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Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

**Public
With Confidential Annexes A, B, C, D and E**

**Public redacted version of “Defence Reply to the Prosecution’s Response to the Defence
Closing Brief” dated 1 August 2018, ICC-01/04-02/06-2307**

Source: Defence Team of Mr Bosco Ntaganda

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon

Me Christopher Gosnell

Me Chloé Grandon

Me Marlene Yahya Haage

Mlle Margaux Portier

Me Didace Nyirinkwaya

Mlle Sandrine De Sena

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants (Participation /
Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

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INTRODUCTION

1. The Prosecution Response is but more of the same. Once again, the Prosecution tells its version of the events, relying repeatedly on a few main allegations that do not represent the reality of the situation at the time. The truth of the matter as highlighted in this Reply is that these allegations are unsupported by the evidence, untrue and once they are removed from the equation, the Prosecution's theory crumbles.
2. Mr NTAGANDA never denied being a high level Commander; holding a senior position in the FPLC; being involved in the training of recruits who became FPLC members; and having developed with others the FPLC ideology. Mr NTAGANDA believed that it was necessary to protect the civilian population -- that was threatened and targeted by LOMPONDO's APC and Lendu combatants -- to organise "all those able and willing"¹ into a military structure for self-defence purposes.
3. Mr NTAGANDA testified for more than one hundred and twenty hours, including more than sixty hours of cross-examination. Mr NTAGANDA candidly provided detailed, plausible and reliable evidence and calmly responded to all questions put to him, often giving concrete examples of the situation at the time. Contrary to the Prosecution's assertion, Mr NTAGANDA's testimony is firmly corroborated by many sources of evidence, including Prosecution witnesses.
4. Although the Prosecution Response addresses challenges to the credibility of insider and other witnesses, the arguments raised are unpersuasive and fail to address the majority of the Defence submissions. The Prosecution thus implicitly acknowledges the lack of credibility of many of its witnesses and the unreliability of the evidence they provided.
5. The evidential issues concerning proof of Counts 6,9,14,15 and 16 go to the heart of the ICC's integrity as a judicial institution in respect of the meaning of proof beyond a reasonable doubt, the Court's commitment to pursue Prosecution witnesses for offences against the administration of justice with equal vigour as such offences by Defence

¹ DCB,para.569.

witnesses, the treatment of anonymous evidence, non-disclosure of exculpatory information, and the Prosecution's failure to adduce corroborating evidence.

6. The UPC-RP called upon the FPLC to protect the civilian population from all ethnic groups but only after taking numerous measures to ensure that the FPLC would be a law-abiding and disciplined military force. Neither the UPC-RP nor the FPLC adopted a policy to target civilians; did not discriminate against non-Hema civilians and did not devise any common plan to expel non-Hema civilians from Ituri. The Prosecution's omission to address Part III of the DCB in its response is revealing.
7. Mr NTAGANDA does not incur any criminal liability in relation to either of the charges.

PART I – LEGAL ISSUES

CHAPTER I – UNCHARGED CRIMINAL ACTS

8. The Prosecution argues that the crimes in Counts 1-5, 7-8, 10-13, and 17-18 are charged with sufficient particularity because of the geographic and temporal limitations of the First Attack and the Second Attack alone, without regard to any more specific description of the events in the UDCC.² The Prosecution also asserts that specific acts within the broad temporal and geographic scope of the two attacks can be communicated through "the List of Evidence and the 1200-page IDAC."³ Indeed, the Prosecution even attempts to claim that the "charged acts" were carried out "during the entire period of each charge"⁴ – as if to say that murder was being committed continuously everywhere and that this is a sufficient manner of charging crimes.
9. This would mean that any and all instances of those crimes within those broad geographic and temporal parameters is properly charged, subject only to subsequent notification of where and when through such unhelpful and non-judicially controlled documents as the "IDAC."

² Response, para. 10.

³ Response, para. 14.

⁴ Response, para. 10.

10. This does not comply with the Statute. Article 61(7) of the ICC Statute prescribes that a person is committed for trial only on “the charges as confirmed.”⁵ Regulation 52(b) of the RoC requires that the UDCC set out “the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial.” Sufficient detail must be provided, accordingly, of where and when a criminal act took place. Mr NTAGANDA could not properly be committed for trial for murder, rape, pillage and other crimes defined no more specifically than that crimes occurred during a period totalling 29 days (or more), a vaguely-defined area consisting of at least 153 square kilometres (or more).⁶
11. Counts 6, 9, 14, 15 and 16 are even less defined, spanning a period of 17 months with no geographic limitation. Counts 6 (rape) and 9 (sexual enslavement) refer to crimes that are constituted by relatively discrete events that are not inherently “continuous” as the Prosecution tries to argue.⁷ Accordingly, the charges that are properly conveyed through the UDCC are only those for which there is some kind of description on which Mr NTAGANDA could have been properly committed for trial.⁸
12. The structure of the NTAGANDA UDCC is similar to the structure of the *Bemba* UDCC.⁹ Paragraphs 63 to 91 of the UDCC in this case set out specific instances of murder, rape within the geographic and temporal scope of the two attacks.¹⁰ Only when the counts, which are really no more than “crimes,” are read in conjunction with these more specific instances can there be said to be a discernible charge.¹¹ To find otherwise would circumvent the function of the confirmation process under Article 61, and the corollary requirement that a person is committed for trial only on the judicially-

⁵ ICC Statute, Art. 61(7)(a).

⁶ The total geographic area encompassed by the First and Second Attacks is hard to assess given the absence of specificity in the UDCC. However, the UDCC (footnote 45) says that the area is a “15 kilometre radius” (i.e. 47 square kilometres) around a list of villages which are themselves spread out in a rough triangle encompassing an area of at least 25 square kilometres. The area of the First Attack extends from Pluto to Kilo, which is a distance of about 27 kilometres. **P-0800**:T-68,15:9-12; **P-0894**:T-104,6:22-24; **a/30365/15**:T-202,20:21-22. If the area of potential crimes between Pluto and Kilo is 3 kilometres wide, then the total geographic area defined by the First Attack is at least 81 square kilometres. Assuming that the Prosecution considers that the area “in and around” the geographic corridor within which crimes are charged between Pluto and Kilo is 3 kilometres wide, then the geographic scope of the first attack is 81 square kilometres. The total area encompassed by the two attacks is, accordingly, at least 153 square kilometres. Meanwhile, the crimes alleged in Counts 6, 9, 14, 15 and 16 have no geographic limitation whatsoever, and are alleged to have occurred over a period of more than a year.

⁷ Response, para. 13.

⁸ [Bemba AJ](#), para. 104.

⁹ [Bemba AJ](#), para. 111.

¹⁰ [Bemba AJ](#), para. 107.

¹¹ [Bemba AJ](#), para. 112.

controlled and approved charges in the UDCC. Post-charge auxiliary documents promulgated without judicial control, such as lists of evidence or the “IDAC,” may provide further details (such as the precise name of a victim or perpetrator)¹² about an existing charge; what is not permissible, however, is for a person to be tried, let alone convicted, of criminal acts that have not been charged. Remedial notice of additional criminal charges through auxiliary documents¹³ is not possible.¹⁴

13. The purported criminal acts, as discussed below, that find no reflection in the UDCC include specific acts by Mr NTAGANDA himself, which requires the highest level of clarity and specificity.¹⁵ Other criminal acts, though not alleged to have been committed by Mr NTAGANDA, are very specific in circumstance, but find no reflection in the UDCC. There is nothing in the nature of alleged rape and sexual enslavement of child soldiers, contrary to the Prosecution’s unsupported submissions,¹⁶ that militates in favour of lesser stringency in respect of the specificity of pleading.¹⁷
14. The following table compares specific criminal acts within the scope of the two attacks for which the Prosecution seeks a conviction where there is no counterpart charge in the UDCC:

Place and/or time	DCB	PCB	UDCC	Deficiency
Pluto	618	Killings as “soon as NTAGANDA’s troops arrived”; “these people were all slaughtered”; anyone caught was “killed”; young Lendu man decapitated (333-335).	Count 1: “Murder and attempted murder” “in or around Mongbwalu, Pluto” with a cross-reference to para. 63: “The UPC/FPLC intentionally targeted the non-Hema civilian population during an attack between on or about 20 November 2002 and on or about 6 December 2002 on various locations in Mongbwalu and Banyali-Kilo collectivité, including Pluto, Nzebi, Mongbwalu, Sayo and Kilo. The	UDCC does not expressly allege that any killing took place in Pluto, how many were killed, who was killed, how (or under what circumstances), or when, other than it was within the 16-plus days spanning the “First Attack”;

¹² [Lubanga AJ](#), para.124.

¹³ Response, para.14.

¹⁴ [Bemba AJ](#), para.98 (“the Prosecutor’s arguments in response are, to a large extent, based on the assumption that notice to the accused is relevant to the determination of whether a criminal act falls within the scope of the charges.”)

¹⁵ [Lubanga AJ](#), para.122.

¹⁶ Response, para.13.

¹⁷ DCB, para.1541.

			UPC/FPLC killed <u>at least 28 non-Hema civilians during this attack.</u>	number of victims (28) not so great as to excuse lack of specificity.
Mongbwalu and Sayo, anti-personnel mines	653	“After the attack, NTAGANDA ordered that <u>anti-personnel landmines</u> be placed around Mongbwalu. These mines killed and wounded many civilians” (342)	“After taking over Mongbwalu and Sayo, the UPC/FPLC went door-to-door to identify Lendu and other non-Hema. A building in Bosco NTAGANDA’s compound in Mongbwalu was used as a prison. Some prisoners were questioned before being executed.” (70-71)	No charge of murder is based on placement of anti-personnel landmines, or when, where or who was killed.
Mongbwalu and Sayo, other post-attack killings	653	“Lendu woman, accused of being a chieftain” (361)		No charge of murder corresponds to this event.
During attack on Sayo	656	“49 bodies of civilians that the UPC had left in the streets” including of “[REDACTED]” (364)	“On or about 23 November 2002 the UPC/FPLC took Sayo and killed many civilians, including men, women and children. Civilians sought refuge in Sayo church and were killed, including in Bosco NTAGANDA’s presence. At Nzebi, Bosco NTAGANDA ordered the execution of two civilians.” (69)	No murder at Sayo is charged other than the incident at Sayo church and at Nzebi.
Killings in Sayo “some days” after attack	656	“Some days after the UPC took over Sayo,” NTAGANDA personally kills four individuals, and pierces LUSALA’s eyes with a bayonet (373)	“After taking over [...] Sayo, the UPC/FPLC went door-to-door to identify Lendu and other non-Hema. A building in Bosco NTAGANDA’s compound in Mongbwalu was used as a prison. Some prisoners were questioned before being executed.” (70-71)	No description even slightly resembling these allegations, especially the personal involvement of Mr NTAGANDA.
Killings in Kilo	670	“Many people” required to dig their own graves before being killed (376); two murders, including of a pregnant woman (377); killing disabled man.	“On or about 6 December 2002, the UPC/FPLC attacked Kilo [...] detained, killed and beat prisoners there.”	No description even slightly resembling these events.
Rape in Beba	687	418	“After the takeover of Mongbwalu and Sayo, UPC/FPLC troops committed rape”; the only rapes specified are of alleged prisoners at “NTAGANDA’s camp at Mongbwalu” (72)	The UDCC does not assert that any rape was committed at Beba, or anywhere other than at NTAGANDA’s camp; no specification of

				place, date, identity of victim, or other circumstances corresponding to V-2's testimony are found in the UDCC.
Destroying enemy property in Mongbwalu and Sayo	731,738	404, 406	"... by deliberately targeting them with heavy weapons" (72)	No destruction other than with heavy weapons is charged.
Attack on protected objects around Mongbwalu	751	Referring to the fact that the "church was subsequently destroyed" (412)	The only reference to acts directed against hospitals and churches is "pillage" (72)	UDCC does not charge any acts of destruction other than pillage, which is not an act of destruction.
Murder in Kobu at start of attack	908	Death of two children during the initial attack on Kobu (592)	"On or about 18 February 2003, the UPC/FPLC attacked Kobu, committing murder and burning houses" (80); "Executed the prisoners because of their ethnicity and raped them" (89)	No specificity provided as to identity of victims, number of victims, circumstances in which killed; the absence of description may be contrasted with the description of the banana field massacre, which is charged.
Rape at Lipri and Bambu	939,940	571-572	"In the immediate aftermath of the Lipri attack, UPC/FPLC soldiers captured Lendu women, detained and raped them" (79); "committed rape in or around Lipri, Kobu, Bambu, Sangi and Buli and sexually enslaved women in or around Kobu, Sangi, Buli, Juitchu and Ngabuli" (84)	The UDCC provides no description corresponding to the place names or circumstances of rape in relation to Lipri; the Confirmation Decision refers to a rape on which the Chamber heard no evidence (fn 191); the UDCC provides no

				description of any rape having occurred at Bambu, let alone that corresponding to the events described by P-0863.
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15. None of the crimes in Counts 6 and 9 are defined with any specificity anywhere in the UDCC and these charges should be dismissed outright on that basis. As to Counts 14, 15 and 16, the UDCC names not a single victim; identifies not a single location where Mr NTAGANDA purportedly forcibly abducted anyone or pressured families to enlist their children; and gives only the vaguest description of the timing of various training camps where these crimes were ostensibly committed.

CHAPTER II – NO FORCIBLE TRANSFER PURSUANT TO ARTICLE 7 ARISES BARRING UNLAWFUL TARGETING FOR THAT PURPOSE

16. The Prosecution is correct that the forced character of displacement requires “targeted violence”¹⁸ against those sought to be expelled, rather than just flight from fighting. In *Gotovina*, convictions for forcible transfer by the Trial Chamber were imposed only for villages where unlawful targeting had occurred during military operations, but not for villages during the same operation where unlawful targeting did not take place.¹⁹ This shows the required directness of the connection between unlawful targeting and the reasons for the departure individuals. Furthermore, once the findings on unlawful targeting during the operation were quashed on appeal in *Gotovina*, all convictions for forcible transfer were reversed.²⁰ This demonstrates that foreseeable large-scale population displacement – even in conflicts that take place in a context of ethnic tension – does not constitute forcible transfer unless the population is the object of unlawful attack designed to coerce their departure.

¹⁸ Response, para.16.

¹⁹ [Gotovina TJ](#), paras.1754-1755.

²⁰ [Gotovina AJ](#), paras.96-97.

17. The UPC and FPLC's repeated calls for the return of non-Hema civilians is relevant not because it excuses prior unlawful conduct,²¹ but because it is probative of whether there was an intent to displace in the first place. Those calls, which distinguished between fighters and non-fighters, reinforce that the FPLC had no intention to target or to expel non-fighters.²²

CHAPTER III – ARTICLE 8(2)(E)(VIII) REQUIRES “ORDERING” DISPLACEMENT

18. The wording of Article 8(2)(e)(viii) plainly limits the *actus reus* of the crime to “[o]rdering the displacement.” This requirement is in the Statute. Chambers cannot ignore this language based on their own opinion that the crime is “unduly restricted.”²³
19. The use of the term “ordering” is not a drafting accident. The word conforms with the scope of the war crime as defined in Article 49 of GCIV and Article 85(4)(a) of API as applicable only to “occupied territory.”²⁴ These customary understandings are reflected in Article 8(2)(b)(viii) of the Statute prohibiting “the deportation or transfer of the population of the occupied territory within or outside this territory.” The crime can, accordingly, only be committed once the population is in the hands of the occupying force. The use of the term “ordering” in Article 8(2)(e)(viii) reflects this established understanding that there must be territorial control before the crime can be committed.²⁵ The manifest intention of States as reflected in the clear language of the Statute is to not extend this established understanding.

CHAPTER IV – APPROPRIATING PROPERTY FOR MILITARY USE IS A LOWER THRESHOLD THAN MILITARY NECESSITY

20. Pillage does not occur unless the perpetrator intends to put the object to personal use, which is a lower standard than military necessity.²⁶ The Prosecution is incorrect that there is no minimum threshold of seriousness for pillage under Article 8(2)(e)(v).²⁷ As stated by the *Bemba* Confirmation Decision, both Article 1 of the ICC Statute and the

²¹ *Contra* Response, para.19.

²² DCB, para.1002.

²³ CD, para.64.

²⁴ [CIHL](#), p.459; *Krupp* case; [Krnojelac AJ](#), para.220; [Blaškić AJ](#), para.151-152; [Pictet](#), p.306.

²⁵ [Guido Acquaviva](#), p.20 (“deportation and forcible transfer as war crimes may only be committed during a military occupation by an occupying power (in an international armed conflict) or when a party to a non-international conflict controls a portion of territory and displaces protected persons living there”).

²⁶ Response, para.21; DCB, para.758.

²⁷ Response, para.23; DCB, para.965.

reference to “[o]ther serious violations of the laws and customs of war” in the chapeau of Article 8(2)(e) exclude “petty property expropriation.”²⁸

CHAPTER V – ATTACKING PROTECTED OBJECTS REQUIRES PHYSICAL DAMAGE TO THE TARGET

21. The Prosecution’s creative analogies to bring pillage within the definition of an “attack”²⁹ are misplaced. The examples cited all concern actions that do or could cause physical damage of the protected object itself. Theft is not an activity that constitutes an “attack” against a protected object.³⁰

CHAPTER VI - EVIDENCE OF MR NTAGANDA’S ALLEGED CRIMINAL CONDUCT MANY YEARS AFTER OR BEFORE THE EVENTS IS NOT PROBATIVE THAT HE COMMITTED ANY CRIMES HE IS CHARGED WITH

22. The Prosecution’s reference to alleged criminal conduct of Mr NTAGANDA between 2006 and 2013³¹ is misguided and inflammatory. These allegations are unproven and not litigated in this case. Even if they were established, they are so far removed in time from the charges that their only real purpose is to “blacken the character of the Accused and show a propensity and capacity to commit the crimes charged,” which is improper.³² The balance between prejudice and probative value may tip in the other direction if there is some distinctive feature of the uncharged actions of the accused (“*modus operandi*”) that is probative that he is the person who committed the charged event,³³ or because the evidence of uncharged events is proximate in place and time to the charged events.³⁴ Three to ten years after the charged events is not proximate, and not a single precedent cited in the Prosecution Response involves subsequent conduct occurring three to ten years after the period of the charges.
23. The alleged recruitment of individuals for training at Tchakwanzi³⁵ in the year 2000 is also of no probative value in relation to the charges. Even leaving aside that there is

²⁸ [Bemba CD](#), para.317. See [Martić TJ](#), para.103; [Fofana and Kondewa AJ](#), para.162; [Brđanin TJ](#), para.587; [Nikolic, Indictment](#), para.21.1; [Sesay TJ](#), para.210; [ICRC](#), para.777.

²⁹ Response, para.25, second bullet.

³⁰ [Katanga and Chui CD](#), para.269; [Commentary on the Law of the ICC](#), p.75.

³¹ PCB, para.1032; Response, para.27.

³² [Bagosora et al., Decision](#), para.12.

³³ [Kupreskic AJ](#), para.321.

³⁴ [Popovic et al., Decision](#), para.33 (admitting evidence of the role of the accused during an uncharged massacre that occurred within days of other massacres).

³⁵ Response, para.27.

absolutely no credible evidence that Mr NTAGANDA was involved in or knew about the recruitment of anyone under 15 at Tchakwanzi, this recruitment purportedly occurred more than two years prior to the temporal scope of the charges,³⁶ when it was not an international crime. As stated in *Bagosora*, “[t]he accused must be found guilty on the basis of the crimes charged, not on the basis that he committed the offence on prior occasions and, therefore, had a propensity to commit them again.”³⁷

CHAPTER VII – THE PROSECUTION BEARS THE BURDEN OF PROVING WHEN A PERSON “ENROLLED” OR “JOINED” THE FPLC

24. An element of the crime of conscription or enlistment of child soldiers proscribed by Article 8(2)(e)(vii) is that the person has been enlisted. This occurs “at the moment a child under the age of 15 is enrolled into or joins an armed force or group.”³⁸ The Prosecution bears the burden of establishing that this condition is satisfied. In some cases, this will require precision as to the moment of enrolment.
25. Whereas the moment of enlistment may be fairly obvious in respect of national armed forces, this may be much less obvious in respect of armed groups. In *Fofana*, the SCSL Appeals Chamber stated that “enlistment” should be interpreted as “including any conduct accepting the child as a part of the militia.”³⁹ The Prosecution states in its Response that “there is no requirement that the child commences or finishes training or does anything more than simply join the armed group”⁴⁰ – but does not positively assert what “conduct” reflects the acceptance of the child as a part of the FPLC.
26. If the Prosecution’s position is that allowing someone to stand around at Rwampara constitutes “conduct accepting the child as a part of the militia,” then it is wrong in law and in fact. Even if no reliance is placed on D-0080’s and Mr NTAGANDA’s testimony that some of the individuals had already been told that they would not be accepted as part of the FPLC,⁴¹ the mere presence of the individuals at the assembly does not show that they had been accepted as part of the FPLC. LUBANGA’s use of

³⁶ DCB,fn.4324.

³⁷ *Bagosora et al.*, Decision, paras.12,38 (defining six criteria for assessing the admissibility of “similar fact evidence”). See *Katanga*, ICC-01/04-01/07-T-99-Red-ENG,14:21-15:7;*Kupreskic et al.*, Decision,para.2.

³⁸ *Lubanga TJ*,para.618.

³⁹ *Fofana AJ*,para.144 (underline added).

⁴⁰ Response,para.31.

⁴¹ DCB,para.1305.

the word “soldiers” when asking those assembled to come closer⁴² is an inadequate basis for such an inference. D-0210 and P-0046’s *Histoires Individuelles* confirm that some individuals sought out the training camps, but were not allowed to train.⁴³ Permitting a young person to remain in the area of a training camp, and even to perform domestic chores or other tasks, but without receiving military training, can no more be assumed to have “enlisted” in the armed group than when adult civilian employees perform similar tasks for an armed force.⁴⁴

27. The least that is required to draw an inference from the Rwampara video that anyone present has been accepted in the FPLC is one or more of the physical indications that they have been accepted for military training, and have passed the screening process. Analysing the video for this purpose is not “strained,”⁴⁵ but rather necessary and reasonable.
28. The Prosecution’s assertion that there is a person “barely able to hoist his weapon into the back of NTAGANDA’s pick-up”⁴⁶ is specious. A person of relatively small stature at 37:43 carefully places, with his/her left hand, a SMG into the back of the white pick-up truck (which is not Mr NTAGANDA’s, incidentally).⁴⁷ The person appears to do so without any difficulty whatsoever.⁴⁸ The Prosecution’s speculative characterisation of this person’s strength illustrates its broader tendency to rely on speculative inferences rather than evidence.

CHAPTER VIII – ATTACKS UNDER ARTICLE 8(2)(E)(I) MUST BE PERPETRATED DURING AN ATTACK

29. The Prosecution cites no authority for its claim that an attack against the civilian population or civilians not taking direct part in hostilities may be committed “after they fall under the control of the armed group.”⁴⁹ The *Katanga* Trial Judgment affirms the

⁴² *Contra* Response, para.33.

⁴³ DCB, paras.1307,1506.

⁴⁴ Solis, pp.212-213 (referring to the various roles of civilian employees of armed forces).

⁴⁵ Response, para.34.

