesses, orchestrated a consistent line of defence evidence and that third persons acting on his behalf improperly exerted pressure over witnesses. In these cases, a Trial Chamber cannot be seen to properly exercise its authority by remaining a mere spectator, much less turn a blind eye to clear and conclusive indications that the process is being abused.⁴⁵⁹ A Trial Chamber must contribute to the establishment of the truth, a primary goal of the trial.⁴⁶⁰ Timely and effectively response to attempts to intimidate witnesses and to instances of deliberate presentation of false evidence is an essential function of a Trial Chamber, which must employ all necessary measures for those purposes either at the request of the parties or *proprio motu*.⁴⁶¹

208. Disregarding the broad powers afforded to it by the Statute, the Trial Chamber took no action during the proceedings to ascertain whether critical witnesses had been intimidated and whether others may have colluded to provide false evidence. In so doing, the Chamber disregarded its own authority to manage the trial and, at least as importantly, its obligation to arrive at the truth. In particular, it did not adopt measures within its broad discretionary powers to inquire into the

⁴⁵⁹ *Zahira Habibulla Sheikh v State of Gurjarat* [2004] 5 SCC 353 (12 April 2004) (India): "If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and of the community it serves (p.9)." "The trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of the charge which has to be beyond a reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny." (p.13); Haradinaj Appeal Judgment, para.35.

⁴⁶⁰ ICC-01/04-01/06-1049, para.47; ICC-01/04-01/06-1346, Separate and Dissenting Opinion of Judge Rene Blattmann, para.5.

⁴⁶¹ Haradinaj Appeal Chamber, para.35. In this regard, the Prosecution submits that the Trial Chamber should have considered not only possible instances of coercion, threats and other flagrant acts of intimidation but also other improper indirect acts or contact designed to dissuade or discourage a witness from testifying or from telling the truth. See Recommendation N. R (97) 13, prepared by the Committee of Experts on Intimidation of Witnesses and the Rights of the Defence, para.52.

Registrar's information such as its authority to request further evidence under Article 69(3).⁴⁶² Not only did the Chamber choose to remain a passive observer, but it also rejected the persistent requests of the Prosecution to comply with its duties under Article 54: first, it prevented the Prosecution from getting full access to the information already gathered by the Registrar but withheld from the Prosecution; second, it refused the use of the known information that was revealed to it in the Registrar's reports, in its examination of Defence witness D03-88 and, particularly, of Ngudjolo himself.

209. In addition, and as it will be described below, even though the Chamber knew or ought to have known from the recorded conversations that considerable pressure had been put on witness P-250, it ignored that fact when the witness made substantive retractions at trial of his prior statements. With the information squarely presented in the Registrar's reports, the Chamber wrongfully restricted the Prosecution's ability to elicit explanations for the witness' sudden departure from his prior statements with leading questions or by merely putting before him his original statements.

210. The only action taken by the Trial Chamber was to restrict Ngudjolo's contacts for a very limited period of time. This was a clearly inadequate response. It cannot be right that a Chamber, after learning of potential witness interference and evidence tampering, should take no proactive action to ensure that the evidentiary record, and indeed the fairness and integrity of the trial itself, has not

⁴⁶² [REDACTED], [REDACTED]. See Triffterer, p.1321: the phrase "it considers necessary for the determination of the truth" demonstrates that "it is not just whether the court has enough material on its hands to reach a decision. The function of the ICC goes beyond that of an ordinary criminal court. Given the kind of situations that might be the subject of a trial, the parties and the Court have the additional duty to clarify as much as possible the historical facts of the case." See also Articles 64(3)(a) or 64(6)(a) and (f) as further examples of the Chamber's broad discretionary powers. Note that Article 64 grants flexibility and significant discretion to the Chamber to fashion and adopt procedures, so long as the rights of the accused are respected and due regard is given to the protection of victims and witnesses. Further, The Statute is neither an exhaustive nor a rigid instrument, and silence on procedural issues does not imply that it is forbidden. ICC-01/09-01/11-524, paras. 27-29.

been and will not be compromised.⁴⁶³ In the particular context in which this Court operates, which frequently involves scenarios of organized criminality, with operational groups capable of causing harm to persons and undertaking criminal schemes aimed at frustrating the Court's investigative and prosecutorial efforts, a Chamber cannot remain passive. It cannot decide, in the face of evidence indicating the existence of criminal activity aimed at boycotting or unduly influencing the Court's process, to run the risk that the integrity and fairness of its trial become fundamentally eroded by failing to take any meaningful action.