⁴⁶ Response, para.34.

⁴⁷ D-0300:T-220,47:22-48:3 (“We had a pickup, a four-wheel drive red in colour”).

⁴⁸ [DRC-OTP-0120-0293](#), 00:37:41.

⁴⁹ Response, para.40.

contrary,⁵⁰ and all the deaths on which it relied to sustain its findings were based on killings while operations were ongoing, including killing villagers as they fled.⁵¹

CHAPTER IX – THE PROSECUTION’S ATTEMPT TO LOWER “THE ORDINARY COURSE OF EVENTS” STANDARD TO MERE FORESEEABILITY IS ERRONEOUS

30. Article 30(2)(b) states that “a person has intent” in relation to conduct when “that person means to engage in the conduct” and in relation to consequence where “that persons means to cause that consequence or is aware that it will occur in the ordinary course of events.” The consistent jurisprudence of the ICC has been that this language means that the occurrence must be a “virtual certainty” and has often relied on the well-established concept of “*dolus directus* in the second degree” to explain the foundations and meaning of this level of certainty.

31. The *Lubanga* Appeals Chamber explained:

The verb ‘occur’ is used with the modal verb ‘will’, and not with ‘may’ or ‘could’. Therefore, this phrase conveys, as does the French version, certainty about the future occurrence. However, absolute certainty about a future occurrence can never exist; therefore the Appeals Chamber considers that the standard for the foreseeability of events is *virtual* certainty. That absolute certainty is not required is reinforced by the inclusion in article 30 (2) (b) and (3) of the Statute of the phrase “in the ordinary course of events.”⁵²

32. The *Katanga* Trial Judgment, explained that it must be “nigh on impossible” for the accused “to envisage that the consequence will not occur.”⁵³ The *Bemba et al.* Trial Chamber “agrees with previous rulings interpreting the words ‘will occur in the ordinary course of events’ as requiring ‘virtual certainty’.”⁵⁴

33. The confirmation decisions in both this case and the *Bemba* case use the expression “*dolus directus* in the second degree” as defining the *mens rea* threshold of intent required by the wording of Article 30(2)(b).⁵⁵ In *Ruto*, the PTC held that “[t]o the

⁵⁰ [Katanga TJ](#), para.799.

⁵¹ See e.g. [Katanga TJ](#), paras.810,814,816,817,875.

⁵² [Lubanga AJ](#), para.447.

⁵³ [Katanga TJ](#), para.776-777.

⁵⁴ [Bemba et al. TJ](#), para.29.

⁵⁵ [CD](#), fn.625; [Bemba CD](#), para.360.

extent that the Amended DCC may appear to rely on *dolus eventualis* to establish individual criminal responsibility, such reliance is unfounded based on article 30.”⁵⁶

34. The Prosecution criticises these references to “*dolus directus*” and “*dolus eventualis*”, asserting that this Chamber should instead be more “assist[ed]” by the ICTY’s interpretation of *dolus eventualis* in interpreting the phrase “will occur in the ordinary course of events.”⁵⁷
35. The Prosecution’s submissions are erroneous. The “*dolus eventualis*” standard has been applied at the ICTY only in the context of the controversial and judicially-created “JCE III” mode of liability, allowing a conviction where: “(i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.”⁵⁸ This is the international criminal law equivalent of “felony-murder” statutes in some countries, where mere foreseeability of murder can give rise to liability when a different violent crime is undertaken with direct intent.
36. The JCE III standard of “might” is manifestly lower than Article 30(2)(b)’s “will.” This is the clear textual difference between the standard prescribed in Article 30(2)(b) and the standard applicable for JCE III. ICTY jurisprudence and illustrative caselaw is helpful not because it shows how Article 30(2)(b) should be interpreted, but how it should not be interpreted.⁵⁹
37. The position advocated by the OTP in this case is also contrary to its own position in previous cases, including whether or not the terminology of “*dolus directus*” is helpful.⁶⁰ The OTP recently submitted that: “the Chamber correctly found that the term ‘intentionally’ in the chapeau of article 70(1) refers to the standard *mens rea* enshrined in article 30 – namely, ‘*dolus directus* in the first degree (direct intent) and second degree (oblique intent)’ – which applies ‘unless otherwise provided.’”⁶¹ In *Ongwen*, the Prosecution submitted that it “doesn’t contest the necessity of establishing that Dominic

⁵⁶ [Ruto CD](#), para.336.

⁵⁷ Response, para.247.

⁵⁸ [Tadić AJ](#), para.228(emphasis added).

⁵⁹ [Tadić AJ](#), paras.219-220; [Stakić TJ](#), para.587; [Simić TJ](#), Separate Opinion of Lindholm, para.3; [Brđanin TJ](#), para.265; [Stakić AJ](#), paras.87-89; [Brđanin AJ](#), para.365; [Martić AJ](#), para.68; [Šainović et al. AJ](#), paras.1633-1645.

⁶⁰ [Bemba et al. Decision](#), para.195.

⁶¹ [Bemba et al. Decision](#), para.195(emphasis added).

Ongwen did more than just foresee the possibility of his acts resulting in the commission of crimes. That's, as I understand it, what the Defence means by *dolus eventualis*.⁶²

38. The Prosecution's invitation to abandon the well-established jurisprudence of the ICC, and conflate the *mens rea* standard required by Article 30(2)(b) with JCE III, should be rejected.

PART II - GENERAL SUBMISSIONS ON THE WEIGHT TO BE ATTRIBUTED TO WITNESS TESTIMONY

CHAPTER I – FACTORS RELEVANT TO ASSESSING WITNESS CREDIBILITY

39. This part replies to paragraphs 41-44 of the Response and related submissions in the LRVs' Responses.
40. The Prosecution's arguments that the Defence relies on the very same Prosecution witnesses that it seeks aggressively to discredit without explaining this inherent contradiction is misguided and without foundation. Indeed, the Prosecution has recognized that a Trial Chamber can reasonably accept parts of a witness's testimony and reject others⁶³ and detailed arguments have been provided in respect of all relevant witnesses challenged.⁶⁴
41. When assessing the credibility of witnesses, a Trial Chamber has to consider relevant factors on a case-by-case basis, including the witness's demeanour in court; his role in the events in question; the plausibility and clarity of his testimony; whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence; any prior example of false testimony; any motivation to lie; and the witness's responses during cross-examination.⁶⁵

⁶² Ongwen, [ICC-02/04-01/15-T-23-Red-ENG](#), 56:22-24.

⁶³ [Ndahimana AJ](#), para.183; Response, para.28.

⁶⁴ DCB paras.254-449; 1165-1282.

⁶⁵ [Popovic AJ](#), para.132; [Nzabonimana AJ](#), para.45.

42. Other potential factors relevant to the Trial Chamber's assessment of a witness's credibility include corroboration,⁶⁶ the witness's close personal relationship to an accused,⁶⁷ and the witness's criminal history.⁶⁸
43. Without citing any authority, the Prosecution erroneously argues that the Defence's suggestion that Rule 74 assurances diminish the reliability of a witness's account is legally incorrect and that Rule 74 assurances are not a guarantee of non-prosecution for any alleged crimes or offences. Whenever assurances were provided to a witness, the Chamber stated: "[t]he Prosecution has further assured that they will not, themselves, use this information to prosecute you before the ICC provided that you tell the truth. Do you understand all this? THE WITNESS: Yes, I do."⁶⁹ When a witness did not understand, such as unreliable witness P-0055, the Chamber clarified the issue as follows:

In my understanding, it means that if you will testify and the testimony also will describe something that could normally lead to prosecution of your person, that you describe that you, for example, participated in some that could be qualified as a crime, so you should be worrying to say that, but because you have been given this assurance, you can freely speak about that because there is no possibility, we are giving you this assurance, no possibility to prosecute for anything you will be saying here. Do you understand? So your testimony can't be basis for any further prosecution of your person [...], to allow them speak freely about the event and to give to the Chamber full picture of the events.⁷⁰

44. The fact that a witness testified with the benefit of such assurances is necessarily a factor to be considered when assessing his testimony as a whole. This is even more so when a witness, as a result of the implementation of in-court protective measures, knows that no one other than the persons present and/or involved from the ICC are aware of his identity and the fact that he is a witness in front of the ICC. This is supported by a recent UNODC manual which refers to the risk that protective measures unwittingly become an incentive for witnesses to give false testimony that they believe the police or prosecution wants or needs.⁷¹ Even the authority cited by the Prosecution acknowledges that "[i]ndeed, when assessing the probative value of the testimony of a

⁶⁶ [Nchamihigo AJ](#), para.47.

⁶⁷ [Nizeyimana AJ](#), para.47.

⁶⁸ [Nizeyimana AJ](#), para.47.

⁶⁹ See *inter alia* **P-0768**:T-33,27:2-5.

⁷⁰ **P-0055**:T-70,21:18-22:3.

⁷¹ [Good Practices for the Protection of Witnesses](#), p.45.

protected witness, the Trial Chamber may take into consideration his status as protected witness”.⁷²

45. A Trial Chamber may also take into consideration the fact that a witness was relocated and admitted into the ICCPP. This is especially the case when a witness, [REDACTED], is aggressively seeking the benefit of additional protective measures and even conditioning his testimony to the granting of such measures.⁷³
46. As for the Prosecution’s assertion that “statement of limited use”,⁷⁴ such as that signed by [REDACTED], [REDACTED], [REDACTED] and [REDACTED] does not provide a guarantee that they will not be prosecuted, as provided therein is incorrect: “2. *Le Procureur n'utilisera contre [REDACTED] aucune déclaration écrite ou orale qu'[REDACTED] fera suite au présent accord [...]*”.⁷⁵
47. What is more, when weighing the probative value of evidence provided by accomplice witnesses, the Trial Chamber is bound to carefully consider the totality of the circumstances in which it was tendered. In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie. Factors particularly relevant for the assessment of accomplice witness’s credibility include: the extent to which discrepancies in the testimony were explained and whether the witness may have any other reason for holding a grudge against the accused.⁷⁶
48. Regarding the role of a witness in the events, indications of improper influence, coaching and/or collusion amongst witnesses are also significant factors to be considered in assessing their credibility and the probative value to attach to their evidence.⁷⁷
49. As for the plausibility of the evidence provided by witnesses, it is certainly one of the most important factors to be considered by a Trial Chamber when assessing the weight which can be attributed to witness testimony. Indeed:

⁷² [Musema AJ](#), para.71.

⁷³ [REDACTED].

⁷⁴ Response, para.44.

⁷⁵ [REDACTED].

⁷⁶ [Popovic AJ](#), para.134; [Bizimungu and al. AJ](#), para.63; [Nchamihigo AJ](#), para.47.

⁷⁷ See DCB, Part V, Chapt.II, Section I, paras.850-898.

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth [...] In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.⁷⁸

50. Lastly, the Prosecution's submission that "the Chamber ordered that all witnesses can review prior statements before testimony; the time for review depends on the volume of materials"⁷⁹ deserves comment. Indeed, pursuant to the *Witness preparation protocol*⁸⁰ no limits whatsoever were imposed on the Prosecution for the preparation of its witnesses, which in many cases lasted for weeks. Prosecution witnesses had the opportunity to read in full their prior statements and all material related to their testimony and to discuss the same with the Prosecution immediately before the beginning of their testimony. In these circumstances, the Trial Chamber is bound when assessing the probative value of the witnesses' evidence to take into consideration the demeanour of the witnesses and their reactions concerning their recollection of events and the contents of their prior-statements.

CONCLUSION

51. As set out in detail in the DCB, no offence to the Prosecution or the LRVs, numerous Prosecution witnesses and victim witnesses who appeared before the Chamber provided false evidence, lied and fabricated evidence. Various motives led these witnesses to do so. The burden now rests on the Chamber to assess which parts, if any, of their evidence is sufficiently reliable and deserving of probative value. That said, two conclusions are inescapable. First, when a witness is caught lying, even if in respect of only one issue, his entire testimony must be assessed with the greatest of caution. Second, when a witness is caught lying, in relation to or by fabricating incriminating evidence, all of the incriminating evidence provided by the witness must be disregarded.

⁷⁸ [Faryna](#), para.11.

⁷⁹ Response, para.44.

⁸⁰ Decision on witness preparation, [ICC-01/04-02/06-652-Anx.](#)

CHAPTER II - ASSESSING THE CREDIBILITY OF DUAL-STATUS WITNESSES WHO CLAIM THAT THEIR VAFs WERE NOT READ BACK TO THEM

52. Responding to challenges to the credibility of dual-status witnesses and to the reliability of their evidence, the Prosecution repeatedly claims that inconsistencies between the content of these witnesses VAFs and statements and/or testimony should be disregarded when these witnesses claim that the content of their VAFs was not read back to them.⁸¹
53. To support its claim, the Prosecution asserts that: interviews conducted by intermediaries with victim applicants take place “often in the presence of others, at busy, noisy locations, and requiring the use of interpreters”;⁸² 18 of the witnesses who applied to participate in the proceedings were assisted by intermediaries who were not Court staff and who were not supervised;⁸³ the VAF does not include an acknowledgement of read-back;⁸⁴ and VPRS noted that “it cannot make assertions one way or the other as to whether or not the victims’ statements were read back to them before their signature, since VPRS staff was not present during these interviews.”⁸⁵ The Prosecution also mentions that most intermediaries have little or no familiarity with international criminal procedure and recalls issues related to the training of intermediaries raised by VPRS.⁸⁶
54. The Prosecution’s claim is inapposite.
55. First, the Prosecution fails to take into consideration that the instinctive reaction of any person prior to signing an important document is to know its content and purpose. Second, it is an established VPRS policy and practice that the content of the application form is read back to the applicant and that, only when the applicant has acknowledged the content, the application form is signed.⁸⁷ It is indeed standard procedure for VPRS staff directly assisting victims in the completion of VAFs to read back their content to applicants before signature⁸⁸ and VPRS has no reason to believe that VPRS staff

⁸¹ PCB,para.75.

⁸² PCB,para.75.

⁸³ PCB,para.76.

⁸⁴ PCB,para.77.

⁸⁵ PCB,para.77.

⁸⁶ PCB,paras.78-79.

⁸⁷ [DRC-D18-0001-5887](#),p.5888.

⁸⁸ [DRC-D18-0001-6742](#),p.6743.

members would not do so.⁸⁹ Third, VPRS confirmed having disseminated guidelines and dispensed training on its established policy and practice not only to VPRS staff but to all civil society actors involved in the completion of VAFs, including well organized NGOs such as [REDACTED] and other independent intermediaries.⁹⁰ Indeed, VPRS confirmed having applied a uniform approach in its interactions with all civil society actors, organizations and other potential intermediaries throughout. For example, [REDACTED] representatives who attended VPRS training received the same guidance and information as any other intermediary. Fourth, VPRS did not issue any guidelines to intermediaries other than the general guidance and information conveyed through the trainings.⁹¹ Fifth, reading back the statement to victims for their acknowledgement is a core facet of the basic training dispensed by VPRS.⁹²

56. In these circumstances – taking into consideration the views of VPRS that it cannot make assertions as to whether or not VAFs were read back to applicants before signature when they were not present – there can be no doubt that reading back VAFs to applicants before signature is the norm and that not reading the form before signature is entirely exceptional.
57. Indeed, the stance taken by the Prosecution essentially amounts to affirming that the majority of intermediaries failed to understand the guidelines issued, ignored a core facet of their training and did not discharge their duties properly, is condescending.
58. The Prosecution’s claim also too easily and conveniently opens the door to unreliable victim applicants to justify inconsistencies between assertions made in their VAFs and their statements or testimony by claiming that their VAFs were not read back to them, to the detriment of the search for the truth.
59. Consequently, the issue is not whether there is indication that the VAF was read back to a witness but whether the circumstances allow for the possibility that the VAF was not read back contrary to established procedure and training. Such assessment must be made on a case-by-case basis taking into account: the nature of the assertions noted in the VAF; the inconsistencies between these assertions and the statements and/or

⁸⁹ [DRC-D18-0001-6742](#),p.6743.

⁹⁰ [DRC-D18-0001-6742](#),p.6747.

⁹¹ [DRC-D18-0001-6742](#),p.6744.

⁹² [DRC-OTP-2107-1936](#),p.1937,fn.2.

testimony of the witness; and the circumstances in which the VAF was completed, based on the evidence.

PART III – SUBMISSIONS RELATED TO THE FIRST ATTACK AS CHARGED

CHAPTER I – WITNESS EVIDENCE

Section I – P-0768

60. The Prosecution's response fails to even scratch the surface of the false and fabricated evidence provided by P-0768. The Prosecution's omission to address DCB submissions challenging the credibility of P-0768 in relation to: murder of civilians in Mongbwalu;⁹³ [REDACTED];⁹⁴ transport of pillaged goods;⁹⁵ age of FPLC soldiers;⁹⁶ logbook messages;⁹⁷ disciplinary measures;⁹⁸ meetings in [REDACTED];⁹⁹ [REDACTED] and [REDACTED],¹⁰⁰ reveals that the evidence does not support the Prosecution's contentions.

A. P-0768 [REDACTED]

61. The Defence clearly put its case to P-0768 that he [REDACTED].¹⁰¹ P-0768 plainly provided inconsistent and contradictory evidence regarding the road he allegedly took to get to Mongbwalu,¹⁰² and it is incorrect to say that he was unfairly cross-examined on this point.¹⁰³ The Prosecution ignores that the map used in cross-examination is the very same map shown to him during many days in [REDACTED].¹⁰⁴ When P-0768 was given an opportunity to confirm that his point of departure was actually not on the map, P-0768 erroneously insisted that the '[REDACTED]' he indicated on the map is where he began his journey.¹⁰⁵

⁹³ DCB, paras. 260-263.

⁹⁴ DCB, paras. 282-283.

⁹⁵ DCB, para. 293.

⁹⁶ DCB, paras. 269-271, 295-296; **P-0768**:T-34,47:7-24; [DRC-OTP-0120-0293](#), 00:06:57; **D-0251**:T-260,18:9;19:19-20:5;T-260,8:3; T-260,96:14-15; **D-0017**:T-253,33:23-34:03;T-253,67:25.

⁹⁷ DCB, paras. 286-289.

⁹⁸ DCB, paras. 289-292.

⁹⁹ DCB, paras. 272-273.

¹⁰⁰ DCB, paras. 284-285, 297; [DRC-OTP-2058-0669](#); [DRC-OTP-2058-0671](#); [DRC-OTP-2058-0673](#).

¹⁰¹ **P-0768**:T-35,43:7-44:8.

¹⁰² DCB, para. 274.

¹⁰³ Response, para. 46.

¹⁰⁴ **P-0768**:T-35,32:13-18.

¹⁰⁵ **P-0768**:T-36,8:1-16.

62. The Prosecution does not dispute that P-0768 [REDACTED] who confirmed arriving on the day [REDACTED],¹⁰⁶ and that it took him a week to reach Mongbwalu.¹⁰⁷ [REDACTED] on or around [REDACTED], which corroborates [REDACTED]¹⁰⁸ which is the determining issue.¹⁰⁹
63. P-0768's description of the fighting in Mongbwalu over two days is highly relevant. P-0768 is the only witness who asserted that the fighting lasted two days;¹¹⁰ which *a fortiori* contradicts the Prosecution's own theory that the fighting lasted three days;¹¹¹ and other witnesses commonly describe fighting over a minimum of three days.¹¹² More importantly, P-0768's description of the fighting also differs from that provided by other witnesses who confirmed that Mongbwalu was liberated first, followed by Sayo.¹¹³
64. The strategic importance of the [REDACTED] advanced by the Prosecution is irrelevant as the Mongbwalu video does not establish any fighting there on the day Sayo was liberated.¹¹⁴ P-0768 testified that on the day Sayo was liberated, Mr NTAGANDA and SALUMU attacked Sayo village [REDACTED].¹¹⁵ Once again, P-0768 is the only witness to describe any other fighting in the area of Mongbwalu taking place in parallel to the operation launched in Sayo. *A contrario*, other witnesses confirm that on the morning of the operation on Sayo, the APC and Lendu combatants had either fled or retreated to Sayo.¹¹⁶
65. P-0768 accepted that [REDACTED]. [REDACTED],¹¹⁷ which took place on the day following the liberation of Sayo¹¹⁸ but before the arrival of KISEMBO the next day.

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ DCB, paras. 278-281.

¹¹⁰ DCB, para. 279.

¹¹¹ PCB, para. 243.

¹¹² P-0017:T-59,75:3-5; P-0886:T-36,70:18; P-0800:T-68,21:18-21; P-0898:T-154,14:5-10.

¹¹³ P-0017:T-58,66:2-67:1; P-0886:T-36,70:17-71:13.

¹¹⁴ [DRC-OTP-2058-0251](#).

¹¹⁵ P-0768:T-33,37:17-20.

¹¹⁶ P-0017:T-61,49:11-51:13; P-0850:T-112,73:18-24.

¹¹⁷ P-0768:T-34,31:24-32:2.

¹¹⁸ [REDACTED].

[REDACTED],¹¹⁹ [REDACTED].¹²⁰ During [REDACTED], Mr NTAGANDA [REDACTED].¹²¹

66. P-0768 conceded that [REDACTED].¹²² P-0768 knew however that [REDACTED]”¹²³ [REDACTED].¹²⁴ P-0768 also knew [REDACTED].¹²⁵ This strongly suggests that P-0768, with a view to bolstering his evidence that [REDACTED], fabricated his evidence about [REDACTED], which never happened.
67. Notably, the Prosecution omitted entirely to address P-0768’s evidence that he [REDACTED] to Mongbwalu, which is plainly false. P-0768 did not have a Thuraya;¹²⁶ Mr NTAGANDA’s *phonie* was not operational until 19 November 2002¹²⁷ and there is no trace of [REDACTED]. The Prosecution also ignores that [REDACTED].¹²⁸
68. Significantly, the Prosecution also fails to address P-0768’s evidence where he confirmed having no knowledge of [REDACTED]¹²⁹ - as recorded in the [REDACTED]¹³⁰ - which demonstrates that [REDACTED].¹³¹
69. Lastly, the Prosecution did not address the fact that on the Mongbwalu video, [REDACTED]¹³² which corroborates Mr NTAGANDA’s testimony that P-0768 [REDACTED]¹³³ and was [REDACTED].¹³⁴

¹¹⁹ [DRC-OTP-2058-0251](#).

¹²⁰ **P-0768**:T-33,40:22.

¹²¹ [REDACTED].

¹²² **P-0768**:T-33,37:17-20.

¹²³ **P-0768**:T-33,41:2-4.

¹²⁴ **P-0768**:T-33,40:22-41:4.

¹²⁵ **P-0768**: T-33,41:2-4;T-35,44:12-25.

¹²⁶ **P-0768**:T-35,21:7-11.

¹²⁷ **D-0300**:T-216,67:1-4.

¹²⁸ [REDACTED].

¹²⁹ **P-0768**:T-35,40:1-8.

¹³⁰ [REDACTED].

¹³¹ DCB,para.278.

¹³² [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

B. P-0768 fabricated his evidence concerning the placing of antipersonnel mines in Mongbwalu

70. The Prosecution's submission¹³⁵ that it is perfectly normal for P-0768 only to have remembered the use of antipersonnel mines during his witness preparation session is nonsensical.
71. First, it is entirely implausible that P-0768 would be the only witness - including all independent observers who produced reports about Mongbwalu -¹³⁶ who has any recollection of the use of antipersonnel mines in Mongbwalu; mines which would have been placed all around Mongbwalu¹³⁷ and which would have led to a number of civilian deaths¹³⁸ including mothers and children.¹³⁹
72. Second, it is entirely incredible that P-0768 would raise the issue of antipersonnel mines for the first time only two weeks prior to his testimony considering: (i) the time he spent in Mongbwalu; (ii) his knowledge as to where, when and how the antipersonnel mines were placed¹⁴⁰ and that Mr NTAGANDA ordered their use;¹⁴¹ (iii) that the use of antipersonnel mines led to a number of civilian deaths¹⁴² including mothers and children;¹⁴³ (iv) his [REDACTED]¹⁴⁴ because he was [REDACTED];¹⁴⁵ (v) [REDACTED];¹⁴⁶ (vi) in 2013, P-0768 *proprio motu* contacted the ICC expressing an interest to testify against Bosco NTAGANDA;¹⁴⁷ and (vii) P-0768 met with Prosecution representatives on various occasions before his preparation session and testimony beginning on 19 October 2015.¹⁴⁸

¹³⁵ PCB, para. 50.

¹³⁶ [DRC-OTP-0074-0628](#); [DRC-OTP-0074-0797](#); [DRC-OTP-0074-0422](#).

¹³⁷ P-0768:T-35,72:16-22.

¹³⁸ P-0768:T-33,66:14.

¹³⁹ P-0768:T-33,67:10.

¹⁴⁰ P-0768:T-33,66:2-14.

¹⁴¹ P-0768:T-33,59:15-16,65:11-66:14.

¹⁴² P-0768:T-33,66:14.

¹⁴³ P-0768:T-33,67:10.

¹⁴⁴ P-0768:T-33,66:17-22,59:15-21.

¹⁴⁵ P-0768:T-33,59:18.

¹⁴⁶ P-0768:T-33,66:23-67:4.

¹⁴⁷ P-0768:T-36,41:7-12.

¹⁴⁸ P-0768:T-36,4:23-5:3.

73. P-0768's testimony that "it's been a long time since I left Ituri, and I wasn't really prepared to testify and therefore certain events may have escaped me"¹⁴⁹ is plainly absurd.
74. The message in the Ntaganda-Logbook which according to the Prosecution contradicts Mr NTAGANDA's evidence¹⁵⁰ is not probative that antipersonnel mines were used by the FPLC at any time, let alone in Mongbwalu. The evidence reveals that the FPLC and Mr NTAGANDA intended all civilians to return to Mongbwalu:¹⁵¹ using antipersonnel mines following the liberation of Mongbwalu made no sense.¹⁵² FPLC units did not have antipersonnel mines.¹⁵³ Mr NTAGANDA did not deploy to Mongbwalu with antipersonnel mines.¹⁵⁴ On 5 December, TIGER ONE was in Kobu while Mr NTAGANDA was in Bunia.¹⁵⁵

C. Kobu

75. Contrary to the Prosecution's assertion,¹⁵⁶ P-0768 did not testify that SALUMU informed him of the events in Kobu when [REDACTED] but rather 'at the time' when the events purportedly took place: "that's what Salumu told me at the time".¹⁵⁷ P-0768 testified that he spoke to SALUMU about the operation to open the road because he "was in contact with him because amongst the units that he was commanding, there was [REDACTED] that was part of [REDACTED] in Mongbwalu",¹⁵⁸ and that SALUMU told him how the operations went.¹⁵⁹
76. Significantly, P-0768's testimony that he sent [REDACTED] in Mongbwalu is not supported by any evidence and the Prosecution did not seek to elicit evidence on this issue.¹⁶⁰

¹⁴⁹ P-0768:T-36,5:20-21.

¹⁵⁰ PCB,para.50.

¹⁵¹ DCB,para.719.

¹⁵² D-0300:T-218,41:1-4.

¹⁵³ [REDACTED].

¹⁵⁴ P-0017:T-58,64:6-14.

¹⁵⁵ [DRC-OTP-0017-0033](#),p.0041(first)(Transl.[DRC-OTP-2102-3854](#),p.3863).

¹⁵⁶ PCB,para.53.

¹⁵⁷ P-0768:T-34,60:23.

¹⁵⁸ P-0768:T-34,59:21-23.

¹⁵⁹ P-0768:T-34,60:5-15.

¹⁶⁰ DCB,para.261; [DRC-OTP-0017-0033](#),p.0143(second)(Transl.[DRC-OTP-2102-3854](#),p.3865).

77. Evidently, P-0768 did not obtain the information he testified about from SALUMU and clearly provided his incriminating evidence on purpose.
78. The Prosecution's attempt to challenge the fact that P-0768 could not have heard commanders discuss the attack on the radio is without foundation.¹⁶¹ Mr NTAGANDA did not testify that he learned about [REDACTED];¹⁶² and the evidence provided by P-0901 and P-0907 regarding radio communications is unfounded and contradicted by reliable evidence.¹⁶³

D. [REDACTED]

79. The Prosecution misconstrues the Defence argument related to [REDACTED] and inappropriately attempts to argue Article 70 allegations in its Response.¹⁶⁴
80. Although P-0055 did refer to [REDACTED] as a [REDACTED] when he joined the FPLC,¹⁶⁵ he did not provide evidence that [REDACTED] was involved in the events which took place in Ituri in 2002-2003 and even less so that [REDACTED] was involved in [REDACTED].
81. The Prosecution fails to address the link between P-0768's evidence regarding the purported involvement of [REDACTED] in the events at the time and P-0768's [REDACTED] submitted to the Prosecution during the year preceding the beginning of Mr NTAGANDA's trial.
82. Clearly, the two are linked.¹⁶⁶ This is further evidence of the malignant grudge held by P-0768 against Mr NTAGANDA which is manifest on the face of P-0768's testimony, which must be disregarded in its entirety.

Section II – P-0017

83. The Prosecution attempts to bolster the reliability of certain elements of P-0017 on the basis that the Defence relies on other elements of P-0017's testimony, including in

¹⁶¹ DCB,para.267.

¹⁶² [REDACTED].

¹⁶³ DCB,paras.385-388.

¹⁶⁴ Response,para.52.

¹⁶⁵ **P-0055**:T-70,32:7-17,33:13-22; T-73,71:4-22.

¹⁶⁶ DCB,para.298.

respect of events during the Main Road operation. This submission is misguided in law, and misrepresents many of the Defence submissions.

84. First, as previously stated,¹⁶⁷ relying on certain elements of a witness's testimony while impugning other aspects as untruthful or unreliable is not contradictory. A witness can lie about some subjects without lying about all of them. In fact, the hallmark of a good liar is to generally adhere to the truth while reserving lies to the minimum extent necessary to achieve the ends of the lie. P-0017's lies are directed at areas that he could identify as obviously incriminating for Mr. NTAGANDA. This does not necessarily mean that P-0017 would lie in respect of other issues, especially if he could not identify the exculpatory nature of these issues.
85. Second, the Prosecution misstates the purpose of many of the Defence references to P-0017 in respect of the *Second Attack*. Many of those references, rather than being for the truth of the matter asserted, are for the purpose of: (i) challenging P-0017's testimony as unreliable or the Prosecution's interpretation of his testimony, such as whether his references to "Lendu" referred to civilians;¹⁶⁸ (ii) addressing general matters that anyone in the FPLC would have known about, such as the meaning of *kupiga na kuchaji*;¹⁶⁹ or (iii) showing that P-0017's testimony is inconsistent with other evidence, such as his claim about seeing assailants in Kobu with machetes and knives dripping with blood,¹⁷⁰ which is irreconcilable with the Prosecution forensic evidence.¹⁷¹ The Prosecution seems to believe that showing inconsistencies between the evidence provided by P-0017 and that of Lendu witnesses – concerning for example the circumstances of the pacification meeting¹⁷² – means that the Defence is asserting the truth of one or the other version, which is incorrect. The mere inconsistency of the evidence is, in itself, relevant to assessing the reliability of both accounts. The other facts for which P-0017 is relied upon are heavily corroborated, either directly or circumstantially, even when the testimony is placed in a separate footnote (which the

¹⁶⁷ See Part II, Chapt. I.

¹⁶⁸ DCB, paras. 835, 837, 1004, 1005.

¹⁶⁹ DCB, para. 848.

¹⁷⁰ Response, para. 54, fn. 200; DCB, paras. 909, 915 (account of pacification meeting inconsistent with Lendu witnesses), 924, 934 (account of pacification emissary inconsistent with Lendu witnesses).

¹⁷¹ DCB, para. 910.

¹⁷² DCB, paras. 877, 915; *contra* Response, para. 54.

Prosecution erroneously interprets as meaning that he is the “sole source” for the information).¹⁷³

86. Although P-0017 appears to have been present and/or to have participated to some extent in the *First Attack* and *Second Attack*, this does not render his evidence reliable. Quite to the contrary, although presence of a witness is the norm, it does not preclude lies.
87. The Prosecution’s weak response concerning challenges to P-0017’s credibility, limiting itself to stating that the Defence is wrong,¹⁷⁴ reveals that the evidence does not support its contentions.

First Attack

88. As set out in the DCB and in light of the demonstration below, P-0017’s inability to recognize [REDACTED], [REDACTED] as well as [REDACTED] is highly relevant.¹⁷⁵
89. The Prosecution’s attempt to counter the Defence submission that P-0017 was not [REDACTED] when Mr NTAGANDA was in Mongbwalu is unpersuasive.¹⁷⁶
90. First, according to P-0017, the events he described [REDACTED] with Mr NTAGANDA and SALONGO [REDACTED] happened at a time when “several activities had begun to take place in Mongbwalu centre. There were drinking places, and quite often he was in the company of Sector Comd SALONGO who was almost always drunk”.¹⁷⁷ However, the Mongbwalu video clearly shows that on 27 November, although the population had begun to return, the shops and the marketplace were empty.¹⁷⁸ P-0017 was thus referring to events which took place at best, many days later.

¹⁷³ See e.g. DCB, paras.825,826(referring to objective of the Main Road operation as being to destroy Lendu forces, not civilians),827(number and composition of fighters at Kobu),836(referring to objective of the Main Road operation as being to destroy Lendu forces, not civilians),923(distinguishing between Lendu civilians and fighters),1206,1243; *contra* Response, para.54.

¹⁷⁴ DCB, paras.300;302-308;309-313;314-326;327-329.

¹⁷⁵ *Contra* Response, paras.57-58.

¹⁷⁶ *Contra* Response, para.58.

¹⁷⁷ P-0017:T-59,22:8-11.

¹⁷⁸ [DRC-OTP-2058-0251](#),01:36:20-01:43:30.

91. Second, P-0017 confirmed that he went to the *Appartements* because he was ordered by [REDACTED] to the *Appartements* [REDACTED].¹⁷⁹ [REDACTED].¹⁸⁰ It follows that P-0017's alleged presence in the *Appartements* was linked both to [REDACTED].
92. Mr NTAGANDA testified that in December after he had departed from Mongbwalu, two sectors were created;¹⁸¹ [REDACTED].¹⁸² [REDACTED].¹⁸³ OpSec-SE appears for the first time in a message on 19 December.¹⁸⁴ On 15 December, Mr NTAGANDA recalled ordering the detention of SALUMU as a result of his opposition to SALONGO's promotion as Comd-SE-OpSec.¹⁸⁵ From a *de jure* point of view, SALONGO appears for the first time as Comd-SE-OpSec in two documents dated 10 December¹⁸⁶ as well as in messages in the Ntaganda-Logbook on 19 December.¹⁸⁷ From a *de facto* standpoint, TIGER ONE appears as holding a command function within the FPLC for the first time in a message dated 4 December.¹⁸⁸ It follows that the earliest date on which SALONGO occupied the function of Comd-SE-OpSec, whether *de facto* or *de jure*, is on 4 December, well after Mr NTAGANDA's departure from Mongbwalu.¹⁸⁹ P-0901's evidence, being informed by SALUMU that SALONGO was Sector Commander on 25 November 2002 is unreliable.¹⁹⁰
93. Regarding [REDACTED], as demonstrated,¹⁹¹ [REDACTED] left for Kilo immediately after the liberation of Sayo [REDACTED]¹⁹² and only [REDACTED]¹⁹³ which suggests that P-0017.
94. Third, P-0017 did not see KISEMBO at the *Appartements*¹⁹⁴ and testified that [REDACTED]. P-0017 [REDACTED].¹⁹⁵ P-0017 did not remember: the plane which

¹⁷⁹ P-0017:T-62,55:17-23.

¹⁸⁰ P-0017:T-59,16:13-22.

¹⁸¹ [DRC-D18-0001-5525](#); [DRC-D18-0001-5527](#).

¹⁸² [REDACTED].

¹⁸³ [DRC-OTP-0017-0033](#),p.0038(third)(Transl.[DRC-OTP-2102-3854](#),p.3860).

¹⁸⁴ [DRC-OTP-0017-0033](#),p.0204(second)(Transl.[DRC-OTP-2102-3854](#),p.4026); p.0061(second)(Transl.[DRC-OTP-2102-3854](#),p.3883).

¹⁸⁵ DCB,para.305.

¹⁸⁶ [DRC-OTP-0091-0709](#); [DRC-OTP-0092-0541](#).

¹⁸⁷ [DRC-OTP-0017-0033](#),p.0204(second)(Transl.[DRC-OTP-2102-3854](#),p.4026); p.0061(second)(Transl.[DRC-OTP-2102-3854](#),p.3883).

¹⁸⁸ [DRC-OTP-0017-0033](#),p.00037(third)(Transl.[DRC-OTP-2102-3854](#),p.3859).

¹⁸⁹ DCB,para.557-558.

¹⁹⁰ See Part III,Chapt.I,Section IV;DCB,para.409.

¹⁹¹ DCB,para.306.

¹⁹² DCB,para.306.

¹⁹³ P-0017:T-62,56:23-57:2.

arrived the day following the liberation of Sayo;¹⁹⁶ seeing the officers attending the post-Sayo meeting on that day;¹⁹⁷ or seeing the arrival of KISEMBO on the following day.¹⁹⁸ P-0017 also testified having seen: two or three cars at SALUMU's camp; the Sector Comd driving with a car with SALUMU to the *Appartements*; and four or five pickups, including that of Mr NTAGANDA, parked in front of his house at the *Appartements*.¹⁹⁹ All of the above demonstrates that P-0017 was not at the *Appartements* when he claims to have been there.²⁰⁰

95. Hence, P-0017 lied under oath, providing false incriminating evidence, leading to the conclusion that all of the incriminating evidence P-0017 provided must be disregarded.²⁰¹ The same conclusion applies to P-0017's evidence in relation to the *Second Attack*.

Second Attack

96. In addition to the false evidence P-0017 provided regarding [REDACTED] between SALUMU and KISEMBO,²⁰² P-0017's account of [REDACTED] is utterly unreliable, if only on the basis that it is [REDACTED].²⁰³ In addition, the [REDACTED].²⁰⁴

Section III – P-0963²⁰⁵

97. The Prosecution Response does not impact the conclusion that most of the evidence provided by P-0963 regarding the *First Attack* and the *Second Attack* is unreliable and as such should be disregarded. The reason is simple, the evidence reveals that P-0963 was not present and/or did not participate either in the *First Attack* or the *Second Attack*.²⁰⁶ His situation differs from that of P-0017 who also provided unreliable evidence but at least, appears to have been present and/or to have participated to some

¹⁹⁴ DCB,para.305.

¹⁹⁵ DCB,para.307.

¹⁹⁶ DCB,para.308.

¹⁹⁷ DCB,para.308.

¹⁹⁸ DBC,para.308.

¹⁹⁹ **P-0017**:T-58,81:2-82:7.

²⁰⁰ See also DCB,para.302-310.

²⁰¹ See Part II,Chapt.I.

²⁰² DCB,para.327-328.

²⁰³ **P-0017**:T-59,58:22-61:13;T-60,40:15-21.

²⁰⁴ DCB,paras.327-328.

²⁰⁵ *Response*,paras.60-70.

²⁰⁶ DCB,paras.330-355.

extent in the *First Attack* and *Second Attack*.²⁰⁷ Nonetheless, both P-0963 and P-0017 provided some reliable evidence regarding [REDACTED] and measures taken to avoid civilian casualties or damage to civilian objects.²⁰⁸

First Attack

98. Had P-0963 accompanied [REDACTED] to Mongbwalu, he would have recalled being in [REDACTED] with the [REDACTED];²⁰⁹ known that the [REDACTED] had a commander called [REDACTED];²¹⁰ remembered a pre-Mongbwalu briefing given by [REDACTED] in [REDACTED] and not in [REDACTED];²¹¹ recalled the [REDACTED] that took place when the [REDACTED] was in [REDACTED];²¹² known that the [REDACTED] reached Mongbwalu by foot;²¹³ and known that [REDACTED] brigade did not have a [REDACTED].²¹⁴
99. Two examples suffice, in addition to the inconsistencies and contradictions already highlighted to demonstrate that P-0963 was not involved in the *First Attack*. First, regarding the gap between the operations launched on Mongbwalu and Sayo, P-0963 testified that after Mongbwalu, they ran out of ammunitions;²¹⁵ they had to wait two to three days;²¹⁶ after which ammunitions did arrive;²¹⁷ by vehicle;²¹⁸ following which they attacked.²¹⁹ No witness mentioned such a gap between the operations on Mongbwalu and Sayo and no ammunition was delivered to Mongbwalu by vehicle between the two operations.²²⁰ P-0963's evidence stands alone and is contradicted by other witnesses, including P-0017.²²¹

²⁰⁷ DCB, paras. 299-329.

²⁰⁸ e.g. DCB, paras. 165-166, 587, 624, 733, 735, 741, 744.

²⁰⁹ DCB, para. 348.

²¹⁰ DCB, para. 348.

²¹¹ **P-0963**, T-58, 53:21-55:9.

²¹² DCB, para. 348.

²¹³ DCB, para. 348.

²¹⁴ DCB, para. 348.

²¹⁵ **P-0963**: T-82, 34:3-5.

²¹⁶ **P-0963**: T-82, 34:13-16.

²¹⁷ **P-0963**: T-82, 34:13-16.

²¹⁸ **P-0963**: T-82, 34:9-12.

²¹⁹ **P-0963**: T-82, 35:9-14.

²²⁰ DCB, para. 350.

²²¹ DCB, paras. 348, 350-352, 522-535; [REDACTED]; [REDACTED]; [REDACTED].

100. Second, regarding the conduct of the operation in Sayo, P-0963 testified that SALUMU was responsible for the operation;²²² SALUMU was present and was the person who led the troops in the fighting;²²³ P-0963 [REDACTED];²²⁴ and [REDACTED]; and they were [REDACTED].²²⁵ P-0963's evidence that there were '[REDACTED]' [REDACTED]²²⁶ is contradicted by P-0017 who testified that [REDACTED].²²⁷ Although P-0017 testified that Mr NTAGANDA arrived in Mongbwalu with [REDACTED], Mr NTAGANDA testified that when he left Bunia, he [REDACTED] and P-0017 later contradicted himself stating that [REDACTED].²²⁸ Moreover, P-0017, corroborated by D-0017,²²⁹ testified that [REDACTED] during the operation in Sayo²³⁰ [REDACTED] he was responsible for.²³¹ P-0963's evidence that [REDACTED] stands alone and is contradicted by P-0017, Mr NTAGANDA, and D-0017.²³² Lastly, P-0963's absurd evidence about [REDACTED]²³³ completes the demonstration that P-0963 was plainly not present when the operation in Sayo took place.

Second Attack

101. P-0963 testified that [REDACTED],²³⁴ [REDACTED].²³⁵ Further, P-0963 is the only witness who claimed that SALUMU went to any pacification meeting with Lendu notables, let alone that he went unarmed;²³⁶ is the only witness who testified that the prisoners killed were initially detained in a house near Kobu market, instead of in a house near the Hotel Paradiso;²³⁷ and the only witness who testified that Gombili informed SALUMU that the Lendu forces were buying ammunition from the Ugandans

²²² **P-0963**:T-82,38:5-8.

²²³ **P-0963**:T-82,37:5-10.

²²⁴ **P-0963**:T-82,37:13-16.

²²⁵ **P-0963**:T-82,37:17-21.

²²⁶ Response, fn.273. **P-0963**:T-78,69:13;T-79-FR,71:12.

²²⁷ Response, fn.273. **P-0963**:T-78,69:13;T-79-FR,71:12.

²²⁸ [REDACTED].

²²⁹ [REDACTED].

²³⁰ [REDACTED].

²³¹ [REDACTED].

²³² [REDACTED].

²³³ DCB,para.352.

²³⁴ [REDACTED].

²³⁵ [REDACTED].

²³⁶ **P-0963**:T-79,52:11-53:14.

²³⁷ **P-0963**:T-79,70:13.

and preparing a counter-attack,²³⁸ and warned him to set up a defence which, in fact, faced and defeated a Lendu counter-attack.²³⁹ P-0963 also falsely testified that “[e]verything was torched in Buli”,²⁴⁰ which is contrary to the appearance of Buli on the satellite imagery after the attack.²⁴¹

102. Considered in the light of P-0963’s testimony that PIGWA was interrogating the prisoners in Kobu before they were allegedly killed – whereas PIGWA was imprisoned in Kilo by KISEMBO before the operation in Kobu – ²⁴² the inference to be drawn is that P-0963 is embroidering his story with specific but inaccurate details to bolster his reliability, which demonstrates that he was not involved in the operation to re-open the Main Road.

Mandro

103. P-0963’s testimony that the training centre in [REDACTED] was attacked by the APC and the Ugandans in April-May is unsupported by the evidence.²⁴³ P-0963 [REDACTED].²⁴⁴ P-0963 did not ‘clarify’ [REDACTED] that [REDACTED] but rather contradicted himself,²⁴⁵ adding new details: “[...] I was referring to [REDACTED]”.²⁴⁶
104. [REDACTED] neither support P-0963’s [REDACTED], nor that he trained in [REDACTED] in 2002.²⁴⁷ The [REDACTED];²⁴⁸ establishes that P-0963 was present at the [REDACTED]; and confirms that P-0963 was authorized [REDACTED], having [REDACTED], which is confirmed by his [REDACTED] that covers [REDACTED].²⁴⁹
105. The Prosecution erroneously refers to P-0963’s testimony as meaning that he received a weapon other than that issued to him in [REDACTED].²⁵⁰ P-0963 travelled

²³⁸ P-0963:T-79,61:1-3.

²³⁹ P-0963:T-79,60:19-63:14.

²⁴⁰ P-0963:T-79,78:17.

²⁴¹ DCB,para.989.

²⁴² DCB,para.355.

²⁴³ P-0963:T-80,64:21-65:12.

²⁴⁴ P-0963:T-81,37:16-38:1.

²⁴⁵ P-0963:T-81,38:9-12.

²⁴⁶ P-0963:T-81,39:19-22.

²⁴⁷ Response,para.62.

²⁴⁸ [DRC-OTP-0118-0020](#),pp.0020,0033.

²⁴⁹ [DRC-D18-0001-0508](#).

²⁵⁰ Response,para.67.