E. The Evidence of witnesses P-250, D03-100 and D03-88

211. In sum, by June 2009 the Chamber knew that witness P-250's identity had been disclosed and his evidence discussed among Ngudjolo's community, that Ngudjolo had instructed that P-250's [REDACTED] be located and interviewed and that Defence witnesses may have been coached on what to testify.

(a) Witness P-250

212. Witness P-250 testified from 27 January to 23 February 2010 for the Prosecution. This witness was crucial to demonstrate the existence of an organised Bedu-Ezekere *groupement* under the leadership of Ngudjolo as well as the involvement of Ngudjolo and this group in the Bogoro attack.⁴⁶⁴ He retracted several confined but critical statements contained in his pretrial statements such as the presence and deaths of civilians during the Bogoro attack;⁴⁶⁵ the presence of child soldiers under the age of 15;⁴⁶⁶ the existence and the content of songs that the Bedu-

⁴⁶³ Haradinaj Appeal Judgment, para.48.

⁴⁶⁴ See the Chamber's summary of this witness' statements : Judgment, para.127-134.

⁴⁶⁵ [REDACTED], [REDACTED], [REDACTED], [REDACTED]; [REDACTED] [REDACTED] [REDACTED], [REDACTED]; [REDACTED], [REDACTED][REDACTED][REDACTED][REDACTED].

⁴⁶⁶ [REDACTED], [REDACTED], [REDACTED], [REDACTED]; [REDACTED], [REDACTED], [REDACTED].

Ezekere group sang before attacking Bogoro;⁴⁶⁷ and the destruction of properties during the Bogoro attack.⁴⁶⁸

213. After one such instance of inconsistent testimony, on 8 February 2010, the Prosecution requested to refresh the witness' memory and to put to him his prior statements through a *mutatis mutandis* application of paragraph 109 of the Trial Chamber's Rule 140 Decision.⁴⁶⁹ The Chamber rejected the Prosecution's application and found:

"[Witness P-250] expresses himself clearly. When he wants to answer in a precise way [...] he answers in a precise way, and sometimes he chooses another type of answer, but the Chamber does have the feeling that the modalities with which he answers aren't due to a lack of memory but a *concern which is personal to him to express himself in a particular manner.*"⁴⁷⁰

214. Thereafter, on 9 February 2010, the Prosecution sought to ask leading questions of witness P-250 with respect to the concrete issues on which the witness had contradicted himself through the application of paragraph 67 of the Rule 140 Decision.⁴⁷¹ The Chamber also rejected this application on the basis that witness

⁴⁶⁷ [REDACTED], [REDACTED], [REDACTED], [REDACTED]; [REDACTED], [REDACTED][REDACTED], [REDACTED].

⁴⁶⁸ [REDACTED], [REDACTED], [REDACTED], [REDACTED]; [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]. See in general T-96, p.46, ln.16 to p.48, ln.21 ; T-98, p.2, ln.8-17 where the Prosecution summarised the areas of his testimony where the witness recanted.

⁴⁶⁹ T-96, p. 48, lines 11-17. See ICC-01/04-01/07-1665-Corr (or Rule 140 Decision), para.109: "In principle, a witness shall testify to what he or she remembers having observed. Witnesses are not allowed to simply read from earlier statements or other documents. However, given the length of time that has passed between the facts relevant to this case and the often traumatic nature of the facts to which the witnesses have to testify, the Chamber may allow witnesses to refer to documents in order to refresh their memory, but only insofar as: a) the documents in question contain the personal recollections of the witness, and b) copies of the document have been made available to the opposing party, who may rely on the parts referred to by the witness during cross-examination."

⁴⁷⁰ T-97, pp. 63-64. Emphasis added.

⁴⁷¹ T-98, p.1, line 22 – p.10, line 15. See ICC-01/04-01/07-1665, para.67: "However, if a party declares that the witness it has called has become adverse and the Chamber allows that party to continue questioning the witness, it may be appropriate for that party to cross-examine the witness. In such a

P-250 could not “be described as hostile”⁴⁷² because he had answered with precision a great majority of the questions, and that evasive answers or answers minimizing previous statements did not justify a declaration of hostility.⁴⁷³ The Chamber further ruled that a witness can only be declared “hostile as a whole” and once a party declares a witness hostile, it cannot continue its examination in chief.⁴⁷⁴

215. The Prosecution unsuccessfully requested leave to appeal the two oral rulings.⁴⁷⁵

Hence, and as a result of these rulings, the Trial Chamber improperly prohibited the Prosecution to show P-250's prior statements or to ask him leading questions without declaring him hostile, in order to enable him to explain the reasons underlying his inconsistencies – whether his retractions were mistakes, true changes in recollection or the result of threats or other improper pressure exerted upon him and his family.⁴⁷⁶

case, cross-examination must be limited to issues raised during the initial part of the interrogation or contained in the witness' previous statements.”

⁴⁷² [REDACTED], [REDACTED].

⁴⁷³ *Ibid.*, p. 20.

⁴⁷⁴ T-98, p.21, lns.15-19.;

⁴⁷⁵ See ICC-01/04-01/07-1872. The Chamber determined that these were not general statements of procedure or law, but only rulings on the «specific and rather unusual circumstances of the testimony» of this witness. See ICC-01/04-01/07-1958, paras.15 and 21.

⁴⁷⁶. See also *Prosecutor v Slobodan Milosevic*, Separate Opinion of Judge O-Gon Kwon on Trial Chamber Confidential Decision Issued 28 January 2004, IT-02-54-T, 29 April 2004, para. 7: “I do not see the purposes and practical benefits of strictly classifying witnesses into three categories - court witness, prosecution witness and defense witness - as in the common law system. Rather I believe that there is merit in viewing all witnesses as means of ascertaining the truth, allowing the tool of cross-examination as a method to do so. In this sense, I strongly endorse the civil law system, which views all witnesses as the court's witnesses in the ascertainment of the truth.”. In the same line, Judge May noted that the ICTY is not bound by common law rules and allowed the Prosecution to ask questions to clarify the witness' evidence on contradictory issues enclosed in his prior statement as “we believe, would be important in the Tribunal's duty to determine the truth and to find the truth”. See *Prosecutor v Krajisnik*, IT-00-39-T, T. 8558-8559, 23 November 2004. See also ICTY *Prosecutor v Popovic et al.*, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, IT-05-88-AR73.3, 1 February 2008, para. 28, where the Chamber noted that the interests of justice dictate a certain measure of flexibility, thus, “the Trial Chamber [may] allow a calling party to put a prior inconsistent statement in order to clarify a particular contradiction without declaring the witness hostile”. In the Halilovic Case, the Trial Chamber conceded that the party calling the witness may challenge the

216. The trial record confirms that witness P-250 feared for the safety of his family, should it be known that he had collaborated with the Prosecution. In particular, at trial he stated that he had told the Prosecution in prior statements that [REDACTED] were dead because he was afraid for their lives. In cross-examination, P-250 explained: "I said that [REDACTED] [REDACTED] is alive. And if I said that, you're going to send someone to go and kill him."⁴⁷⁷ Upon further insistence by Defence counsel, he reiterated:

"I said that so that people should not be subsequently sent to go and kill them, because when someone was asking you for such information, you even give the telephone number of the person, that person would be at risk. He might even be killed. It is for that reason that I said this."⁴⁷⁸