[REDACTED].²⁵¹ If P-0963 ever received a weapon,²⁵² he received his first weapon upon arriving in [REDACTED].²⁵³ Considered in the light of P-0963's testimony that he reported to the FPLC after [REDACTED] was torched and after [REDACTED], it is manifest that P-0963 neither attended training in Mandro nor performed duties at [REDACTED].²⁵⁴

Coaching

106. In addition to the arguments set out in the DCB, it can reasonably be inferred, bearing in mind the fabricated evidence and the false specific details provided in his testimony, that P-0963 was coached by [REDACTED] and probably others. The problem is, he got the script wrong.

Section IV – P-0901

107. Attempting to savage the credibility of P-0901, the Prosecution argues²⁵⁵ that: the Defence accepted much of his testimony; the Defence blamed P-0901 for being obstructive while relying on one of the 'obstructive' answers he provided; the Defence implied without success that P-0901 and P-0190 colluded; and P-0901's testimony in relation to [REDACTED].

108. The Prosecution's arguments are unpersuasive to say the least.

109. First, a trier of fact may disregard segments of the evidence provided by a witness who lied or fabricated evidence while relying on others.²⁵⁶ In this case, the Defence explained why P-0901's evidence - in so far as it corroborates Mr NTAGANDA's testimony - is reliable²⁵⁷ even though P-0901 was obstructive, lied and fabricated evidence. Detailed reasons were provided as to why the incriminating evidence P-0901 provided cannot be relied upon.²⁵⁸

²⁵¹ P-0963:T-81,14:13-19:22.

²⁵² P-0963:T-81,19:7-24:16.

²⁵³ DCB,paras.344-345; P-0963:T-81,12:17-13:8.

²⁵⁴ P-0963:T-78,29:6-17.

²⁵⁵ Response,paras.71-73.

²⁵⁶ See Part II,Chapt.I.

²⁵⁷ DCB,paras.381-382.

²⁵⁸ DCB,paras.383-416.

110. Second, a reading of P-0901's testimony plainly reveals that he was an obstructive witness, even beyond the examples provided.²⁵⁹ The Prosecution's reference to questions put to P-0901 in relation to Komanda is baseless.²⁶⁰ P-0901 denied having knowledge of well-known actions taken by Mr NTAGANDA who ordered that goods looted in Komanda be burnt in front of all FPLC members and that those responsible be punished in public²⁶¹ on the basis that "I didn't get to Komanda at the time. That's kind of far from Bunia, some 75 kilometres from Bunia. So if something happened there, I would not be in a position to be aware of it."²⁶² Considering P-0901's evidence that there were many attacks on the road from Bunia to Komanda going through Marabo²⁶³ and that it was especially when the soldiers went to Komanda that they looted,²⁶⁴ P-0901's answer was indeed obstructive and his evidence unreliable.
111. Third, the relationship between P-0901 and P-0190, a witness who provided false incriminating evidence under oath,²⁶⁵ is indeed an important consideration in assessing P-0901's evidence. [REDACTED].²⁶⁶ In the context in which P-0901 [REDACTED],²⁶⁷ [REDACTED],²⁶⁸ which he provided to the Prosecution.²⁶⁹ P-0901's [REDACTED].²⁷⁰
112. Fourth, whereas [REDACTED] possessed detailed practical knowledge based on years of experience [REDACTED],²⁷¹ [REDACTED].²⁷² More importantly, P-0055 – even though he fabricated and provided unreliable evidence²⁷³ - corroborated [REDACTED].²⁷⁴ P-0055 even provided examples such as when returning from Bambu to Bunia, it was necessary to use [REDACTED] in order to [REDACTED] Bambu²⁷⁵ which is closer to Bunia than Lipri. [REDACTED] provided reliable evidence

²⁵⁹ DCB,para.383.

²⁶⁰ Response,para.71.

²⁶¹ **P-0901**:T-32,35:16-36:8.

²⁶² **P-0901**:T-32,36:9-13.

²⁶³ **P-0901**:T-29,43:9-16.

²⁶⁴ **P-0901**:T-29,19:1-12.

²⁶⁵ [REDACTED].

²⁶⁶ DCB,para.378.

²⁶⁷ DCB, para.379.

²⁶⁸ [REDACTED].

²⁶⁹ [REDACTED].

²⁷⁰ [REDACTED].

²⁷¹ [REDACTED]

²⁷² **P-0901**:T-27,54:22-23.

²⁷³ See Part IV,Chapt.I,Section I(A).

²⁷⁴ **P-0055**:T-70,86:10-12

²⁷⁵ **P-0055**:T-71,41:17-22.

concerning his relationship with P-0901²⁷⁶ [REDACTED].²⁷⁷ [REDACTED]²⁷⁸ [REDACTED].²⁷⁹ [REDACTED] testimony that KISEMBO had use [REDACTED] in Bunia [REDACTED] SALUMU who was in Kobu to order the immediate return of 409Bde to Bunia²⁸⁰ further confirms P-0901's false evidence in relation to [REDACTED]. Clearly [REDACTED] evidence concerning FPLC [REDACTED] at the time²⁸¹ must be accorded full probative value.

113. Lastly, and most significantly the Prosecution's omission to respond to the well documented arguments concerning: P-0901's lies about having listened in real time to the events heard on the KBL-audio-recording;²⁸² P-0901's made up evidence concerning looting committed by members of SALUMU's brigade during the FPLC operation in Kobu;²⁸³ P-0901's unreliable evidence concerning the FPLC operations in Mongbwalu, in particular concerning [REDACTED];²⁸⁴ and P-0901's fabricated evidence implicating Mr NTAGANDA in looting in Mongbwalu, must be duly considered by the Chamber. As a result all incriminating evidence provided by P-0901 cannot be relied upon.

Section V - P-0907 and P-0887

A. [REDACTED]P-0907 and [REDACTED] undermines their credibility

114. P-0907 [REDACTED], and [REDACTED].²⁸⁵ It stems from P-0907's testimony that [REDACTED],²⁸⁶ and that [REDACTED].²⁸⁷
115. The Prosecution argues that [REDACTED].²⁸⁸ These insinuations are baseless; were never investigated by the Prosecution; not charged and not proved. Moreover, the Prosecution disregards the fact that [REDACTED] and that [REDACTED],²⁸⁹ which

²⁷⁶ [REDACTED].

²⁷⁷ [REDACTED].

²⁷⁸ [REDACTED].

²⁷⁹ [REDACTED].

²⁸⁰ [REDACTED].

²⁸¹ [REDACTED].

²⁸² DCB, paras. 393-398.

²⁸³ DCB, paras. 399-402.

²⁸⁴ DCB, paras. 405, 407.

²⁸⁵ DCB, paras. 359-362, 420.

²⁸⁶ DCB, para. 362.

²⁸⁷ DCB, para. 362.

²⁸⁸ Response, paras. 75-76.

²⁸⁹ DCB, paras. 361, 421.

was [REDACTED] for the Prosecution, in particular knowing that [REDACTED] P-0907 [REDACTED].²⁹⁰ It also disregards P-0907 testimony's that he asked "[BOURGON] to send [his] regards to Bosco Ntaganda because if it wasn't for him [P-0907] would not be alive today".²⁹¹

116. Taken [REDACTED], P-0907's and [REDACTED] evidence must be disregarded.

B. [REDACTED] VAF

117. The information contained in [REDACTED] VAF cannot have been made up by the person who assisted her. As demonstrated in Part II, Chapter II, reading back VAFs to applicants before signature is the norm, whereas not reading the form before signature is the exception. *A fortiori* in this case, [REDACTED] was assisted by an [REDACTED]. VPRS specifically provided training and guidelines to [REDACTED], and reading back the statement to victims for their acknowledgement was a core facet of the basic training provided to them.

118. [REDACTED] *volte face* concerning [REDACTED],²⁹² can only be attributed to an attempt to save face.

119. Similarly, in her VAF, [REDACTED] lied about her biological father's name being [REDACTED] and her son being called [REDACTED]. This fault cannot be attributed to the intermediary, since she obtained certificates corroborating both information a few months following the signature of her VAF.²⁹³

120. [REDACTED] also provided false evidence concerning her neighbour being raped by UPC soldiers.²⁹⁴ She doesn't know the girl's name; the girl's ethnicity; she didn't see her being raped; and the girl didn't tell [REDACTED] or anybody about her rape.²⁹⁵ [REDACTED] testimony actually amounts to an opinion that the girl was raped. All

²⁹⁰ DCB,para.363.

²⁹¹ P-0907:T-92,67:17-21.

²⁹² DCB,para. 424.

²⁹³ DCB,paras.422-423.

²⁹⁴ PCB,para.419.

²⁹⁵ [REDACTED].

she knows is that the girl left her house followed by a soldier and came back the next morning.²⁹⁶

C. P-0907's evidence concerning the nomination of Tiger One is unreliable

121. The evidence the Prosecution relies on at paragraph 78 of its response does not demonstrate that SALONGO was appointed Comd-SE-OpSec right after Mongbwalu was captured.

122. P-0017's evidence concerning SALONGO's appointment is unreliable.²⁹⁷ He testified that Mr NTAGANDA and Comd-SE-OpSec SALONGO would go drinking in the centre of Mongbwalu on a daily basis, at a time when "several activities had begun to take place in Mongbwalu centre".²⁹⁸ Yet, it stems clearly from the Mongbwalu video that until Mr NTAGANDA left Mongbwalu, shops and the market were empty and commercial activities had not resumed in Mongbwalu.²⁹⁹

123. P-0901's evidence concerning SALONGO's nomination is also unreliable.³⁰⁰

124. As demonstrated elsewhere,³⁰¹ the evidence confirms that the earliest date on which SALONGO could have begun to assume the duties of Comd-SE-OpSec, whether *de jure* or *de facto*, is on 4 December 2002.³⁰²

125. Accordingly, P-0907 did not go to Mongbwalu until after the first and second attempt to liberate the town.³⁰³ This is further reinforced by the fact that D-0017 testified not seeing P-0907 during the entire Mongbwalu operation he participated in.³⁰⁴ The fact that P-0907 affirmed having participated with Mr NTAGANDA and P-0055 in a battle

²⁹⁶ [REDACTED].

²⁹⁷ See PART III, Chapt. I, Section II, *First Attack*.

²⁹⁸ P-0017:T-59,22-17.

²⁹⁹ [DRC-OTP-2058-0251](#), 01:36:20-01:43:30.

³⁰⁰ See Part III, Chapt. I, Section V, C.

³⁰¹ See PART III, Chapt. I, Section II.

³⁰² [DRC-OTP-0017-0033](#), 0037 (third) bearing reference number "N°002/FPLC/EM TIGER ONE/COMDT/2002". The second Ntaganda-Logbook message sent by SALONGO at p.0041 (first) bears the same reference number, leading to think that a mistake was made with regards to the first message's number. DCB, para.374.

³⁰³ DCB, paras.370-374.

³⁰⁴ D-0017:T-253,43:22-44:1.

in Mwanga also confirms that at the time of the first and second attempts to liberate Mongbwalu, he was still [REDACTED].³⁰⁵

Section VI – P-0877

126. The Prosecution's response to paragraphs 430-434 of the DCB is without merit.
127. First, the Prosecution's argument that the Defence was unable, despite its access to all [REDACTED], to point to a single instance where his account was influenced by [REDACTED],³⁰⁶ misses the point entirely. The determining issue is that P-0877 [REDACTED]³⁰⁷ [REDACTED],³⁰⁸ a fact which is established. P-0877 heard and was exposed to [REDACTED] who were all [REDACTED].³⁰⁹ As a result, the evidence provided by P-0877 [REDACTED], was contaminated and cannot be relied upon in the absence of independent corroboration.
128. This is where the notion of hearsay, which the Prosecution omits to mention in its Response,³¹⁰ takes all of its relevance. The fact that P-0877 admitted having drawn conclusions found in his statements on the basis of his 'understanding of the circumstances' in which certain events³¹¹ he was not an eye witness of occurred, proves the point.
129. What is more, the Prosecution's submissions regarding P-0877's [REDACTED]³¹² fail to rebut the claim in paragraphs 433-434 that P-0877 fabricated and included [REDACTED] in the context and for the purpose of the second statement he provided to the Prosecution.³¹³ P-0877 was not asked and evidently volunteered to use [REDACTED].³¹⁴ The fact that [REDACTED]. The fact that P-0877 was not able to

³⁰⁵ **P-0907**:T-89,22:21-22;T-92,59:14-60:50; DCB,paras.509-511.

³⁰⁶ Response,para.80.

³⁰⁷ **P-0877**:T-109,69:8-10.

³⁰⁸ [REDACTED] (T-109,68:24-69:2).

³⁰⁹ **P-0877**:T-109,69:8-10.

³¹⁰ Response,para.80.

³¹¹ **P-0877**:T-109,78:21-79:5("I was explained what had happened in the massacre in Kobo. I did not see it for myself. [...]But in this case, the case here, I did not see who torched the houses. [...] these villages are close to Kilo and there were no houses left in those villages").

³¹² **P-0877**:[DRC-OTP-2077-0140](#).

³¹³ **P-0877**:[DRC-OTP-2077-0118-R03](#).

³¹⁴ **P-0877**:[DRC-OTP-2069-2086-R03](#),p.2087-2088("[REDACTED]"); [DRC-OTP-2077-0118](#),p.0120("I [REDACTED]")(emphasis added).

identify [REDACTED],³¹⁵ blaming for this incongruity the “[REDACTED]”,³¹⁶ completes this demonstration.

Section VII – P-0892 and P-0912

130. Contrary to the Prosecution’s erroneous argument, P-0912 [REDACTED] testified³¹⁷ and P-0892 [REDACTED] testified.³¹⁸ P-0912 affirmed that [REDACTED] insisted that she meets with the investigators, which is the reason “why [she] came here”.³¹⁹ It is also evident from P-0892 and P-0912’s respective testimony that they concocted their narrative, at least about P-0912’s rape,³²⁰ together.
131. P-0892’s testimony that her VAF was not read back to her cannot be attributed any weight.³²¹ No reasonable [REDACTED] could possibly have noted that P-0892’s [REDACTED] and that this was the source of her prejudice without P-0892 having provided this information.³²² The [REDACTED] who assisted P-0892 was trained by VPRS.³²³ There is nothing derogatory about stating that [REDACTED].³²⁴
132. Regarding P-0912’s alleged rape, it is highly significant that: (i) with respect to the chronology of events, the Prosecution refers solely to the evidence provided by P-0912,³²⁵ ignoring the evidence provided by [REDACTED];³²⁶ and (ii) the Prosecution ignores all together all evidence related to P-0912’s account of her schooling history.³²⁷
133. The only reasonable conclusion that can be drawn on the basis of the sum of P-0912 and P-0892’s testimony, taking into account all relevant factors, is that P-0912’s

³¹⁵ **P-0877**:T-109,97:17-18.

³¹⁶ **P-0877**:T-109,97:18-20.

³¹⁷ **P-0912**:T-148,93:23-25.

³¹⁸ **P-0892**:T-85,24:10-25:25.

³¹⁹ **P-0912**:T-148,102:7-21.

³²⁰ [REDACTED].

³²¹ [REDACTED].

³²² See Part II, Chapt. II.

³²³ [DRC-D18-0001-6742](#), p.6746, fns.3-4 (“During the training, they were informed that as part of the process of taking victim statements, they should read the statement back to the victim for their acknowledgement before the person signs the application form”, P-0892’s victim number is a/00800/13).

³²⁴ Response, para.84.

³²⁵ Response, para.85, fns.339-340.

³²⁶ Response, para.85, fns.339-340.

³²⁷ Response, paras.85-86.

alleged rape took place [REDACTED]³²⁸ and not within the time-period relevant to the UDCC.

134. The Prosecution's further argument that P-0892 and P-0912's evidence concerning [REDACTED]³²⁹ and certain events as they unfolded³³⁰ does not disturb the coherence and reliability of their evidence,³³¹ is specious. In fact, P-0892 and P-0912's inconsistent and confusing evidence on these matters further demonstrates the unreliability of their evidence.³³²

Section VIII – P-0894

135. The Prosecution attempts in vain to salvage the evidence provided by P-0894.
136. For the reasons stated earlier,³³³ the Prosecution's assertion that "it is not surprising that specific details of P-0894's account were incorrectly captured in the form"³³⁴ is without merit. The issue is not whether the VAF was read back to P-0894 but whether it is possible that P-0894's VAF was not read back to him. The nature of the assertions in P-0894's VAF demonstrates that the form was indeed read back to him. Regardless of the conditions in which P-0894's interview and completion of his VAF occurred, [REDACTED] could have noted the assertion "[REDACTED]"³³⁵ unless it was mentioned by P-0894.
137. What is more, as demonstrated by [REDACTED]'s evidence,³³⁶ although P-0894 conceded during his testimony that he is not [REDACTED],³³⁷ he went as far as attaching to his VAF,³³⁸ a forged proof of [REDACTED] enacted by someone who did not have the authority to do so.³³⁹

³²⁸ DCB,para.445.

³²⁹ DCB,paras.447,449.

³³⁰ DCB,para.448.

³³¹ Response,para.86; **P-0912**:T-148,95:22-97:20.

³³² DCB,paras.447-449.

³³³ See Part II,Chapt.II.

³³⁴ Response,para.87.

³³⁵ **P-0894**:[DRC-OTP-2090-0099](#),para.1.

³³⁶ [REDACTED].

³³⁷ **P-0894**:T-104,27:5-19("[y]ou see, we are Africans. When you come from the same country, the same territory, you're already brothers").

³³⁸ [DRC-OTP-2090-0099](#),p.0103.

³³⁹ [REDACTED].

138. The Prosecution's claim,³⁴⁰ unheard of before,³⁴¹ that the lack of DNA match between [REDACTED] does not show that the body exhumed was that of [REDACTED]³⁴² is fallacious. The DNA samples were obtained by the Prosecution³⁴³ and the Prosecution sought the admission of Expert Witness P-0945's report.³⁴⁴ The Prosecution's new hypothesis based on lack of information, is unrealistic, speculative and not supported by any evidence.
139. The Prosecution's additional claim that [REDACTED] asserted that the body exhumed was that of [REDACTED] does not demonstrate that the DNA results are incorrect. Quite to the contrary, it confirms the unreliability of the evidence provided by [REDACTED], [REDACTED] and [REDACTED]³⁴⁵ and strongly suggests that the killing of [REDACTED], as described by [REDACTED] who is the only [REDACTED], is fiction. Strikingly, the Prosecution failed to address the Defence argument that P-0894's related narrative is simply incredible.
140. The Prosecution's omission to address Defence arguments at paragraphs 439, 440 and 442 is also highly significant. Indeed, P-0894's testimony that Mr NTAGANDA addressed civilians [REDACTED], when civilians had not yet returned; P-0894's lie concerning an alleged meeting with [REDACTED]; and P-0894's preposterous allegations of [REDACTED], critically undermine P-0894's credibility and the reliability of his evidence beyond repair.

³⁴⁰ [REDACTED].

³⁴¹ See generally **P-0945**:T-124,T-125;[DRC-OTP-2084-0002](#);[DRC-OTP-2070-0062](#). At no point during the testimony of P-0945, did the Prosecution raise the issue of having supplied the expert with erroneous information.

³⁴² [DRC-OTP-2084-0002](#),p.0010("Table 4. Human remains without matches to biological relatives of the missing persons [...][REDACTED]"); **P-0945**:T-125,6:17-7:15("So for the body number with the number [REDACTED], we were able to generate a DNA profile but we were not able to match this to one of the four pedigrees that were part of this investigation"); ("So the [REDACTED] DNA profile is not part of the family tree [REDACTED] as present on the screen").

³⁴³ [DRC-OTP-2070-0062](#)(metadata)"Chain of Custody": [REDACTED]. See also "[REDACTED] born [REDACTED]" and "[REDACTED]. The Prosecution's hypothesis would require that [REDACTED] lied about the biological relationship [REDACTED].

³⁴⁴ [REDACTED].

³⁴⁵ [REDACTED]; [REDACTED]; [REDACTED].

Section IX – V2

141. V2's reluctance³⁴⁶ to answer any basic common-knowledge questions related to the situation in Mongbwalu,³⁴⁷ and the fact that, in the Prosecution's submission V2 "did not wish to comment on the ethnic conflict between two other groups"³⁴⁸ further, demonstrates [REDACTED]³⁴⁹ before the 2002/2003 events. She tried to distance herself from anything occurring in Mongbwalu, explaining that: "when [she] came to Mongbwalu [she] came there to do some business. [She] wasn't interested in anything else".³⁵⁰ Following the witness's reticence to answer Defence questions, the Presiding Judge reminded the witness of her obligation to tell the truth and "nothing but the truth".³⁵¹
142. The Prosecution's contention that V2 knew where Sayo was located is wrong. V2 was not able to give an estimation of where Sayo was located compared to where she was purportedly living, asserting that she "didn't really move around very much in that neighbourhood"³⁵² or only 5km separate Mongbwalu from Sayo, information that she should have known.³⁵³ Beside testifying to the fact that the [REDACTED] was close to Mongbwalu, V2 was not able to provide a description of the Kodulu quarry or a feature in Mongbwalu, which would have been close to Kodulu quarry.³⁵⁴ The Mongbwalu airport could not have been confused with a football pitch at the time, as it was a major airport in the region, used by the APC and then the UPC to receive weapons, ammunitions or other support.³⁵⁵

³⁴⁶ V2:T-202,73:8-9("I am not aware of what happened with the Hema and the Lendu"); V2:T-202,69:20("I do not know because I did not hail from Mongbwalu either"); V2:T-202,69:25("I do not know because there were many ethnic groups in Mongbwalu"); V2:T-202,70:20-21("I do not know. Everyone lived in their own home. I don't know what their habits were and I do not know how they behaved"); V2:T-202,71:17("I do not know. I couldn't be aware of what was going on at the airport"); V2:T-202,14:12-13("[they] did not see any soldiers when war broke out"); V2:T-202,66:10-12("[they] did not know from which group they hailed, but we came to know this fact later on").

³⁴⁷ See for instance concerning the fact that Hemas were chased by Lendus from Mongbwalu in 2002: DCB,para.52;The treatment of civilians by Lendus: DCB,para.364 referring to P-0907 and P-0887.

³⁴⁸ Response,para.91.

³⁴⁹ V2:T-202,66:10-12.

³⁵⁰ V2:T-202,72:2-3.

³⁵¹ V2:T-202,73:10-14.

³⁵² V2:T-202,72:4-6.

³⁵³ P-0800:T-68,15:9-12.

³⁵⁴ V2:T-202,76:9-23.

³⁵⁵ DCB,para.586-587.

143. Differences in the Prosecution's and the LRV's account of V2's story also demonstrate that her account of the events is inconsistent and unreliable.³⁵⁶ The Prosecution claims [REDACTED] told V2 to "give her child to a soldier and to lie down", that when [REDACTED] were raping V2 in the bush, [REDACTED] was standing "[REDACTED]".³⁵⁷ According to LRV2, "[REDACTED] and the baby had just been left somewhere nearby while V2 was being raped".³⁵⁸ V2's account of her rape was inconsistent and cannot be attributed to mere mental affection and emotion. While she declared that she was raped by [REDACTED], both in her statement³⁵⁹ and during her testimony,³⁶⁰ she later contradicted herself when she testified that [REDACTED] raped her and [REDACTED] refused to do so.³⁶¹
144. When asked about the age of her children and wrongfully replying that they were [REDACTED], V2 explained "maybe I forgot".³⁶² When asked if she had looked for [REDACTED], V2 replied "no, I haven't done that".³⁶³ When asked about her husband, V2 testified that she had [REDACTED]³⁶⁴ before testifying to the contrary that "[REDACTED]"³⁶⁵ confirming that she had [REDACTED].³⁶⁶
145. These additional contradictions seriously cast doubt as to her credibility. In addition, V2's account is not corroborated by any reliable evidence.