217. [REDACTED].⁴⁷⁹ [REDACTED].⁴⁸⁰ [REDACTED].⁴⁸¹

witness' credibility on portions of his testimony without declaring him hostile by confronting him with specific passages of his prior statement, so that the witness can explain the alleged discrepancies and these explanations can be tested by cross-examination. The Chamber considered that "confronting a witness with material passages of his or her prior statement allows the witness to explain, comment or elucidate on the existence of the alleged inconsistencies and therefore it is respectful of the witness' integrity and enhances the reliability of the testimony." See *Prosecutor v Halilovic*, Decision on Admission into Evidence of Prior Statement of a Witness, IT-01/48-T, 5 July 2005, p. 3. Finally, even in entirely common law systems, there may be greater flexibility. For example, in the United States, a common law system, Rule 607 of the Federal Rules of Evidence expressly states that "the credibility of a witness may be attacked by any party, including the party calling the witness". See also Canada Evidence Act S.9 (2) and Milgaard (Can.), [1992] 1 S.C.R. 866 .

⁴⁷⁷ T-102, p.46, lns.17-18.

⁴⁷⁸ T-102, p.49, lns.25 to p.50, lns.3. 68. Note that after more than 20 days of testimony and in the midst of the cross-examination, the trial was suspended for a day because the witness refused to testify. He expressed his tiredness and the fact that he did not understand why his testimony was taking so long, why questions were being put on several times and felt not respected during the questioning (T-104, pp.1-4. See also T-105, pp.60-61). The cross-examination however resumed and the witness concluded his testimony on 23 February 2010.

⁴⁷⁹ [REDACTED], [REDACTED].

⁴⁸⁰ [REDACTED], [REDACTED].

⁴⁸¹ [REDACTED], [REDACTED].

(b) Witness D03-100

218. The testimony of P-250's [REDACTED] confirmed that P-250's family had been intimidated. Witness D03-100, also known as "[REDACTED]", testified for Ngudjolo on 12 and 13 September 2011. He testified that [REDACTED], witness P-250, was at school during the relevant time of the charges and, in particular, that he had spent part of the 2003 school year in Gety and then Kagaba.⁴⁸²

219. The witness testified that he knew many of the friends and relatives of Ngudjolo, such as witness D03-88 (Chef Manu), because they all belonged to the same community.⁴⁸³ Chef Manu was the chief of the Bedu-Ezekere *groupement*⁴⁸⁴ and came to visit him, along with Katanga's resource person (Logo).⁴⁸⁵ He also testified that Pastor Lopa (another resource person for Ngudjolo) told him that [REDACTED] had testified before the ICC⁴⁸⁶ and that Pastor Lopa and other "visitors" came often to talk about witness P-250.⁴⁸⁷ D3-100 testified that he became very afraid.⁴⁸⁸ When Pastor Lopa inquired about the whereabouts of witness P-250 during the time of the Bogoro attack, the witness felt attacked and responded: "Are you trying to accuse me of something".⁴⁸⁹ The witness then explained that [REDACTED] testimony created conflict between his family and Ngudjolo's family, and that he and his family were being threatened with death:

Yes. I was afraid for the safety of my family. You know, my family lived in Zumbe, and Zumbe is not far away from Kambutso. Ngudjolo's family members said some negative things, and said that *if Ngudjolo did not come*

⁴⁸² Judgment, para.149.

⁴⁸³ T-310, p.26, ln.21 to p.27, ln.2. He also knew Mr Ngudjolo's brother [REDACTED] (T-310, p.24, lns.2-6) ; [REDACTED] or deceased witness D03-0033 (T-310, p.27, ln.13 to p.28, ln.3) ;

⁴⁸⁴ T-310, p.26, lns.21-25 to p.27, lns.1-2.

⁴⁸⁵ T-310, p.28, ln.25 to p.29, ln.5.

⁴⁸⁶ T-310, p.25, ln.10 to p.26, ln.1.

⁴⁸⁷ T-310, p.29, ln.10 to p.30, ln.10.

⁴⁸⁸ T-310, p.6, lns.4-15.