CHAPTER II - THE TESTIMONY OF P-0046, P-0315 AND P-0317 IS LARGELY ANONYMOUS HEARSAY, AND CANNOT BE RELIED UPON FOR INCRIMINATING INFERENCES, ESPECIALLY IN LIGHT OF THE DELIBERATE NON-DISCLOSURE OF THEIR SOURCES

146. The Prosecution tries to re-cast these three witnesses' testimony as direct testimony because they appeared in court. This argument is fallacious. Almost all of the incriminating information they provided, whether orally or in the form of written reports or databases, came from sources whom they interviewed, almost none of whom

³⁵⁶ PCB,para.418; LRV2 Brief,para.149.

³⁵⁷ [DRC-PCV-0001-0042](#),para.20.

³⁵⁸ [DRC-PCV-0001-0042](#),para.20.

³⁵⁹ [DRC-PCV-0001-0042](#),para.20.

³⁶⁰ V2:T-202,22:4-6.

³⁶¹ V2:T-202,25:17-19.

³⁶² V2:T-202,81:14-20.

³⁶³ V2:T-202,81:3-4.

³⁶⁴ V2:T-202,20:6-13.

³⁶⁵ V2:T-202,21:2-3.

³⁶⁶ V2:T-202,72:22-83:4.

is identified by name. This is anonymous hearsay. Still worse, the hearsay is anonymous not because the identities of the sources have been forgotten or never known, but because they were deliberately with-held or the Prosecution failed to adduce this information.

147. Whether this Court can rely on anonymous hearsay as incriminating evidence is a question with very serious implications for this Court's compliance with international human rights standards, as well as for the precedent that will be set by this Court for other courts. The Prosecution cites to seven ICC decisions purportedly supporting the proposition that hearsay can be relied upon "even if stemming from anonymous sources."³⁶⁷ Not a single one supports this proposition. The first decision concerns only reliance on anonymous hearsay in confirming charges,³⁶⁸ and the remaining six citations refer only to hearsay, not anonymous hearsay.
148. The Prosecution asserts that UN and NGO reports are widely admitted and relied upon by international tribunals.³⁶⁹ In almost all cases, as the Prosecution seems to acknowledge, reliance on any such reports is confined to showing background context or notice of some particular fact to the accused, but not as proof of specific incriminating facts.³⁷⁰
149. Moreover, admission of such reports is denied when there is not at least some element of direct observation by the report's author. Hence, in *Milutinovic* an HRW report and an OSCE report that were based almost entirely on anonymous hearsay were denied admission outright. Though "the challenged reports use extensive footnotes throughout these excerpts, they do not identify the persons interviewed, leaving the sources of this critical information largely anonymous."³⁷¹ The Trial Chamber, noting that these reports conveyed incriminating information, denied their admission for any purpose at all:

Not having had the opportunity of hearing any of the persons upon whose statements these excerpts are based, the Chamber is not in a position to assess the reliability of the factual contentions contained

³⁶⁷ Response, fn.383.

³⁶⁸ [Lubanga CD](#), para.101.

³⁶⁹ Response, para.95.

³⁷⁰ Response, para.95.

³⁷¹ [Milutinović et al.](#), Decision, para.21.

therein [...] neither the report's acknowledgement of [certain problems of reliability], nor the opportunity to cross-examine one of the authors and editors of the report, can adequately replace the opportunity to test the reliability of any of the persons making the statements. The Trial Chamber does not have before it sufficient material to satisfy if of the general reliability of the information on which this report is based.³⁷²

150. The various substitute factors put forward by the Prosecution for assessing the reliability of the information, including the purported methodology of the interviewers (which was far from impeccable) or broad information about the affiliation of sources,³⁷³ simply cannot replace the minimum requirements for testing the reliability of information. This is all the more so where the source witnesses have an obvious reason to be biased, or had personal motives to lie. It is entirely understandable that P-0046, given her mandate and job, would say that she could not recall even one person having lied to her about affiliation;³⁷⁴ but this testimony merely underscores the unsuitability of the Chamber's reliance on her as an intermediary-of-fact.

151. As stated in the separate opinion of Judges van den Wyngaert and Morrison in *Bemba*:

What distinguishes judgments from reports of special investigation commissions, NGOs, and the media is precisely the strength and quality of the evidential foundations of judicial findings of fact. In times where it has become ever more difficult to distinguish facts from 'fake news', it is crucial that the judiciary can be relied upon to uphold the highest standards of quality, precision and accuracy.³⁷⁵

152. Trial Judgments can be no better than the quality of the evidence relied upon. This Court should not sub-contract its fact-finding to HRW, the UN, or any other entity no matter how respected or righteous their motives may be. The legitimacy of their reasons for with-holding information about sources is also irrelevant: what matters is the impact of such with-holding on the ability of this Chamber to rely on it.
153. This Trial Chamber is perfectly capable of distinguishing between the information in P-0046's, P-0315's and P-0317's reports that is based on anonymous hearsay, and information that each of these individuals observed. The vast majority falls into the

³⁷² [Milutinović et al.](#), Decision, paras.21-22.

³⁷³ Response, paras.96-97.

³⁷⁴ P-0046:T-102,62:14-64:10.

³⁷⁵ [Bemba AJ](#), Separate opinion, para.5.

former category. No weight should be accorded to any of it because the prejudice arising from reliance on such information to reach incriminating inferences far outweighs its reliability.

CHAPTER III - MR NTAGANDA'S TESTIMONY IS FULLY CORROBORATED³⁷⁶

154. In respect of the First Attack, Mr NTAGANDA provided detailed evidence regarding all aspects of the FPLC operation in Mongbwalu³⁷⁷, which is abundantly corroborated by the NTAGANDA-Logbooks,³⁷⁸ the testimony of Defence witnesses,³⁷⁹ documentary evidence,³⁸⁰ audio visual exhibits³⁸¹ and even Prosecution witnesses. Significantly much of this evidence was adduced and/or obtained by the Prosecution.
155. In particular, comparing Mr NTAGANDA's evidence fully supported by the NTAGANDA-Logbooks with the unreliable evidence provided by Prosecution insider witnesses, leaves no doubt that Mr NTAGANDA's testimony must be accorded full probative value.³⁸²

³⁷⁶ Response, paras.101-107.

³⁷⁷ DCB, paras.458-461.

³⁷⁸ DCB, paras.465-488, See Part III-V.

³⁷⁹ D-0017, D-0243, D-0251, D-0080, D-0210, D-0038, D-0172, D-0211, D-0054, D-0013.

³⁸⁰ [DRC-D01-0003-5896](#); [DRC-D01-0003-5900](#); [DRC-D18-0001-0425](#); [DRC-D18-0001-0427](#); [DRC-D18-0001-0431](#); [DRC-D18-0001-0433](#); [DRC-D18-0001-0463](#); [DRC-D18-0001-0464](#); [DRC-D18-0001-1765](#); [DRC-D18-0001-1767](#); [DRC-D18-0001-5290](#); [DRC-D18-0001-5441](#); [DRC-D18-0001-5442](#); [DRC-D18-0001-5443](#); [DRC-D18-0001-5457](#); [DRC-D18-0001-5530](#); [DRC-D18-0001-5531](#); [DRC-D18-0001-5540](#); [DRC-D18-0001-5550](#); [DRC-D18-0001-5562](#); [DRC-D18-0001-5576](#); [DRC-D18-0001-5587](#); [DRC-D18-0001-5599](#); [DRC-D18-0001-5609](#); [DRC-D18-0001-5620](#); [DRC-OTP-0003-0028](#); [DRC-OTP-0004-0435](#); [DRC-OTP-0005-0267](#); [DRC-OTP-0005-0271](#); [DRC-OTP-0009-0021](#); [DRC-OTP-0016-0060](#); [DRC-OTP-0037-0295](#); [DRC-OTP-0051-0210](#); [DRC-OTP-0052-0049](#); [DRC-OTP-0056-0761](#); [DRC-OTP-0064-0476](#); [DRC-OTP-0082-0016](#); [DRC-OTP-0091-0182](#); [DRC-OTP-0091-0778](#); [DRC-OTP-0091-0888](#); [DRC-OTP-0100-0164](#); [DRC-OTP-0113-0052](#); [DRC-OTP-0113-0133](#); [DRC-OTP-0120-0294](#); [DRC-OTP-0124-0002](#); [DRC-OTP-0127-0063](#); [DRC-OTP-0127-0115](#); [DRC-OTP-0128-0011](#); [DRC-OTP-0134-0062](#); [DRC-OTP-0147-0002](#); [DRC-OTP-0151-0299](#); [DRC-OTP-0152-1609](#); [DRC-OTP-0161-3038](#); [DRC-OTP-0164-0567](#); [DRC-OTP-0164-0710](#); [DRC-OTP-0165-0254](#); [DRC-OTP-0176-0011](#); [DRC-OTP-0176-0027](#); [DRC-OTP-0176-0098](#); [DRC-OTP-0176-0187](#); [DRC-OTP-0176-0418](#); [DRC-OTP-0176-0646](#); [DRC-OTP-0194-0328](#); [DRC-OTP-0195-1382](#); [DRC-OTP-0207-0330](#); [DRC-OTP-2055-1474](#); [DRC-OTP-2055-1678](#); [DRC-OTP-2058-0251](#); [DRC-OTP-2062-0363](#); [DRC-OTP-2067-1976](#); [DRC-OTP-2067-1989](#); [DRC-OTP-2074-0767-R02](#); [DRC-OTP-2074-0830-R02](#); [DRC-OTP-2078-0393](#); [DRC-OTP-2080-0239](#); [DRC-OTP-2081-0003](#); [DRC-OTP-2094-0218](#); [DRC-OTP-2101-0981](#); [DRC-OTP-2101-1132](#); [DRC-OTP-2101-1147](#); [DRC-OTP-2101-1248](#); [DRC-OTP-2101-1420](#); [DRC-OTP-2101-1436](#); [DRC-OTP-2102-3468](#); [DRC-OTP-2102-3828](#); [DRC-OTP-2102-3854](#); [DRC-REG-0001-0053](#); [DRC-REG-0001-0054](#); [DRC-REG-0001-0055](#); [DRC-REG-0001-0056](#); [DRC-REG-0001-0057](#); [DRC-REG-0001-0058](#); [DRC-REG-0001-0059](#); [DRC-REG-0001-0060](#); [DRC-REG-0001-0061](#); [DRC-REG-0001-0062](#); [DRC-REG-0001-0063](#); [DRC-REG-0001-0064](#); [DRC-REG-0001-0065](#); [DRC-REG-0001-0066](#); [DRC-REG-0001-0067](#); [DRC-REG-0001-0068](#); [DRC-REG-0001-0069](#); [DRC-OTP-0001-0393](#).

³⁸¹ See *inter alia* [DRC-OTP-0082-0016](#); [DRC-OTP-2058-0251](#).

³⁸² DCB, para.464.

156. What is more, Mr NTAGANDA was cross-examined during no less than 63 hours divided in two periods from 14 June to 21 July and from 28 August to 13 September 2017. With the benefit of years of investigation to prepare for this ultimate moment, the Prosecution had an unprecedented occasion to adjust, enhance and tailor its cross-examination during a five-week period after the completion of Mr NTAGANDA's examination-in-chief.
157. The Prosecution thus had more than ample opportunity to challenge and test Mr NTAGANDA's evidence. Yet Mr NTAGANDA calmly responded to every question without being destabilized at any time and the Prosecution was unable to expose any major inconsistencies or unreasonable responses in his evidence.
158. Significantly, the Prosecution opted not to cross-examine Mr NTAGANDA on numerous important parts of the evidence he provided. Of course, the Chamber is not bound to necessarily accept as credible those parts of Mr NTAGANDA's testimony, which were not specifically challenged in cross-examination. However, in determining Mr NTAGANDA's overall credibility in the context of the totality of the evidence,³⁸³ the Prosecution's omission to put questions to Mr NTAGANDA in relation to his evidence is certainly a meaningful factor, which the Chamber must take into consideration. This is especially the case when Mr NTAGANDA's evidence that was not challenged is directly related to or contrary to material aspects of the Prosecution's case and exculpatory in nature.

NTAGANDA's logbooks

159. Mr NTAGANDA rearranged the pages in the short-NTAGANDA-logbook because they were not in chronological order and did not reflect the events in the order in which they unfolded.³⁸⁴ Mr NTAGANDA did so, on the basis of objective criteria.³⁸⁵
160. Mr NTAGANDA testified that messages addressed to persons ('TO') demonstrate that the sender and receiver are not together in the same area.³⁸⁶ The fact that the purpose of *phonie* was to convey messages from one FPLC unit to another, which were separated

³⁸³ [Popovic TJ](#), para.21.

³⁸⁴ DCB, para.468.

³⁸⁵ DCB, para.467.

³⁸⁶ **D-0300**:T-237,49:9-20; *Contra* Response, para.105.

by long distances,³⁸⁷ plainly confirms Mr NTAGANDA's testimony. Messages sent to ALL STATIONS are the exception that confirms the rule.³⁸⁸ All other messages in the NTAGANDA-Logbooks confirm that the sender and the addressee 'TO' are not co-located. Moreover as set out in the DCB,³⁸⁹ this rule also applies to the physical location of the sender of a message ('FROM') and the addressee for information ('INFO'), with limited exceptions. The only exception found in the NTAGANDA-Logbook refers to messages sent by Mr NTAGANDA ('FROM') with LUBANGA appearing as an 'INFO' addressee, although both are in Bunia.³⁹⁰ These messages suggest that the President was the approving authority regarding the content of the message.

161. The Chamber may indeed rely on any message it deems relevant in the NTAGANDA-Logbooks. Again however, the Prosecution's omission to put questions to witnesses in relation to a message which is material to its case it is a significant factor the Chamber is bound to take into consideration.
162. The Chamber is also bound to take into consideration that within the FPLC, the NTAGANDA-Logbooks were considered as secret documents, only available to those who had and/or used a *phonie*.³⁹¹
163. The absence of messages in the NTAGANDA-Logbooks for any significant period of time establishes that during this period Mr NTAGANDA neither sent nor received any message, which was necessarily the case when Mr NTAGANDA's *phonie* was switched off.³⁹² As demonstrated in para 518-530 of the DCB on the basis of the short-NTAGANDA-Logbook,³⁹³ Mr NTAGANDA neither sent nor received messages: from the moment he departed Bunia on 21 November until 21h38 the same night; from his departure from Iga-Barriere on 22 November in the morning until 19h44 the same day; from the moment he departed Mabanga on 23 November in the morning until 07h15 on 24 November. During these periods, [REDACTED]. Moreover, until Mr NTAGANDA

³⁸⁷ DCB, paras.470-471,178-181.

³⁸⁸ Response, para.105.

³⁸⁹ DCB, para.473.

³⁹⁰ [DRC-OTP-0017-0033](#), p.0198(first)(Transl.[DRC-OTP-2102-3854](#), p.4020).

³⁹¹ DCB, paras.181,470; *See inter alia*: [DRC-OTP-0017-0033](#), p.0171(first)(Transl:[DRC-OTP-2102-3854](#), p.3993).

³⁹² Response, para.104.

³⁹³ [DRC-D18-0001-5748](#), p.5754(first)(Transl.[DRC-D18-0001-5778](#), p.5784); [DRC-D18-0001-5748](#), p.5756.(first)(Transl.[DRC-D18-0001-5778](#), p.5786); [DRC-D18-0001-5748](#), p.5758(Transl.[DRC-D18-0001-5778](#), p.5788); [DRC-D18-0001-5748](#), p.5760(Transl.[DRC-D18-0001-5778](#), p.5790).

arrived in Mongbwalu on 23 November in the evening it was not possible for him to communicate via VHF radio with SALUMU and/or SEYI due to the distance separating them.³⁹⁴

[REDACTED]

164. [REDACTED] evidence corroborates Mr NTAGANDA's testimony. Accordingly, his whereabouts are highly relevant to the chronology of the First Attack.

165. *First*, [REDACTED] and Mr NTAGANDA's [REDACTED],³⁹⁵ [REDACTED],³⁹⁶ [REDACTED],³⁹⁷ and [REDACTED]³⁹⁸ [REDACTED].

166. *Second*, Mr NTAGANDA testified that: on 21 November he departed from Bunia late in the afternoon and spent the night in Iga-Barriere; on 22 November he departed from Iga-Barriere in the morning arriving in the evening in Mabanga where he spent the night; on 23 November he departed Mabanga³⁹⁹ in the morning arriving in the evening in Mongbwalu, going through the airport, at a time when there was no more fighting in Mongbwalu; from 23-28 November he was in Mongbwalu; and returned to Bunia on 28. D-0017 testified that Mr NTAGANDA'[REDACTED] travelled [REDACTED] from Bunia to Mongbwalu arriving on the evening of the third day when there was no more fighting in Mongbwalu.⁴⁰⁰

167. *Third*, [REDACTED] testified that he travelled with Mr NTAGANDA to Mongbwalu⁴⁰¹; a trip which took place after [REDACTED]⁴⁰²; "when Mongbwalu was taken, the airport, I think",⁴⁰³ and "I can't be precise, but it must have been towards [REDACTED]".⁴⁰⁴

³⁹⁴SEYI and SALUMU's location at the relevant time can be established from the messages in the Short-NTAGANDA-Logbook. **D-0243**:T-257,33:6-7; **D-0300**:T-215,82:11-13.

³⁹⁵ [REDACTED].

³⁹⁶ [REDACTED].

³⁹⁷ [REDACTED].

³⁹⁸ [REDACTED].

³⁹⁹ DCB,para.347.

⁴⁰⁰ [REDACTED].

⁴⁰¹ [REDACTED].

⁴⁰² [REDACTED].

⁴⁰³ [REDACTED].

⁴⁰⁴ [REDACTED].

168. Considering that no questions were put to [REDACTED] regarding: the activities and the whereabouts of Mr NTAGANDA during this period; how long he was in Mongbwalu or more importantly where he was when [REDACTED] during the period from 19 November to 6 December 2002, the Prosecution's protestation that when [REDACTED] testified, it was unaware that Mr NTAGANDA "would argue [REDACTED]"⁴⁰⁵ is preposterous.

169. Even pursuant to the Prosecution's scenario, Mr NTAGANDA did not travel to Mongbwalu by plane.

CHAPTER IV - PROSECUTION ARGUMENTS RELATED TO THE FIRST ATTACK⁴⁰⁶

170. In support of challenges to the case for the Defence in relation to the First Attack the Prosecution refers to PCB, Section VII.A.2.b,⁴⁰⁷ which is entirely based on speculation resulting from the Prosecution's lack of military knowledge.

171. Indeed, using expressions such as "wove a story..."⁴⁰⁸ "this account is not credible",⁴⁰⁹ "cannot plausibly have been unaware",⁴¹⁰ "would have the Chamber believe that",⁴¹¹ "troops were miraculously fully prepared",⁴¹² "entirely implausible that NTAGANDA would",⁴¹³ "unreasonable",⁴¹⁴ "is also hard to believe",⁴¹⁵ "entirely unrealistic"⁴¹⁶ the Prosecution offers an unrealistic and unsubstantiated scenario as to how they imagine the First Attack unfolded, ignoring the candid, coherent, reasonable, detailed and comprehensive⁴¹⁷ testimony of Mr NTAGANDA based on real military experience and fully corroborated.

⁴⁰⁵ Response, para.123.

⁴⁰⁶ Response, paras.108-124.

⁴⁰⁷ PCB, paras.254-282.

⁴⁰⁸ PCB, para.254.

⁴⁰⁹ PCB, para.255.

⁴¹⁰ PCB, para.255.

⁴¹¹ PCB, para.256.

⁴¹² PCB, para.258.

⁴¹³ PCB, para.260.

⁴¹⁴ PCB, para.264.

⁴¹⁵ PCB, para.265.

⁴¹⁶ PCB, para.274.

⁴¹⁷ DCB, para.460.

172. Regarding the example related to Sayo advanced by the Prosecution,⁴¹⁸ the issue is not that Mr NTAGANDA's testimony should be preferred over that of P-0017, P-0768, P-0898, P-0963 but rather that it was clearly demonstrated that the evidence provided by these witnesses concerning the operation in Sayo is wholly unreliable. Notably the Prosecution omitted to cross-examine Mr NTAGANDA regarding the manner in which heavy weapons were used to liberate Sayo.
173. Regarding P-0055,⁴¹⁹ although he did travel to [REDACTED],⁴²⁰ it is manifest from the evidence he provided regarding: his arrival [REDACTED] to join the FPLC; his travel to [REDACTED]; the weapons allegedly transported on [REDACTED] and other weapons purportedly given to [REDACTED]; the purpose of Mr NTAGANDA's trip to [REDACTED]; and information he obtained regarding the FPLC operation later to take place in [REDACTED], he provided a modified version of events as they unfolded based on information obtained from other sources. Two examples suffice to illustrate P-0055's unreliable evidence.
174. First, repeatedly asked, in fact more than ten times,⁴²¹ whether he was present and/or could hear ongoing discussions between *inter alia* [REDACTED], P-0055 stated:
- I believe that I have already provided an explanation to this question. I told you that [REDACTED] and that there were some discussions [REDACTED] and I would be present or absent. These were not meetings as such, just discussions. I don't know how to explain this further to you. It was not a situation where people were convened to a meeting. It was simply a matter of informal discussions between [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. Sometimes I would be present and then I would hear what was being discussed, and at other times I was absent and therefore could not hear what they were discussing.⁴²²
175. On the day he travelled to [REDACTED], P-0055 was [REDACTED],⁴²³ he had arrived [REDACTED] on the same day,⁴²⁴ he had no knowledge of the FPLC;⁴²⁵ he had no

⁴¹⁸ Response, para. 109.

⁴¹⁹ Response, para. 111.

⁴²⁰ [REDACTED].

⁴²¹ P-0055:T-70,45:2-52:18.

⁴²² P-0055:T-70,59:10-17.

⁴²³ P-0055:T-73,76:7-13;T-70,26-31.

⁴²⁴ P-0055:T-70,35:22-36:14.

⁴²⁵ P-0055:T-70,42:14-23.

uniform;⁴²⁶ he held no position;⁴²⁷ he did not discuss [REDACTED]⁴²⁸ and the operation in Mongbwalu had not yet begun.⁴²⁹ P-0055 also contradicted his own statement regarding *inter alia* [REDACTED] he travelled to [REDACTED]⁴³⁰ and the weapons and ammunitions allegedly [REDACTED].⁴³¹

176. Secondly, with respect to weapons, P-0055 suddenly remembered as a result of suggestions put to him during cross-examination, having obtained information quasi-identical to Mr NTAGANDA's testimony concerning: (i) [REDACTED];⁴³² and (ii) the fact that [REDACTED]:

[...][REDACTED]. He left, [REDACTED]. When I got to Bunia, and I'm talking -- this is something I heard about. I was told that [REDACTED]. When Lubanga went back to Bunia [...][REDACTED]. And when [REDACTED] got to Bunia, that was when the aeroplane was transporting the ammunition [REDACTED]. [REDACTED]. And that day, that was the first time that Ntaganda [REDACTED].⁴³³

177. Considered in the light of the totality of P-0055's testimony and the false evidence he provided on many other matters, his evidence certainly cannot be relied upon in respect of the First Attack.
178. KISEMBO, during his private meeting with nuns from *la Communauté 'Servantes de Dieu'*, did not mention the presence of the *Abbé* at the *Appartements*,⁴³⁴ which is plainly an operational matter. On the previous day, Mr NTAGANDA had informed KISEMBO of the presence of the *Abbé* at the *Appartements* for the purpose of being interrogated by KASANGAKI but had not mentioned his name.⁴³⁵ KISEMBO and Mr NTAGANDA visited two religious congregations, namely '*les sœurs de la charité maternelle*'⁴³⁶ et

⁴²⁶ [REDACTED].

⁴²⁷ P-0055:T-70,47:5-8; [REDACTED].

⁴²⁸ P-0055:T-70,42:24-43:2.

⁴²⁹ DCB, paras.167-171.

⁴³⁰ P-0055:T-73,81:12-13;T-73,82:17-83:14.

⁴³¹ P-0055:T-70,36:15-19;T-70,43:23-25,T-73,89:16-20;T-73,84:15-86:16;T-73,90:5-24.

⁴³² P-0055:T-73,91:21-92:7.

⁴³³ P-0055:T-73,92:17-93:1.

⁴³⁴ [DRC-OTP-2058-0251](#),00:53:37-01:25:47(Transl.[DRC-OTP-2102-3708](#),ll.828-1362); Response,para.112.

⁴³⁵ DCB,Part IV,Chap.VI,SectionIV,III.

⁴³⁶ [DRC-OTP-2058-0251](#),00:51:07-00:54:07(Transl.[DRC-OTP-2102-3708](#),ll.747-783).

‘les servantes de Dieu’.⁴³⁷ During this visit, Mr NTAGANDA is indeed seen taking measures to ensure the security of the perimeter.⁴³⁸

179. Addressing the population in Shari, LUBANGA stated “*nous avons envoyés ces militaires à Aru, ils protègent les habitants là-bas, ils se trouvent à Mahagi, ils sont (...) partout. Nous les avons formés avec l’intention bienveillante d’aider tout le monde et de protéger tout le monde (...) nos militaires passent la nuit à l’extérieur là-bas pour protéger toutes les ethnies*”.⁴³⁹ Considering that the exchange of troops between Bunia and JEROME’s forces in Aru involved the same number of personnel on both sides - other than the fact that the soldiers from Bunia were sent with their weapons as opposed to those coming from Aru who arrived in Bunia without weapons- LUBANGA’s speech confirms that one of the objectives of the exchange of troops was to ensure that FPLC units were comprised of soldiers from various ethnic backgrounds.
180. Regarding P-0055’s testimony related to the expression ‘*Kupiga na kuchaji*’ the examples he provides of things that were taken “vehicles, motorcycles, bicycles, and what have you, vehicles”⁴⁴⁰ is significant. These examples refer to items that are necessary for the conduct of military operations and not necessarily taken with the intent to use them for private or personal use, which is the determining criteria.
181. Regarding P-0190’s testimony concerning Mongbwalu is not even necessary to support the argument that the FPLC operation was solely directed at the enemy, including the APC and the Lendu combatants. The Prosecution misunderstands his evidence. P-0190 made it clear that the FPLC “(...) had to attack the forces on site. There was an armed group that was on site”.⁴⁴¹
182. There is no contradiction in the evidence cited in support of the assumptions that “even civilians from the Lendu ethnic group could and did return”.⁴⁴² As set out in DCB paragraph 716 countering counts 12-13, civilians from all ethnic groups returned to

⁴³⁷ [DRC-OTP-2058-0251](#),00:54:29-01:25:35(Transl.[DRC-OTP-2102-3708](#),ll.785-1359).

⁴³⁸ [DRC-OTP-2058-0251](#),00:50:59-00:52:18(Transl.[DRC-OTP-2102-3708](#),ll.747-759);[DRC-OTP-2058-0251](#),01:25:36-01:26:31(Transl.[DRC-OTP-2102-3708](#),ll.1361-1371).

⁴³⁹ [DRC-OTP-0102-0003](#),15:38-17:06(Transcript.[DRC-OTP-0161-0014](#),Transl.[DRC-OTP-2102-3433](#),p.3441:173-178.); **P-0030**:[DRC-OTP-2054-3092](#),p.3157-3182.

⁴⁴⁰ **P-0055**:T-72,11:1-7.

⁴⁴¹ **P-0190**:T-97,7:10-12.

⁴⁴² Response,para.117.

Mongbwalu after the FPLC operation. Whereas P-0907 and P-0963, both unreliable witnesses, attempted to create an exception in respect of civilians from the Lendu ethnic group, their evidence is contradicted by P-0800 “after the war everyone came back to Mongbwalu from all different tribes” and P-0859, a Lendu civilian, who confirmed that he “and others returned to Mongbwalu and settled [REDACTED] where they used to live”.⁴⁴³

183. The Prosecution’s example concerning the reference to P-0016 is inapposite. The possibility that “*Mongbwalu a changé de mains très souvent à cause de la possibilité d’extraire les revenus*” has no bearing on the fact that in November 2002 at a time when the *Usine* had been destroyed for some time and that “gold mining activities in Mongbwalu were limited to amateurish small scale individual gold prospectors” gold mining in Mongbwalu was not one of the UPC-RP’s objectives in launching the operation in Mongbwalu.
184. The DNA result for the five bodies exhumed in SAI1-F1 is incontestable; there was only one match to the [REDACTED] family, that of [REDACTED].⁴⁴⁴ Despite the difficulties associated with the DNA analyses, SAI1-F1-B5 was not [REDACTED]⁴⁴⁵ or any missing member of the [REDACTED] family.
185. The determined age of SAI1-F1-B5 does not corroborate [REDACTED] as to the age [REDACTED]. Although [REDACTED] may have claimed that [REDACTED] was [REDACTED] during his testimony,⁴⁴⁶ the year of birth he originally provided the Prosecution,⁴⁴⁷ would make him [REDACTED] in 2002.⁴⁴⁸

⁴⁴³ DCB,para.716.

⁴⁴⁴ SAI1-F1-B3:[DRC-OTP-2084-0002](#),p.0010; P-0945:T-124,77:24-78:1;T-125,10:21-11:2.

⁴⁴⁵ [REDACTED].

⁴⁴⁶ [REDACTED].

⁴⁴⁷ [REDACTED] (metadata Source Identity: [REDACTED]).

⁴⁴⁸ [REDACTED] (“[REDACTED]”). Similarly, [REDACTED] originally stated [REDACTED] was 33 years old and later testified he was 19-20 to match P-0420’s finding that SAI1-F1-B2 was between 18-29. [REDACTED];P-0420:[DRC-OTP-2070-0180](#). [REDACTED] originally stated that [REDACTED] was 11 and later testified she was 12-14 to fit in the range of 13-17 years old determined by P-0420 for SAI1-F1-B4. [REDACTED];P-0420:[DRC-OTP-2074-0195](#).

186. [REDACTED]’s claim not to have been close to the bodies when they were dug up is plainly false. The video of the exhumation depicts [REDACTED] assisting and observing the exhumation process from a close distance.⁴⁴⁹
187. The Prosecution’s assertion that “[REDACTED] who is deceased, so the likelihood of it being him is virtually certain”⁴⁵⁰ is erroneous. It is precisely because the [REDACTED] is deceased that it is possible that the remains exhumed were those of the [REDACTED]. This is even more significant as the date the [REDACTED] died is unknown.⁴⁵¹ It is impossible to know whether the remains exhumed were those of [REDACTED] or the deceased [REDACTED].⁴⁵²
188. The “DNA samples were tested only for the biological relationship between parent-child or siblings and not for a nephew-uncle relationship (as existed between [REDACTED] and [REDACTED])”⁴⁵³ this is plainly false. This test was conducted yielding negative results.⁴⁵⁴

Mandro video

189. Contrary to the Prosecution erroneous assertion, the assembly or *Foren* depicted in the Mandro video happened at the end of October/early November before Mr NTAGANDA’s departure to Aru.⁴⁵⁵ “All the commanders, even lower-ranking officers as well as the troops in Mandro, all of them, they were all at this assembly”.⁴⁵⁶ When Mr NTAGANDA went to Aru all these forces were given to SALUMU and this force was deployed in Mongbwalu, that was at the start of the month of November.⁴⁵⁷ When the assembly took place in Mandro SALUMU was not present. Mr NTAGANDA saw SALUMU for the first time in Mongbwalu.⁴⁵⁸ The speech delivered by Chef KAHWA

⁴⁴⁹ [DRC-OTP-2072-0003](#),21:22-28:20(individual in the blue shirt).

⁴⁵⁰ Response,fn.454.

⁴⁵¹ [REDACTED].

⁴⁵² **P-0945**:T-124,77:24-78:1;T-125,10:21-11:2.

⁴⁵³ Response,para.120.

⁴⁵⁴ [DRC-OTP-2084-0002](#),p.0010;[DRC-OTP-2070-0040](#),p.0010(“The DNA profiles from the human remains of the unidentified persons were compared with the DNA profiles from the relatives mentioned in Table 2”),p.0006(“Table 2 [...] [REDACTED]”).

⁴⁵⁵ **D-0300**:T-216,7:10-24.

⁴⁵⁶ **D-0300**:T-216,7:18-19.

⁴⁵⁷ **D-0300**:T-216,7:10-24; **D-0017**:T-253,30:9-31:17.

⁴⁵⁸ **D-0300**:T-216,7:8-9.

is an accurate reflection of FPLC ideology.⁴⁵⁹ Mr NTAGANDA contributed to the content of the speech of Chef KAHWA.⁴⁶⁰ The Mandro assembly was not filmed for any propaganda purpose and no media representatives were invited even though some were present.⁴⁶¹ The Prosecution failed to demonstrate let alone to prove that FPLC events were filmed for propaganda purposes.⁴⁶² No probative value can be attached to the testimony of unreliable witnesses P-0768, P-0907, P-0010, P-0963, P-0017 that they were instructed to commit crimes.⁴⁶³

CHAPTER V - MR NTAGANDA BEARS NO RESPONSIBILITY IN RELATION TO THE FIRST ATTACK⁴⁶⁴

190. The Prosecution's submissions regarding direct co-perpetration are misguided.⁴⁶⁵ The Prosecution ignores, once again,⁴⁶⁶ that this mode of liability was expressly rejected by PTC II.⁴⁶⁷ This plainly shows the extent to which the Prosecution is at a loss to find 'ways to convict Mr NTAGANDA' without a required evidence.

191. D-0251, [REDACTED] and D-0017 [REDACTED], clearly described Mr NTAGANDA's attitude towards PMF; views towards relationships between male and female FPLC members/bodyguards; and rape in any situation.⁴⁶⁸ P-0010's allegations that she was raped by [REDACTED] are preposterous.⁴⁶⁹ When informed of allegations of sexual violence, including attempts, Mr NTAGANDA took measures.⁴⁷⁰ FPLC members did receive instructions on the FPLC ideology, including the absolute prohibition of rape in all circumstances.⁴⁷¹ D-0017 and D-0251 had not met for years before their testimony. D-251 confirmed that neither the financial assistance she received from Mr NTAGANDA nor any alleged [REDACTED] between her and Mr.

⁴⁵⁹ **D-0300**:T-216,12:5-12.

⁴⁶⁰ **D-0300**:T-216,12:13-13:1.

⁴⁶¹ **D-0300**:T-216,13:11-14:10.

⁴⁶² Response,para.124.

⁴⁶³ Response,para.124; DCB,Part IV,Chapt.III,SectionI; DCB,Part VI,Chapt.I,SectionIV.

⁴⁶⁴ Response,paras.211-225.

⁴⁶⁵ Response,para.211.

⁴⁶⁶ PCB,paras.25,794,826.

⁴⁶⁷ CD,para.102.

⁴⁶⁸ **D-0251**:T-260,33:12-39:6,66:3-21,68:14-18; **D-0017**:T-253,60:23-61:6;T-254,35:23-25,36:2-39:2.

⁴⁶⁹ DCB,paras.1272-1276.

⁴⁷⁰ DCB,para.175,1560.

⁴⁷¹ [DRC-OTP-0082-0016](#),25:17-26:47(Transl.[DRC-OTP-0164-0710](#),ll.375-397); [DRC-OTP-0082-0016](#),16:57-18:12(Transl.[DRC-OTP-0164-0710](#),ll.247-260); **D-0017**:T-252,68:17-69:5; DCB,para.703.

NTAGANDA motivated her decision to testify: “That’s not it”.⁴⁷² D-0017 denied similar allegations, “It’s not because [REDACTED] that I am here”.⁴⁷³

192. No Lendu-related derogatory songs were sung in Mandro.⁴⁷⁴ The evidence provided by P-0010 in this regard refers to the period when she was a member of the APC.⁴⁷⁵
193. The G5 monthly report demonstrates the FPLC’s intention to manage and safe guard its relationship with local civilians and to ensure the well-being of the population.⁴⁷⁶ The information in the report which was obtained by various G5 representatives is just that; information obtained from various sources, which had yet to be validated. Mr NTAGANDA confirmed that he never read this report.⁴⁷⁷
194. The Mongbwalu video firmly establishes that FPLC leaders did not intend to displace civilians.⁴⁷⁸ As evidenced by the lady speaking to KISEMBO addressing civilians who had returned to Mongbwalu, they were not only Hema: “*je suis rentrée car je me suis dis que les Hema sont des gens avec qui nous cohabitons*”.⁴⁷⁹ There is no evidence that the Mongbwalu video was propaganda. Strikingly, [REDACTED] who provides an objective description of the situation in Mongbwalu, indeed favourably to the ‘UPC’, later appears in a different video in which he is very critical of UPC.⁴⁸⁰ That [REDACTED] and [REDACTED] does not establish in any way that the videos were produced for propaganda purposes. Comparing the testimony of [REDACTED] and [REDACTED] with [REDACTED] reveals significant differences, which highlight a surprising change of mind rendering their evidence unreliable.⁴⁸¹
195. [REDACTED] statement on the Mongbwalu video does not negate in any way that FPLC leaders’ did not intend to displace civilians.⁴⁸² [REDACTED] rather underscores the Lendu combatants’ disinformation campaign and the good conduct of the troops

⁴⁷² D-0251:T-260,85:6-9.

⁴⁷³ D-0017:T-255,42:18-43:4.

⁴⁷⁴ D-0017:T-252,70:11-15; D-0300:T-213,66:20-23,67:4-18.

⁴⁷⁵ DCB,paras.1263-1264.

⁴⁷⁶ [DRC-OTP-0109-0136](#),p.0137,0138,0142(“*Chercher un moyen de communication dans l’armée pour ne pas embêter les civils*”).

⁴⁷⁷ D-0300:T-234,4:12-5,9:5.

⁴⁷⁸ Response,para.216.

⁴⁷⁹ [DRC-OTP-2058-0251](#),01:51:34-01:51:37(Transl.[DRC-OTP-2102-3766](#),l.1904).

⁴⁸⁰ [DRC-OTP-0081-0006](#),00:12:39-00:14:00(Transl.[DRC-OTP-0180-0434](#),0440:168-190),00:15:50-00:22:48 (Transl.[DRC-OTP-0180-0434](#),0441:231-0445:361).

⁴⁸¹ [REDACTED].

⁴⁸² [DRC-OTP-2058-0251](#),01:31:07-01:34:41(Transl.[DRC-OTP-2102-3766](#),ll.1461-1533).

coming from Aru such as *“le fait de ne pas s’emparer de biens des gens, d’encourager les habitant qu’ils rencontraient à rentrer chez eux sans se faire le moindre souci, dans la confiance totale et reprendre la vie comme par le passé”* and the need to get closer to the population *“pour leur donner de plus amples explications”*. In fact, KISEMBO and Mr. NTAGANDA’s message to the returning population is telling: *“nous demandons également aux Lendu de revenir, mais pas les combattants. Vous comprenez ? pas les combattants. Hein ?”*;⁴⁸³ *“mais vous qui êtes revenus avant les autres, vous ne devez pas entrer dans les maisons d’autrui. Si vous avez laisse votre maison, c’est à cette même maison que vous devez revenir. Hein ?”*;⁴⁸⁴ *“J’irai à la radio et je demanderai à tout le monde de revenir maintenant.”*;⁴⁸⁵ *“alors vous êtes un civil. En tant que tel vous êtes un civil. Un civil reste un civil, et tous les civils sont égaux.”*;⁴⁸⁶ *“Ce n’est un problème des Hema uniquement. Les Bira ont combattu. Hein ? toutes les ethnies ont combattu les Lendu. Alors ? N’allez pas semer la zizanie en disant que c’est un conflit entre les Lendu et les Hema. Je ne veux pas entendre ces choses-là”* ⁴⁸⁷ ; *“Il faut bien contrôler cette situation. Aussi je ne voudrais pas que les militaires circulent par ici dans les ... je ne veux pas ça. Hein?”*.⁴⁸⁸

196. Regarding the Lendu civilians who were sheltered and protected in Mandro, Mr NTAGANDA testified that Chef KAHWA gave them a place to live while he was protecting them.⁴⁸⁹ Mr NTAGANDA spoke to them “they were with us. Every time I went to see where they were”.⁴⁹⁰ It can certainly be inferred based on the totality of the evidence related to this event that ‘Bosco’ referred to by D-0054 was Mr NTAGANDA. Moreover, the actions of Chef KAHWA at the time certainly cannot be dissociated from that of Mr NTAGANDA who had been tasked by KISEMBO to oversee the training in Mandro.⁴⁹¹ This event undoubtedly reveals the attitude of those who eventually became UPC-RP or FPLC leaders’ towards Lendu civilians.

⁴⁸³ [DRC-OTP-2058-0251](#),01:44:50-01:44:57(Transl.[DRC-OTP-2102-3766](#),ll.1688-1689).

⁴⁸⁴ [DRC-OTP-2058-0251](#),01:44:13-01:44:21(Transl.[DRC-OTP-2102-3766](#),ll.1672-1673).

⁴⁸⁵ [DRC-OTP-2058-0251](#),01:44:08-01:44:11(Transl.[DRC-OTP-2102-3766](#),ll.1669).

⁴⁸⁶ [DRC-OTP-2058-0251](#),01:45:08-01:45:15(Transl.[DRC-OTP-2102-3766](#),ll.1698-1699).

⁴⁸⁷ [DRC-OTP-2058-0251](#),01:46:22-01:46:34(Transl.[DRC-OTP-2102-3766](#),ll.1727-1729).

⁴⁸⁸ [DRC-OTP-2058-0251](#),01:53:49-01:53:53(Transl.[DRC-OTP-2102-3766](#),ll.1971-1973).

⁴⁸⁹ **D-0300**:T-213,71:9-12.

⁴⁹⁰ **D-0300**:T-213,71:6-8.

⁴⁹¹ **D-0300**:T-213,57:19-24.

197. Significantly, even though most of P-0963's testimony is utterly unreliable - mainly on the basis that it reveals that he was neither present during the First Attack nor the Second Attack – his evidence confirms that SALUMU followed the proper targeting procedure; sought to avoid destruction; and confined target to military objectives. "The house and the people in it" evidently refers to a military objective and the combatants who were using/sheltering in it.
198. Mr NTAGANDA did care "for religious people and places".⁴⁹² The Prosecution's theory⁴⁹³ [REDACTED]⁴⁹⁴ concerning: BWANALONGA; orders to kill three nuns; attack against churches; and pillage of religious property in the context of the fictional placing of anti-personal mines must be rejected.
199. Mr NTAGANDA issued orders and instructions prohibiting looting, always insisting on the protection of the civilian population and their goods.⁴⁹⁵ Mr NTAGANDA also took numerous measures in relation to FPLC members involved in looting.⁴⁹⁶ On this backdrop, the corroborated evidence confirming that Mr NTAGANDA ordered the burning of looted goods in Komanda and publicly punished the perpetrators thereof;⁴⁹⁷ was involved in the execution of an FPLC member by firing squad for pillaging a civilian of the *nande* ethnic group in Ndromo;⁴⁹⁸ and arrested ABELANGA for looting in Mongbwalu,⁴⁹⁹ manifestly demonstrate Mr NTAGANDA's zero tolerance policy with respect to looting.
200. The Prosecution misunderstands the content of and the context depicted by the three logbook messages referred to in paragraph 221. These messages are related to the FPLC's aim to enforce discipline and to repress looting. In particular Mr NTAGANDA's message dated 17 February 2003⁵⁰⁰ sheds light on the importance Mr

⁴⁹² DCB,para.756.

⁴⁹³ Response,para.219.

⁴⁹⁴ See Part III, Chapt.I, Section I; DCB, Part IV, Chapt.III, Section I, A.

⁴⁹⁵ **D-0251**:T-260,27:12-20; **D-0017**:T-252,59:4-11.

⁴⁹⁶ DCB,para.774.

⁴⁹⁷ **D-0017**:T-252,80:10.

⁴⁹⁸ **D-0300**:T-227,47:8-13,83:7-25;T-242,84:17-86:8.

⁴⁹⁹ **D-0017**:T-255,7:7-12.

⁵⁰⁰ [DRC-OTP-0017-0033](#),p.0178(Transl.DRC-OTP-2102-3854,p.4000).

NTAGANDA attaches to this issue. Other messages also illustrate the handling of cases related to theft.⁵⁰¹

201. The Prosecution failed to prove that Mr NTAGANDA harboured the specific intent to discriminate against non-Hema civilians.⁵⁰² This conclusion is supported by the evidence related to *inter alia* the multi ethnic composition of the UPC-RP;⁵⁰³ the multi ethnic composition of the FPLC;⁵⁰⁴ the creation of the UPC-RP, its strategic goals and ideology;⁵⁰⁵ speeches delivered by LUBANGA and others UPC-RP members;⁵⁰⁶ the FPLC ideology developed by NTAGANDA, KISEMBO in conformity with the UPC-RP ideology;⁵⁰⁷ UPC-RP and FPLC's senior leadership speeches addressed to FPLC members concerning the UPC-RP and FPLC ideology;⁵⁰⁸ measures taken to create a binding military force;⁵⁰⁹ instructions and orders issued by Mr NTAGANDA;⁵¹⁰ the conduct of FPLC's operations and measures taken at all levels to prevent and repress the commission of crimes.⁵¹¹
202. Events described in DCB paragraph 796 further support this conclusion. The victim killed by LIRIPA in Mongbwalu, a crime for which he was executed by firing squad, was a Lendu civilian.⁵¹² The official crimes for which LIRIPA was executed suggest that they were selected as part of the forceful message to all FPLC members and the population that such acts were not tolerated; that the ethnicity of the victim was not expressly mentioned in the message is not a relevant consideration regarding specific intent. Whether the official orders leading to the public execution by firing squad of FPLC members were issued by LUBANGA is also not relevant to specific intent. Quite to the contrary, it demonstrates the existence of and respect for the FPLC chain of command; that the FPLC was subordinated to the UPC-RP and that punishment were not meted out arbitrarily. The sheltering and protection of Lendus in Mandro also

⁵⁰¹ [DRC-OTP-0017-0033](#),p.0079(third)(Transl.DRC-OTP-2102-3854,p.3901);[DRC-OTP-0017-0033](#),p.0169(first)(Transl.DRC-OTP-2102-3854,p.3991).