⁴⁸⁹ T-310, p.50, ln.22 to p.51, ln.8.

*back they were going to kill us, those of us, [REDACTED], and that there would be fighting between our two communities. That really frightened me. All that was the result of the fighting that we had experienced in our collectivité.*⁴⁹⁰

220. Witness D03-100 testified that he had therefore decided to appear before the Court to put an end to this situation⁴⁹¹ and that Pastor Lopa was of great assistance in this matter.⁴⁹²

(c) Witness D03-88

221. Chef Manu, the Chief of the Bedu Ezekere community, testified in late August and early September 2011 also for the Defence of Ngudjolo. He had been interviewed by the Prosecution in March 2009 whereby the witness had indicated that he had talked to Ngudjolo only once and with respect to a car of Ngudjolo's property which had been confiscated.⁴⁹³ At Court, when asked by the Prosecution whether he had talked to Ngudjolo in any other occasion, he refused categorically: "Your honours with all due respect, before God and before the entire world, I never spoke with Mathieu Ngudjolo".⁴⁹⁴

222. Although the reports of the Registrar indicate that Ngudjolo regularly talked to D03-88 and discussed with him evidentiary matters, the Prosecution was unable to confront the witness with this material as a result of the Chamber's prior ruling.⁴⁹⁵

⁴⁹⁰ [REDACTED], [REDACTED], [REDACTED].

⁴⁹¹ T-310, p.56, lns.7-16.

⁴⁹² T-310, p.25, ln.17 to p.26, ln.1 and p.63, lns.6-15.

⁴⁹³ DRC-OTP-1043-0536, page 0552 et seq.

⁴⁹⁴ [REDACTED][REDACTED], [REDACTED].

⁴⁹⁵ [REDACTED], [REDACTED], [REDACTED].

F. The Trial Chamber's Error materially impacted on the Judgment

223. The cumulative effect of these significant errors had a material impact on the Judgment. First, based on obvious discomfort by the witness and because of seeming recantations from earlier statements, the Chamber rejected as not credible the evidence of witness P-250, without considering that the witness and/or his family had been threatened or pressured and without considering the effect that such pressure had on the in-court evidence.⁴⁹⁶ The exclusion of this witness testimony had a critical impact on the Judgment.⁴⁹⁷

224. Second, the Chamber did not allow the Prosecution to use the Registrar's reports in his examination of Ngudjolo and Defence witness D03-88. Deprived of that material, it was unable to question Ngudjolo on his (and his associates) efforts to locate [REDACTED]-protected Prosecution witnesses and family members in order to pressure them to recant or refuse to cooperate. It was also unable to question Ngudjolo on his efforts to ensure that Defence witnesses presented a consistent and approved line when testifying on his behalf. Similarly, and upon D03-88's testimony that he had not talked to Ngudjolo, the Prosecution was unable to use the recorded conversations to show that the witness was not telling the truth.⁴⁹⁸

225. Third, the Chamber deprived itself of evidence of Ngudjolo's activities in the detention centre – his (and his associates) efforts to dissuade or exert pressure

⁴⁹⁶ The Trial Chamber found that testimony of witness P-250 was "at times vague, inconsistent and strange [in] nature" (Judgment, para.157). It noted that the witness said some strange things, that his behaviour was peculiar (Ibid., para.141) and that although some areas of his testimony were thorough, others were not as detailed and presented contradictions with prior statements or within his testimony (Ibid., paras.137-140). The Chamber concluded that it was "unable to rely on his statement in the present case". (Ibid., para.159).

⁴⁹⁷ See above para.36. This witness was critical to the Chamber's findings – or lack thereof – on the organised military and hierarchical structure of the Bedu Ezekere *groupement* (see Judgment, para.404. See also paras.374, 375, 377, 390-391) and Mr Ngudjolo's position in the Bedu-Ezekere *groupement* (Judgment, para.503; see also, paras.405, 488-9).