⁵⁰² Response,para.223.

⁵⁰³ DCB,para.70.

⁵⁰⁴ DCB,para.236.

⁵⁰⁵ DCB,paras.5,154.

⁵⁰⁶ DCB,paras.71,160,161,173,175,811,1304,1376.

⁵⁰⁷ See DCB,Part III,Section I,B.

⁵⁰⁸ DCB,paras.140,591,624,

⁵⁰⁹ DCB,paras.210,233.

⁵¹⁰ DCB,paras.460,594,763,771,775,784,794.

⁵¹¹ DCB,paras.588,589,590,810,811,812,813

⁵¹² **P-0859**:T-51,43:6-20; DCB,para.175.

confirms that the UPC-RP, FPLC and Mr NTAGANDA did not harbour a specific intent to discriminate against non-Hema.

203. There is no evidentiary base for the Prosecution's submission that Mr NTAGANDA interrogated BWANALONGA [REDACTED] whose evidence must be disregarded in its entirety.⁵¹³
204. Considering in particular Mr NTAGANDA's evidence regarding the identity of the FPLC's enemy, Mr NTAGANDA's affirmation that authorising KASANGAKI to interrogate was not related to the latter's ethnicity is certainly plausible.⁵¹⁴
205. P-0769's evidence being told that the UPC-RP's aim was to take over Congo in its entirety⁵¹⁵ is not supported by the totality of the evidence in this case, whether documentary or testimonial. On the other hand, his testimony that "we weren't just fighting enemies, be they Bahema or Balendu, but that we were fighting the government"⁵¹⁶ is supported by a wealth of evidence. P-0769's evidence that the UPC's ideology involved targeting their Lendu enemies through insulting songs⁵¹⁷ is contradicted by D-0017.⁵¹⁸ P-0769's unreliable testimony regarding the short time he spent in Mandro,⁵¹⁹ motivated by the desire to take revenge on fellow FPLC members who mistreated him during [REDACTED],⁵²⁰ cannot be relied upon.

PART IV - SUBMISSIONS RELATED TO THE SECOND ATTACK AS CHARGED⁵²¹

CHAPTER I – MR NTAGANDA INCURS NO CRIMINAL LIABILITY IN RELATION TO THE SECOND ATTACK⁵²²

INTRODUCTION

206. Mr NTAGANDA did not testify that he knew nothing about the operations related to the Second Attack as charged.⁵²³ Addressing the 19 February message he read in the

⁵¹³ Response, para. 224.

⁵¹⁴ Response, para. 224.

⁵¹⁵ Response, para. 225.

⁵¹⁶ P-0769:T-120,31:9-11.

⁵¹⁷ P-0769:T-120,32:9-11.

⁵¹⁸ D-0017:T-252,70:11-15.

⁵¹⁹ P-0769:T-121,90:13-22;T-122.

⁵²⁰ P-0769:T-122,48:4-49:18.

⁵²¹ Response, paras. 226-242.

⁵²² Response, paras. 226-242.

“In” Section of the Ntaganda-Logbook – a message he did not send –⁵²⁴ Mr NTAGANDA stated that he was not surprised about FPLC activities taking place in the area of Lipri on the basis of his general awareness that opening the Main Road⁵²⁵ going through the area controlled by Lendu combatants and APC elements was one of the objectives of the FPLC.⁵²⁶ Mr NTAGANDA also knew that his superior KISEMBO was personally handling operations in that area; that TIGER ONE was commanding FPLC forces on the Mongbwalu-Kilo-Nyangaray-Bunia axis; and that 409Bde was located in Kilo under the command of SALUMU.⁵²⁷

Section I - Mr Ntaganda did not plan, contribute to the planning or have knowledge of the planning of the operation to open the Main Road

207. Based on the unreliable evidence provided by P-0055 and messages in the Ntaganda-Logbook, the Prosecution claims that Mr NTAGANDA was involved in planning the Second Attack allegedly preceded by two meetings: a planning meeting not attended by Mr NTAGANDA followed by a preparation meeting during which Mr NTAGANDA was present and issued instructions [REDACTED].⁵²⁸ The Prosecution’s claim is not supported by the evidence
208. First, as revealed by a comprehensive analysis of P-0055’s testimony, including, *inter alia*, his inability to provide dates, significant evidence he only remembered during cross-examination, incriminating evidence he fabricated and his conduct related to his testimony in this case, the evidence P-0055 provided on this issue is unreliable and cannot be accorded any weight. Second, Mr NTAGANDA firmly rejected the suggestion that he attended any planning or preparation meeting, adding that meetings [REDACTED] happened only once, on 5 March 2003, the day before the FPLC was chased from Bunia. Third, Mr NTAGANDA explained in what circumstances a commander could initiate an attack in his zone without first seeking authorisation from the senior leadership, and even provided examples. Mr NTAGANDA also testified that KISEMBO, his superior holding the position of Chef-EMG-FPLC, did not report to him and explained why. Fourth, KISEMBO, Mr NTAGANDA and TIGER ONE were

⁵²³ *Contra* Response, para. 234.

⁵²⁴ DCB, paras. 1064-1071.

⁵²⁵ Mongbwalu-Kilo-Kobu-Bambu-Nizi-Bunia (“Main Road”).

⁵²⁶ DCB, para. 1071.

⁵²⁷ DCB, paras. 1049, 1051-1052.

⁵²⁸ Response, para. 231.

not in Bunia when the planning and preparation meetings alleged by the Prosecution took place. Fifth, the G2 report admitted in evidence *via* the Bar table, and other alleged contemporaneous documents, do not support the conclusion that a *saba saba* was captured during an operation which took place on the previous day. Sixth, the 18 February message related to the refusal of AMERICAIN to advance does not support the conclusion that ZERO ONE died in February 2003. Seventh, P-0901 testified that when the orders for the operation on Kobu, Bambu and Lipri were given, [REDACTED]. Eighth, the unreliable evidence provided by P-0907 and P-0901 does not support the conclusion that Mr NTAGANDA planned the Second Attack. Ninth, the unauthorised operation led by ZERO ONE during which he died took place on or about the period from 26 to 28 January 2003. Tenth, BEBWA was indeed appointed as interim commander of the Mwanga Bde following the death of ZERO ONE in January. Lastly, KAREKA appointed as commander of the 3rd Bn on 12 February is not KAREKA the S4 who died along ZERO ONE in January.

A. The evidence provided by P-0055 is unreliable

I. Dates

209. On numerous occasions during his testimony, P-0055 stated that he was not able to provide dates.⁵²⁹
210. Nevertheless, he was in a position to indicate that the Lipri operation happened one month or one month and a half before the 6 March attack,⁵³⁰ and did not deny the suggestion that it happened in January.⁵³¹
211. He testified about numerous events that Mr NTAGANDA also testified about, but always refused to date them or to place them in a chronological order.
212. He testified about Mr NTAGANDA's trip to KASENYI, and [REDACTED].⁵³² This trip occurred on or about 26 to 28 February 2003.⁵³³

⁵²⁹ P-0055:T-70,25:18-22;T-71,59:24-60:3;T-72,37:10-12,84:6-10,85:3-5;T-73,70:7-19;T-74,26:8-13,41:3-13,48:9-18.

⁵³⁰ DCB,para.1029.

⁵³¹ P-0055:T-74,48:6-8.

⁵³² P-0055:T-71,21:23-24

⁵³³ D-0300:T-219,38:18-39:14.

213. He provided evidence regarding the RCD-Goma's visit to Bunia, [REDACTED].⁵³⁴ Yet again, he was not in a position to date the event, which occurred between 6 and 8 February 2003.⁵³⁵
214. He also testified [REDACTED].⁵³⁶ Yet, despite numerous questions during cross-examination, he refused to place these two events and the Lipri ambush in a chronological order.⁵³⁷
215. Reading the complete transcript of P-0055's testimony reveals his refusal to provide dates to avoid being caught in fabricating his testimony. In particular, his inability to provide [REDACTED] and other related events undermine his reliability.

II. When examined by the Prosecution, P-0055 omitted to mention significant and material events directly linked to his interaction with Mr Ntaganda at times relevant to the UDCC

216. During cross-examination P-0055 mentioned for the first time, *inter alia*:
- [REDACTED].⁵³⁸
 - Having knowledge that during the ambush in Lipri when ZERO ONE died, a heavy weapon/type 12 weapon was also captured, which P-0055 acknowledged as being an important event;⁵³⁹
 - Having a telephone conversation with [REDACTED] when Mr NTAGANDA was [REDACTED] and KISEMBO [REDACTED].⁵⁴⁰ More than an omission, P-0055 actually lied as he previously testified that he did not communicate with Mr NTAGANDA when the latter was [REDACTED].⁵⁴¹
217. [REDACTED] by P-0055 is material and corroborates Mr NTAGANDA's testimony.⁵⁴² It is significant because it is directly related to the timing of events he

⁵³⁴ P-0055:T-74,50:14-51:1.

⁵³⁵ DCB,para.1033.

⁵³⁶ P-0055:T-74,47:24-48:4.

⁵³⁷ P-0055:T-74,47:10-15,47:24-48:4,51:21-53:15.

⁵³⁸ [REDACTED].

⁵³⁹ P-0055:T-74,46:24-47:9.

⁵⁴⁰ P-0055:T-74,73:2-8.

⁵⁴¹ P-0055:T-71,42:9-15.

⁵⁴² DCB,paras.1017-1019.

testified about, namely the death of ZERO ONE and KAREKA during a second unauthorised operation in the area of Lipri within a few days.⁵⁴³

218. [REDACTED] is material as well as of critical importance in that: (i) it establishes that by [REDACTED], Mr NTAGANDA was still in [REDACTED];⁵⁴⁴ (ii) it confirms that KISEMBO had returned from Mongbwalu and was in Bunia before Mr NTAGANDA returned to Bunia, which is linked to another of P-0055 lies;⁵⁴⁵ (iii) it contradicts P-0055's testimony that following Mr NTAGANDA's return to Bunia, [REDACTED],⁵⁴⁶ which is false; (iv) it assists in providing a timeframe concerning the [REDACTED] he testified about, which must have taken place before Mr NTAGANDA's departure from Bunia; and (v) it corroborates Mr NTAGANDA's testimony.⁵⁴⁷ It is also very important in relation to the chronology of events.

219. These are not events P-0055 could have forgotten. He deliberately omitted to mention them, which irreparably impairs his reliability.

III. *P-0055 fabricated incriminating evidence*

220. LUBANGA was not informed by MONUC about alleged crimes in Kobu⁵⁴⁸ and therefore [REDACTED].⁵⁴⁹ Consequently, P-0055 could not and did not [REDACTED] during which alleged crimes in Kobu were discussed.⁵⁵⁰ P-0055 did not contact [REDACTED] about alleged crimes in Kobu.⁵⁵¹ P-0055 did not get [REDACTED] about alleged crimes in Kobu.⁵⁵² P-0055 did not convey information allegedly obtained from [REDACTED] (whose name he did not remember) [REDACTED].⁵⁵³ P-0055 did not have a conversation [REDACTED].⁵⁵⁴ P-0055 could not and did not report the information he purportedly obtained [REDACTED].⁵⁵⁵

⁵⁴³ DCB, paras.1017-1024.

⁵⁴⁴ DCB, paras.1084-1086,1136.

⁵⁴⁵ DCB, paras.1084-1086,1136.

⁵⁴⁶ **P-0055**:T-71,43:23-24.

⁵⁴⁷ DCB, paras.1084-1086.

⁵⁴⁸ DCB, paras.1133-1134.

⁵⁴⁹ DCB, para.1134.

⁵⁵⁰ DCB, paras.1132-1135.

⁵⁵¹ DCB, para.1134.

⁵⁵² DCB, para.1134.

⁵⁵³ DCB, para.1134.

⁵⁵⁴ DCB, paras.1136-1139.

⁵⁵⁵ DCB, paras.1136-1139.

221. P-0055 testified that Mr NTAGANDA and JEROME planned the Mongbwalu operation while [REDACTED].⁵⁵⁶ Yet, Mr NTAGANDA's [REDACTED] was not related to the Mongbwalu operation, and the planning occurred later.⁵⁵⁷
222. P-0055's fabricated evidence fatally undermines his credibility and precludes the Chamber from relying on his testimony for any incriminating purpose.

IV. P-0055 provided inconsistent and confusing evidence

223. P-0055 account of his [REDACTED] is inconsistent and unclear: he stated that he was supposed to get [REDACTED],⁵⁵⁸ then he stated it was [REDACTED].⁵⁵⁹ In any case, the Prosecution never elicited evidence that [REDACTED]. He also stated that he went to Bambu to help the troops [REDACTED].⁵⁶⁰ Then he stated that he went to see the troops who were [REDACTED].⁵⁶¹ This account is also inconsistent with the Prosecution's own theory that the attack on [REDACTED] occurred on [REDACTED].⁵⁶²
224. [REDACTED],⁵⁶³ [REDACTED],⁵⁶⁴ [REDACTED].⁵⁶⁵
225. P-0055 testified that he never heard the name PIGWA, [REDACTED],⁵⁶⁶ whereas PIGWA was in charge of [REDACTED].⁵⁶⁷
226. [REDACTED].⁵⁶⁸
227. P-0055 claims that KISEMBO went to Mongbwalu the [REDACTED] to prepare troops belonging to SALUMU's brigade,⁵⁶⁹ while the evidence relied on by the Prosecution is that troops were stationed in Kilo before they headed to Kobu.⁵⁷⁰

⁵⁵⁶ P-0055:T-70,43:7-25.

⁵⁵⁷ DCB, paras.167-171,490-499.

⁵⁵⁸ [REDACTED].

⁵⁵⁹ [REDACTED].

⁵⁶⁰ [REDACTED].

⁵⁶¹ [REDACTED].

⁵⁶² [REDACTED].

⁵⁶³ [REDACTED].

⁵⁶⁴ [REDACTED].

⁵⁶⁵ [REDACTED].

⁵⁶⁶ [REDACTED].

⁵⁶⁷ [REDACTED].

⁵⁶⁸ [REDACTED].

⁵⁶⁹ P-0055: [REDACTED].

228. P-0055 acknowledged [REDACTED],⁵⁷¹ information that had never been mentioned to the prosecution before.⁵⁷² P-0055 knew however that Mr NTAGANDA was well aware of [REDACTED].

229. P-0055 contradicted [REDACTED] and statements [REDACTED].⁵⁷³ [REDACTED].

V. P-0055's [REDACTED]

230. [REDACTED].⁵⁷⁴ [REDACTED].⁵⁷⁵ [REDACTED].⁵⁷⁶

231. [REDACTED].⁵⁷⁷ [REDACTED].⁵⁷⁸

232. P-0055 ended up testifying in February 2016.⁵⁷⁹

233. P-0055 clearly had an interest in providing incriminating evidence against Mr NTAGANDA with a view [REDACTED]. [REDACTED].

234. It is also significant that in the process, P-0055 made serious accusations [REDACTED] against Mr NTAGANDA which were never adjudicated nor proved.⁵⁸⁰

B. Mr Ntaganda did not participate in any meeting related to the Second Attack

235. When the Prosecution specifically put to Mr NTAGANDA that he participated in a preparation meeting with LUBANGA, KISEMBO, TCHALIGONZA, SALONGO [REDACTED]:

[REDACTED].⁵⁸¹

236. Mr NTAGANDA also denied the suggestion that he ordered the [REDACTED] troops that were attacking the Bambu road in February 2003:

⁵⁷⁰ **P-0017**:T-63,10:11 et seq.

⁵⁷¹ [REDACTED].

⁵⁷² [REDACTED].

⁵⁷³ [REDACTED].

⁵⁷⁴ [REDACTED].

⁵⁷⁵ [REDACTED].

⁵⁷⁶ [REDACTED].

⁵⁷⁷ [REDACTED].

⁵⁷⁸ [REDACTED].

⁵⁷⁹ **P-0055**:T-70 to T-74.

⁵⁸⁰ *Ex parte* hearing[REDACTED],p.5-7.

⁵⁸¹ [REDACTED].

[REDACTED].⁵⁸²

C. An FPLC commander could launch an attack without first seeking authorisation, and Kisembo did not report to Mr Ntaganda

237. Mr NTAGANDA explained that each commander in their sector could initiate an attack in his zone without first seeking authorisation from the senior leadership.⁵⁸³ He gave the example of MUGISA, who opened the road to Mahagi as he was in Fataki without requesting authorisation from the EMG.⁵⁸⁴ Mr NTAGANDA also testified that KISEMBO, his superior holding the position of Chef-EMG-FPLC was not bound to report to him or inform him, did not report to him and explained why.⁵⁸⁵

238. That Mr NTAGANDA did not have detailed information concerning the actions and plans of KISEMBO on the Mongbwalu-Kilo-Nyangaray-Bunia axis and Main Road area, other than what he obtained in the Ntaganda-Logbook messages, was not exceptional. KISEMBO did provide basic information to the President and Mr NTAGANDA, telling them that more was to come, which did not surprise Mr NTAGANDA.

D. Kisembo, Mr Ntaganda and Tiger one were not in Bunia on the date suggested by the Prosecution when the planning and preparation meetings would have taken place

239. The Prosecution claims that the ambush in Lipri, death of two FPLC commanders and loss of a heavy weapon occurred on 17 February 2003. Thus, the Prosecution's theory, based [REDACTED] is that the preparation meeting Mr NTAGANDA was involved in occurred on 16 February 2003.⁵⁸⁶

240. Significantly, on 16 February 2003, Mr NTAGANDA,⁵⁸⁷ KISEMBO⁵⁸⁸ and TIGER ONE⁵⁸⁹ were not in Bunia.

⁵⁸² [REDACTED].

⁵⁸³ D-0300:T-238,11:24-12:2,12:6-12,13:5-8.

⁵⁸⁴ D-0300:T-238,11:25-12:1.

⁵⁸⁵ DCB,para.1056; D-0300:T-243,52:6-11;T-215,37:1-38:10.

⁵⁸⁶ [REDACTED].

⁵⁸⁷ DCB,paras.1041-1044.

⁵⁸⁸ DCB,paras.1041,1047,1033; P-0017:T-59,78:10-11;T-63,13:1-2.

⁵⁸⁹ SALONGO was appointed Comd-SE-OpSec based in Mongbwalu or Kilo on/or about 10 December 2002,DCB,paras.305,1038,1052. His appointment was confirmed in the 12 February 2003 *Mise en place*: [DRC-OTP-0017-0033](#),0183.

241. The evidence demonstrates that on 16 February 2003, Mr NTAGANDA was in Rwanda. He left Bunia on 14 February 2003 and returned early on 17 February.⁵⁹⁰
242. The evidence establishes that between January and March 2003, KISEMBO was in Bunia twice: during the 1st of January ceremony and when the RCD-Goma visited Bunia between 6 and 8 February.⁵⁹¹ The Prosecution did not elicit evidence concerning KISEMBO's presence in Bunia at any other time.
243. In addition, Mr NTAGANDA met KISEMBO on 14 February in Mongbwalu.⁵⁹² On 17 February, early in the morning before leaving Mongbwalu, he was informed by BANGA SAFARI that KISEMBO had left Mongbwalu for Kilo.⁵⁹³
244. KISEMBO came back to Bunia before Mr NTAGANDA, between 21 February and 2 March.⁵⁹⁴ A message sent by KISEMBO on 21 February shows that on that day he was in Kilo or Mongbwalu.⁵⁹⁵ This message is significant as it appears in both the "In" and "out" sections of the Ntaganda-Logbook,⁵⁹⁶ which is an error. This mistake, which can only have been made by the signora involved, is identical to the mistake related to the 19 February message.⁵⁹⁷ The content of this message demonstrate that it was sent by KISEMBO in his capacity as Chef-EMG-FPLC and that KISEMBO and Mr NTAGANDA were not co-located.⁵⁹⁸ Only Mr NTAGANDA was in Bunia.⁵⁹⁹
245. Other messages demonstrate that KISEMBO and Mr NTAGANDA were not co-located when Mr NTAGNADA was in Bunia from 17 February to 19 February and from late on 20 February to 21 February.⁶⁰⁰
246. As for SALONGO, the evidence establishes that he was in Bunia, along with KISEMBO, for the New Year celebration⁶⁰¹ and the RCD Goma visit.⁶⁰² There is no

⁵⁹⁰ DCB,paras.1039-1041.

⁵⁹¹ DCB,para.1048.

⁵⁹² DCB,para.1039.

⁵⁹³ DCB,paras.1047-1048.

⁵⁹⁴ DCB,paras.1084,1085,1136.

⁵⁹⁵ [DRC-OTP-0017-0033](#),0175(third).

⁵⁹⁶ [DRC-OTP-0017-0033](#),0171(third); DCB,para.1070.

⁵⁹⁷ DCB,para.1064-1071.

⁵⁹⁸ See Part III, Chapt.III, *NTAGANDA's Logbook*.

⁵⁹⁹ DCB,para.1074.

⁶⁰⁰ [DRC-OTP-0017-0033](#),0171(first),0175(first),0171(third).

⁶⁰¹ **D-0300**:T-218,47:1-12.

⁶⁰² **D-0300**:T-220,8:4-19.

evidence of SALONGO's presence in Bunia at other times and the Prosecution has not sought to elicit evidence of his presence in Bunia at other times. In fact, messages in the Ntaganda-Logbook demonstrate that he was not in Bunia during the period the planification and the preparation meetings would have taken place.⁶⁰³

247. Accordingly, no meeting could have occurred involving Mr NTAGANDA, KISEMBO and SALONGO between at least 7 February and 2 March. Consequently, the preparation meeting, as alleged [REDACTED] by the Prosecution could not have happened. [REDACTED].

E. Alleged contemporary documents do not mention the loss of a heavy weapon and death of FPLC commanders

248. Two documents admitted in evidence by the Prosecution mention fighting activities in Lipri on 17 February, but make no mention of a heavy weapon captured and two Comd being killed, including a Bn Comd.

249. The death of two commanders and loss of a weapon in Lipri is not mentioned in G2 report DRC-OTP-0017-0023 dated 18 February 2003.

250. It is also not mentioned in the alleged [REDACTED].

F. AMERICAIN

251. Contrary to the Prosecution's submission, the messages received from 409Bde on 13 and 18 February 2003 do not establish that the weapon mentioned in the latter was captured on 17 February 2003. There are many reasons why AMERICAIN might have been involved in the 13 February fighting in Kilo mission without expressing his fear at the time, even though the weapon was captured earlier in Lipri.

252. First, the location of AMERICAIN's Bn on the Mongbwalu-Kobu-Nyangaray-Bunia axis on 13 January is not known.

⁶⁰³ [DRC-OTP-0017-0033](#),0168(second),0175(second),0176(third).