⁴⁹⁸ See above paras. **Error! Reference source not found. - Error! Reference source not found..**

upon Prosecution witnesses and to coach Defence witnesses -- that, was relevant to the credibility of improperly pressured witnesses,⁴⁹⁹ or to draw appropriate inferences as to Ngudjolo's conduct and state of mind.⁵⁰⁰

226. And fourth, by denying the Prosecution access to (and use of) the full Registry reports, the Chamber was denied the full information as to potential fabrication of evidence, including which witnesses were coached and the particulars of their orchestrated testimony. This evidence, excluded from the record, was essential to an accurate factual determination, and its absence makes it impossible to rely on the verdict with confidence.

F. RELIEF SOUGHT

227. As demonstrated above, the Trial Chamber made significant legal, factual and procedural errors vitiating the Decision. The Prosecution further submits that, in relation to the Ngudjolo's position of authority, the only reasonable conclusion based on the evidence and factual findings described above is that Ngudjolo was

⁴⁹⁹ See in this regard Recommendation No R (97) 13, prepared by the Committee of Experts on Intimidation of Witnesses and the Rights of the Defence, para.53: "The genuineness and reliability of statements made by intimidated witnesses may be seriously questioned. Therefore, the impact of the intimidation on their statements should also be taken into consideration by criminal procedural law; it should be permissible for judicial authorities not to rely at all or not take into account parts of the statements made by such witnesses."

⁵⁰⁰ False exculpatory statements or attempts to influence the testimony of a witness may exhibit a consciousness of guilt - which has been deemed as circumstantial evidence in some jurisdictions, see, e.g., *United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir.1992) and *United States v. Macklin*, 927 F.2d 1272, 1279 (2d Cir.), cert. denied, 502 U.S. 847, 112 S.Ct. 146, 116 L.Ed.2d 112 (1991). This is particular relevant in this case because the Trial Chamber found that Mr Ngudjolo's testimony was not to be believed on certain aspects of this testimony: (a) denying he ever met P-317 or made the admission to her regarding Bogoro and Mandro (paras.290,470, 497); (b) claiming he falsely admitted leading the operation in Bunia to the military tribunal (paras.455-6); (c) claiming that he only became a senior military person by chance; and his military activities only began on 6 March 2003 (paras.94,97); (d) claiming that on 24 February 2003 he was at Kambutso health centre all day delivering a baby (para.95); (e) claiming that Lendu from Bedu-Ezekere did not participate in the Bogoro (para.92) and that Bogoro presented no strategic interest to the Bedu-Ezekere Lendu (para.91); (f) claiming that in Bedu-Ezekere there was only a self-defence group and no military combatants per se, no permanent military positions, and no commanders (para.93).

the leader of the Lendu combatants of the Bedu-Ezekere *groupement* who attacked Bogoro on 24 February 2003.

228. Article 83(2) provides that the Appeals Chamber may “reverse or amend the decision ... or ... order a new trial before a different Trial Chamber”.

229. When amending the decision, the Appeals Chamber may enter findings of law or of fact, applying the appropriate standard of review.⁵⁰¹ The Appeals Chamber confirmed its fact-finding powers,⁵⁰² consistent with Article 83(1), which states that “the Appeals Chamber shall have all the powers of the Trial Chamber”.

230. To remand a case for re-trial is a discretionary decision of the Appeal Chamber, for which the circumstances of the case as well as the interests of justice should be taken into consideration.⁵⁰³ The Appeals Chamber may also remand the case for a partial re-trial,⁵⁰⁴ in relation to which the Appeals Chamber has the power to determine the scope.⁵⁰⁵

231. In relation to the First Ground of Appeal, the Prosecution requests the Appeals Chamber, pursuant to Article 83, to:

- a) find that the Trial Chamber incorrectly applied the standard of proof under Article 66(3) to establish the facts of the case;
- b) reverse the Judgment;

⁵⁰¹C. Staker, “Proceedings on appeal” in O. Triffterer, Commentary on The Rome Statute of the ICC, Second Edition, p. 1483.

⁵⁰²ICC-02/05-01/09-73 OA, para.42; ICC-01/04-01/07-522 OA3, DissOp Judge Pikis, para.2.

⁵⁰³*Prosecutor v. Blaskic*, IT-95-14-A, Decision on Evidence, 31 October 2003, para. 6; *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Appeal Judgement, para.148; *Prosecutor v. Jelisić*, IT-95-10-A, Appeal Judgement, 5 July 2001, para.77.

⁵⁰⁴*Prosecutor v. Delalic et al.*, IT-96-21-Abis, Appeals Judgment, 8 April 2003, para.17; *Prosecutor v. Haradinaj et al.*, IT-04-84bis-A, Appeals Judgment, 29 November 2012.

⁵⁰⁵*Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Appeal Judgement, para.12.

- c) find that no reasonable trier of fact could, on the basis of the evidence before the Chamber, have concluded that Ngudjolo was not the leader of the Lendu combatants of the Bedu-Ezekere *groupement* who attacked Bogoro on 24 February 2003, apply the correct standard of proof and enter a factual finding that Ngudjolo was the leader of the Lendu combatants of the Bedu-Ezekere *groupement* who attacked Bogoro on 24 February 2003; and
- d) remand the case for a re-trial before a different Trial Chamber in order for it to enter the necessary factual and legal findings on the charges other than Ngudjolo's position of authority or, if the Appeals Chamber rejects the Prosecution's request for a factual finding, on all elements of the charges. The Prosecution further requests that the Appeals Chamber instruct the new Trial Chamber to make full use for the purposes of the re-trial of the existing record, including by resorting to Rule 68 and Rule 69, where appropriate.

232. In relation to the Second Ground of Appeal, the Prosecution requests the Appeals Chamber, pursuant to Article 83, to:

- a) find that the Trial Chamber erred by failing to take into consideration the totality of the evidence and its own factual findings during the three stages of decision-making;
- b) reverse the Judgment;
- c) find that on the basis of the totality of the evidence and bearing in mind the Chamber's factual findings, no reasonable trier of fact could have concluded that Ngudjolo was not the leader of the Lendu combatants of the Bedu-Ezekere *groupement* who attacked Bogoro on 24 February 2003, take into consideration the totality of the evidence referred to in the Prosecution's Document in Support of the Appeal and all the factual findings of the Trial Chamber, and enter a factual finding that Ngudjolo was the leader of the

Lendu combatants of the Bedu-Ezekere *groupement* who attacked Bogoro on 24 February 2003;

- d) remand the case for a re-trial before a different Trial Chamber in order for it to enter the necessary factual and legal findings on the charges other than Ngudjolo's position of authority or, if the Appeals Chamber rejects the Prosecution's request for a factual finding, on all elements of the charges, with the same instruction as to the modalities of the re-trial requested above.

233. In relation to the Third Ground of Appeal, the Prosecution requests the Appeals Chamber, pursuant to Article 83, to:

- a) find that the Trial Chamber infringed on the Prosecution's right to a fair trial under Article 64(2);
- b) reverse the Judgment;
- c) instruct the Registrar to provide the Prosecution with full access to all unredacted transcripts of Ngudjolo's monitored and non-privileged conversations from the detention centre that were the subject of the Registrar's reports referred to under the Third Ground of Appeal (Section 3) together with the related list of contacts of persons with whom Ngudjolo wished to communicate from the detention centre; and
- d) if the Appeals Chamber has allowed the First and or Second Ground of Appeal, and accepted the request for a factual finding, remand the case for a re-trial before a different Trial Chamber in order for it to enter the necessary factual and legal findings on the charges other than Ngudjolo's position of authority, with the instruction that the Trial Chamber make full use of the existing record, including by resorting to Rule 68 and Rule 69, where appropriate. Or, if neither the First and Second Ground have been allowed or the request for a factual finding made therein has not been accepted, to

remand for a re-trial on all elements of the charges, with the same instruction as to the modalities of the re-trial requested above.



Fatou Bensouda
Prosecutor

Dated this 15th day of October 2014

At The Hague, The Netherlands