253. Second, the fighting near Kilo mission reported on the 13 February message was not triggered by 409Bde⁶⁰⁴ and if AMERICAIN was involved in this fighting, he would not have had an opportunity to refuse to advance or to express his fear at the time.
254. Third, AMERICAIN's refusal to depart on 18 February was also due to the fact that he had just met a girlfriend in Kilo.⁶⁰⁵
255. Fourth, while SALUMU purportedly mentioned the captured weapon during a meeting with AMERICAIN before launching an operation in Kobu, he did not say when this weapon was captured.⁶⁰⁶
256. Fifth, P-0017 described the Lipri ambush as occurring before the Kilo Mission one, referring to the latter as the "second ambush".⁶⁰⁷

G. P-0055 is contradicted by P-0901

257. Significantly, P-0901 explained that [REDACTED] at the time when the orders to attack Kobu were given.⁶⁰⁸ Consequently, [REDACTED].

H. The unreliable evidence provided by P-0907 and P-0901 does not support the conclusion that Mr Ntaganda planned the Second Attack

258. Neither P-0901 nor P-0907 corroborates [REDACTED] the Second Attack.
259. P-0901 merely testified that he thought KISEMBO and his deputy decided to re-open the road.⁶⁰⁹ This is contrary to P-0055 [REDACTED],⁶¹⁰ and that KISEMBO planned the attack on Lipri, Kobu and Bambu while Mr NTAGANDA was not in Bunia.⁶¹¹ Moreover, P-0901 testified [REDACTED] when the order was given.⁶¹²
260. P-0907's testimony that Mr NTAGANDA planned the operation⁶¹³ provides no support for the proposition that Mr NTAGANDA took part in a preparation meeting in Bunia

⁶⁰⁴ D-0300:T-223,13:14-21; [REDACTED].

⁶⁰⁵ [REDACTED].

⁶⁰⁶ P-0017:T-63,13:12-14:12;T-59,46:15-19.

⁶⁰⁷ P-0017:T-59,46:13-47:1,47:13-18.

⁶⁰⁸ DCB,paras.1031,1126.

⁶⁰⁹ P-0901:T-29,10:17-20.

⁶¹⁰ P-0055:T-71,29:20-30:12.

⁶¹¹ P-0055:T-71,31:17-31:25.

⁶¹² DCB,para.1126.

⁶¹³ Response,para.232; P-0907:T-90,62:9-12.

on 16 February. Interestingly, [REDACTED] at that time,⁶¹⁴ and he confirmed the presence of SALONGO in [REDACTED].⁶¹⁵ Thus SALONGO could not have participated in an alleged preparation meeting, which is a fiction.

I. The unauthorised operation during which Zero One died and the FPLC lost a saba saba occurred in or around the period between 26-28 January

261. Mr NTAGANDA testified that as soon as he heard about the death of ZERO ONE, he called the Brigade Commander, who was TCHALIGONZA at the time to get more information.⁶¹⁶ Had the ambush and subsequent meeting happened after 12 February 2003, as suggested by the Prosecution, Mr NTAGANDA would have contacted DAVID or KIZITO, who were assigned as Bde Comd and Bde Comd 2I/C on 12 February 2003.⁶¹⁷

262. While repeatedly claiming that he was not in a position to give dates,⁶¹⁸ P-0055 stated that the death of ZERO ONE happened one month or one month and a half before the 6 March attack,⁶¹⁹ and did not deny the suggestion that it happened in January.⁶²⁰ P-0017 also does not date the event.⁶²¹

263. Both P-0055 and Mr NTAGANDA testified that the death of the two commanders and loss of the *saba saba* were followed by [REDACTED], [REDACTED].⁶²²

264. [REDACTED].

265. [REDACTED] could not have taken place between the date on which the Prosecution suggests there was an ambush in Lipri, i.e. 17 February, and the attack launched on 6 March 2003, when [REDACTED] and Mr NTAGANDA left for Goma.⁶²³ First, neither P-0055 nor Mr NTAGANDA testified to [REDACTED] having taken place in the period between Mr NTAGANDA's return to Bunia following the 4 March combats in

⁶¹⁴ [REDACTED].

⁶¹⁵ [REDACTED].

⁶¹⁶ DCB,para.1023.

⁶¹⁷ [DRC-OTP-0017-0033](#),0183("307th Bde: EM Bde BUNIA (-) COMD Bde:DAVID COMD 2nd Bde: DAVID").

⁶¹⁸ P-0055:T-74,41:10-13.

⁶¹⁹ DCB,para.1030.

⁶²⁰ P-0055:T-74,48:6-8.

⁶²¹ P-0017:T-63,13:12-14:12;T-59,46:15-19.

⁶²² [REDACTED];DCB,para.1024.

⁶²³ DCB,paras.1097-1108.

Mandro and the 6 March against the UPDF.⁶²⁴ [REDACTED].⁶²⁵ [REDACTED].⁶²⁶ Second, P-0055 merely states that it was “during the daytime when Ntaganda had just returned”,⁶²⁷ which is similar and related to Mr NTAGANDA’s testimony that [REDACTED],⁶²⁸ [REDACTED].⁶²⁹ Third, [REDACTED] after the successful operation to reopen the main road, additional issues would certainly have been raised by Mr NTAGANDA other than chastising TCHALIGONZA. Fourth, P-0055 did not testify [REDACTED].

J. BEBWA

266. On 25 January 2003, BEBWA was appointed Commander SP/FPLC. The message was sent to both Comd-NE-OpSec and Comd-SE-OpSec, as well as to all Brigade Commanders,⁶³⁰ suggesting that the person holding this position is involved with all FPLC units. There is no indication concerning BEBWA’s whereabouts at this time, or that he was sent to Mahagi. The 25 January 2003 message was never put to Mr NTAGANDA during his cross-examination, and he was not given an opportunity to explain its meaning.
267. During the period from on or about 26-28 January, TCHALIGONZA appointed BEBWA as interim Comd of the Mwanga Bde,⁶³¹ as Mr NTAGANDA testified.
268. On 11 February 2003, BEBWA was in the Mahagi area when Mr NTAGANDA requested JEROME that he be sent back to Bunia as a result of his promotion.⁶³² Whereas YUDA and MATESO who are mentioned in the same message held positions in the NE-OpSec, BEBWA did not, he was operating in the Mahagi area at the time. Again, this suggests that BEBWA occupied a position involving visiting FPLC brigades in Ituri.

⁶²⁴ DCB,paras.1090-1101.

⁶²⁵ DCB,paras.1094-1099.

⁶²⁶ [REDACTED].

⁶²⁷ P-0055:T-71,43:5-6.

⁶²⁸ DCB,paras.1023,1024.

⁶²⁹ [REDACTED].

⁶³⁰ [DRC-OTP-0017-0033](#),p.0195(third)(“TO: COMD SECT. OPS N-E – SUD-EST – COMD BDE INF. TOUS”).

⁶³¹ D-0300:T-219,45:1-4.

⁶³² [DRC-OTP-0017-0033](#),p.0185(first)(Transl. [DRC-OTP-2102-3854](#),p.4007).

269. On 12 February 2003, BEBWA was nominated as Bn Comd on the Marabo-Komanda axis.⁶³³ Mr NTAGANDA was not asked and there is no evidence as to how long BEBWA was the interim commander of Mwanga Bde or regarding BEBWA's activities during the period from his appointment as interim Comd of the Mwanga Bde and 11 February when he was in the Mahagi area. Hence, these messages do not show that BEBWA was not in Mwanga at the end of January, after TCHALIGONZA had nominated him as interim commander following the death of ZERO ONE.⁶³⁴

K. KAREKA

270. As both Mr NTAGANDA and [REDACTED] testified, there were two KAREKA in the FPLC in 2003.⁶³⁵

271. Mr NTAGANDA testified that when [REDACTED] and detained in Mandro, he appointed ZERO ONE as interim Commander of the Mwanga Bde, after consulting with KISEMBO.⁶³⁶

272. KAREKA who accompanied ZERO ONE to Mwanga, occupied the post of S4 and died in the unauthorised combat in Lipri during the period from on or about 26-28 January⁶³⁷ is not the same as KAREKA who was appointed Comd of the new 3Bn – which now included Mwanga, Central, Katoto and Mandro – in the 12 February *Mise en place*.⁶³⁸

273. KAREKA who was appointed as Comd 3Bn on 12 February never occupied this position as JEROME asked Mr NTAGANDA to assign him as T2 (intelligence officer) in the NE-OpSec, which Mr NTAGANDA accepted.⁶³⁹ [REDACTED].⁶⁴⁰

274. Mr NTAGANDA testified that this KAREKA did become T2-NE-OpSec and that he is still alive today.⁶⁴¹ Other than for mixing up the two KAREKA, P-0055 corroborated Mr NTAGANDA's evidence. [REDACTED] was either mistaken or purposely provided false evidence.

⁶³³ [DRC-OTP-0017-0033](#),p.0183("4th BN: COMD BN: BEBWA (-)").

⁶³⁴ **D-0300**:T-219,45:1-4.

⁶³⁵ [REDACTED]; **D-0300**:T-238,40:10-17,42:2-6.

⁶³⁶ [REDACTED].

⁶³⁷ DCB,para.1124.

⁶³⁸ [DRC-OTP-0017-0033](#),p.0183; **D-0300**:T-238,40:10-17,42:2-6.

⁶³⁹ **D-0300**:T-238,40:10-17;42:20-22.

⁶⁴⁰ [REDACTED].

⁶⁴¹ **D-0300**:T-238,40:10-17;42:5-6,42:20-22.

CONCLUSION

275. It follows from the above that (i) Mr NTAGANDA neither attended nor had any knowledge of any meetings, planning or preparatory, related to the operation to open the Main Road; (ii) Mr NTAGANDA did not issue any instructions, orders or requests in relation to the operation to open the Main Road; and (iii) Mr NTAGANDA did not plan, contribute to the planning or have knowledge of the planning of the operation to open the Main Road.
276. Even assuming that a finding is possible that Mr NTAGANDA was aware of or involved in some way in the planning of the operation to open the Main Road, the degree of input provided by Mr NTAGANDA is so *de minimis* that it cannot possibly be characterized as participation in planning.
277. Furthermore, as revealed by the totality of the evidence, no objectives other than legitimate military objectives and means were discussed at any time within the FPLC.
278. Consequently, Mr NTAGANDA not only did not plan the operation to open the Main Road, he neither had knowledge nor participated in any common plan to commit even a single one of the crimes charged in the UDCC, let alone all of them.
279. Mr NTAGANDA did not make any advance contribution to or had any involvement in any plan to commit any of these crimes.

Section II – During the implementation of the operation to open the Main Road, Mr NTAGANDA did not contribute to, or learn about, any criminal plan or crimes being committed

280. The Prosecution claims that Mr NTAGANDA was in contact with UPC Commanders leading the operation and that he knew about the operations or crimes in the Second Attack. The evidence does not support the Prosecution's claim.
281. First, Mr NTAGANDA knew which FPLC forces were present on the Mongbwalu-Kilo-Nyengaray-Bunia axis including the territory controlled by Lendu combatants and APC elements on the main road.⁶⁴²

⁶⁴² DCB, paras.1048-1052.

282. Second, Mr NTAGANDA also knew which FPLC officers operated on this axis, more particularly that KISEMBO, Chef-EMG-FPLC personally took charge of the operations in that area/axis.⁶⁴³
283. Third, other than for limited information obtained from messages in the Ntaganda-Logbook and limited contacts with some officers, Mr NTAGANDA did not have detailed knowledge of FPLC operations in this area.⁶⁴⁴
284. Fourth, in January 2003, Mr NTAGANDA was ordered by KISEMBO to supervise operations in the Mahagi as well as on the Komanda axis and his focus in January and mid-February 2003 was on the operations in those areas.⁶⁴⁵
285. Fifth, Mr NTAGANDA was personally tasked by the President to conduct three very important missions on behalf of FPLC, namely: (i) deliver weapons; (ii) escort MUZORA; and (iii) conduct negotiations with Lendu Combatants and Ugandan rebels to organise a joint operation against the UPDF.⁶⁴⁶
286. Sixth, as demonstrated by messages in the Ntaganda-Logbook, the existing situation in January and early February, considering the activities of the UPDF, PUSIC, APC, FAC, FPDC and FNI, and the possibility of an all-out attack on the FPLC, was precarious, tense and dangerous, such that Mr NTAGANDA had to focus on the tasks he was responsible for.⁶⁴⁷
287. Seventh, Mr NTAGANDA was away from Bunia from the afternoon of 14 February until the early morning of 17 February 2003.⁶⁴⁸
288. Eighth, Mr NTAGANDA was away from Bunia from 19 February in the evening until late in the evening on 20 February 2003. The Prosecution did not challenge Mr NTAGANDA on this point.⁶⁴⁹

⁶⁴³ DCB,paras.1048-1052.

⁶⁴⁴ DCB,paras.1048-1054.

⁶⁴⁵ DCB,paras.1012-1047.

⁶⁴⁶ DCB,para.1055 et seq.

⁶⁴⁷ DCB,paras.1012-1014.

⁶⁴⁸ DCB,paras.1039-1041.

⁶⁴⁹ DCB,paras.1072-1074.

289. Ninth, Mr NTAGANDA was away from Bunia from the evening of 21 February until very late on the evening of 3 March 2003.⁶⁵⁰

Section III - Upon returning to Bunia on 3 March, Mr Ntaganda did not gain knowledge of the implementation of any criminal plan or crimes committed during the operation to open the Main Road

290. The Prosecution's claim that reliable direct and circumstantial evidence proves Mr NTAGANDA's intent and knowledge concerning the Second Attack is not supported by the evidence.

291. By the time Mr NTAGANDA returned to Bunia late on 3 March, the Second Attack as charged was over and 409Bde members had returned to Bunia.⁶⁵¹ The situation was more tense than ever as (i) the UPDF had deployed forces close to LUBANGA's residence;⁶⁵² (ii) two FPLC members had been killed purportedly by UPDF;⁶⁵³ (iii) serious stand-off involving KISEMBO and KALE KAHYURA, UPDF senior Commander had just been resolved;⁶⁵⁴ and (iv) Chef-EMG-FPLC had obtained credible intelligence that UPDF was intended and could attack UPC-RP and FPLC at any time.⁶⁵⁵

292. On 4 March, Mr NTAGANDA was involved in fighting in Mandro all day, following which he reported to KISEMBO and LUBANGA. Mr NTAGANDA informed them that the enemy in Mandro was composed of UPDF, APC and Lendus combatants, which raised the alert level even higher.⁶⁵⁶ There were no discussion about the earlier operation to open the main road on that occasion.⁶⁵⁷

293. On 5 March, Mr NTAGANDA met with FPLC senior commanders to decide on a course of action regarding the UPDF and the situation in Bunia. This meeting lasted for

⁶⁵⁰ DCB, paras.1078-1089.

⁶⁵¹ DCB, paras.1089,1093.

⁶⁵² DCB, paras.1086-1088.

⁶⁵³ DCB, paras.1086-1088.

⁶⁵⁴ DCB, paras.1086-1088.

⁶⁵⁵ DCB, paras.1085-1093.

⁶⁵⁶ DCB, paras.1090-1093.

⁶⁵⁷ DCB, para.1093.

most of the day.⁶⁵⁸ The earlier operation to open the road was not discussed during this meeting.⁶⁵⁹

294. On 6 March 2003, the FPLC was defeated by the UPDF, Mr NTAGANDA left Bunia for Goma, where he arrived 10-15 days later in March after intense fighting with the UPDF in Bule, Fataki and other areas.⁶⁶⁰ While in Goma, Mr NTAGANDA did not obtain any information regarding the Second Attack.⁶⁶¹
295. From his return to Bunia in June 2003 until 2004, Mr NTAGANDA did not obtain information on the Second Attack.⁶⁶²
296. The 24 February 2003 video is no indication that MONUC or LUBANGA were aware of a massacre in Kobu.⁶⁶³
297. What P-0055 knows about Kobu is part of rumours floating around, and could have come from many sources, before his statements and testimony in 2016.
298. Contrary to the Prosecution's submissions, the only source of P-0016's knowledge concerning the alleged Kobu massacre [REDACTED].⁶⁶⁴ Moreover, there is no indication concerning [REDACTED]'s role, if any, in the operation, or from whom he himself learnt about the massacre. The Prosecution's own admission that there is an error in P-0016's testimony at para.153 is further indication that his statement, admitted pursuant to Rule 68(2) cannot be relied upon.⁶⁶⁵ In any case, Mr NTAGANDA did not return to Mongbwalu after the alleged Kobu massacre until Mongbwalu III in June 2003.⁶⁶⁶

⁶⁵⁸ DCB,paras.1094-1096.

⁶⁵⁹ DCB,para.1096.

⁶⁶⁰ DCB,paras.1102-1108.

⁶⁶¹ DCB,para.1109.

⁶⁶² DCB,paras.1154-1157.

⁶⁶³ DCB,para.1147.

⁶⁶⁴ Response,para.241; *Contra* [DRC-OTP-0126-0422](#),paras.155-159.

⁶⁶⁵ Response,para.241,fn.890.

⁶⁶⁶ DCB,paras.1078-1109,218.

299. The evidence relied upon by the Prosecution contradict P-0016 account of the events as most of the witnesses testified that victims in Kobu died as result of sharp force trauma or bladed weapons.⁶⁶⁷
300. Only two bodies out of 14 were found to have been killed *via* projectile injuries,⁶⁶⁸ and neither the expert evidence nor the Prosecution establishes a link between the bodies and the Second Attack.⁶⁶⁹ Expert evidence supports the conclusion that exhumed bodies could have been buried since 1994.⁶⁷⁰

Section IV - Mr Ntaganda does not incur liability for crimes allegedly committed during the Second Attack

301. The Prosecution claims that it is not necessary to prove Mr NTAGANDA's actual knowledge of crimes under Art.25 and 30.⁶⁷¹ It is unclear to what Article 25 mode of liability the Prosecution's assertion refers.
302. In any case, the Prosecution's legal reasoning is flawed.
303. All modes of liability pursuant to Article 25 require proof of the intent of the Accused, including 25(3)(d).
304. Indeed, knowledge as defined in Article 30(3) defines the same threshold as Article 30(2)(b), namely that a future event will – not would – “occur in the ordinary course of events”,⁶⁷² which is a precondition for any mode of liability under Article 25.
305. Accordingly, contrary to the Prosecution's assertion, what is undoubtedly required, at a minimum, for Mr NTAGANDA to incur criminal liability, is knowledge either of the specific crimes committed or of the plan to commit these crimes.
306. As demonstrated in Sections I, II and III, a review of the totality of the evidence reveals that Mr NTAGANDA's involvement or knowledge of the operation to open the Main Road including its planning, implementation and follow up is insufficient to attract criminal liability.

⁶⁶⁷ DCB,para.909.

⁶⁶⁸ DCB,para.910.

⁶⁶⁹ DCB,paras.853-856,931.

⁶⁷⁰ DCB,para.931.

⁶⁷¹ Response,para.233.

⁶⁷² [Lubanga AJ](#),para.447. See also Triferrer,p.1124, [Bemba et al TJ](#),para.29;ICC-01/05-01/08-T-373,14:1-4.

307. Moreover, as set out in the DCB the UPC-RP and/or FPLC neither had an organisational policy to attack civilians nor devised or implement a common plan to expel non-Hema civilians from Ituri.⁶⁷³ The Prosecution did not respond to these submissions.

Section V - Mr Ntaganda does not incur liability pursuant to Article 28 for crimes allegedly committed during the Second Attack

308. The Prosecution claims that Mr NTAGANDA's failure to take measures when obtaining some information in 2004 concerning crimes allegedly committed by the FPLC in Kobu in February 2003 renders him liable pursuant to Article 28. The Prosecution's legal reasoning is flawed.

309. When crimes were allegedly committed by the FPLC in Kobu in February 2003, Mr NTAGANDA did not exercise effective command and control over the forces involved.⁶⁷⁴ Accordingly, Mr NTAGANDA is not liable pursuant to Article 28.

310. When Mr NTAGANDA obtained some information about crimes allegedly committed by the FPLC in 2004, Mr NTAGANDA did not have any duty to take measures, as Article 28 liability – as is the case for Article 7(3) liability before the ICTY – applies solely to commanders for crimes committed while they exercised effective command and control.

311. Even if Mr NTAGANDA could be liable pursuant to Article 28 for not taking measures in respect of alleged crimes he acquired knowledge of despite the fact that he did not exercise effective command and control when these crimes were committed, his failure to “exercise command” would have taken place in 2004, after the time period covered by the UDCC. In any event, there was nothing he can do as the commanders involved were not in the FPLC anymore.

⁶⁷³ DCB,Part III.

⁶⁷⁴ DCB,Part V,Chapt.III,IV.

CHAPTER II - SHORTCOMINGS OF THE EVIDENCE CONCERNING THE “SECOND ATTACK”

Section I - P-0154’s influence and the extensive contacts amongst the KBL crime-base witnesses

312. [REDACTED] P-0154 interviewed witnesses before they were interviewed by the OTP; sub-contracted the choice of, and initial contact with, witnesses to [REDACTED]; allowed those [REDACTED] to continue to act as sub-intermediaries for ongoing contacts; revealed witness identities to one another; convoked them to group meetings; dispensed benefits to those witnesses provided by the OTP or the Court and, in at least one case, did so in a manner that OTP investigators considered dishonest. These actions, inappropriate in themselves, also provide circumstantial evidence of contamination. The damage arising from this conduct does not require proof that P-0154 told anyone to lie; rather, this conduct opened the door to coaching and contamination even after P-0154’s dismissal, and substantially undermines the corroborative value of these witnesses.

Collective meetings of witnesses

313. The Prosecution seems to acknowledge that group meetings of witnesses were convened by P-0154,⁶⁷⁵ but disputes how many there were. The Prosecution should be able to affirm, and not just speculate about,⁶⁷⁶ how many meetings were held with witnesses by its own intermediary.

314. The Prosecution’s refusal to acknowledge that the attendance lists reflects meetings is unreasonable in light of: (i) the report describing the [REDACTED] meeting corresponding to the attendance list of the same date;⁶⁷⁷ (ii) express references in P-0154’s reports to meetings with annexed “attendance lists”⁶⁷⁸ that were never disclosed by the Prosecution; (iii) references to meetings in P-0154’s reports suggesting that they were routine – *e.g.* a meeting of “the regular clients”,⁶⁷⁹ (iv) the signed lists⁶⁸⁰ suggesting physical presence, even though the Prosecution has not disclosed a signed

⁶⁷⁵ Response, para.146.

⁶⁷⁶ Response, para.144.

⁶⁷⁷ [DRC-OTP-2092-0215](#)([REDACTED]); [DRC-OTP-2095-0217](#)([REDACTED]).

⁶⁷⁸ [DRC-OTP-2095-0113](#),p.0119(“[REDACTED]”);[DRC-OTP-2095-0206](#),p.0208(“[REDACTED]”);[DRC-OTP-2095-0217](#),p.0219(“[REDACTED]”).

⁶⁷⁹ [DRC-OTP-2095-0217](#)(“[REDACTED]”);[DRC-OTP-2095-0206](#),p.0208.

⁶⁸⁰ [REDACTED];[DRC-OTP-2095-0089](#),p.0093(“[REDACTED]”);[DRC-OTP-0198-0072](#).

counter-part for every typewritten list; and (v) comments on the lists implying visual observation.⁶⁸¹ Minor discrepancies such as the appearance of names of individuals who probably were not physically present⁶⁸² is likely attributable to P-0154's interest in over-stating the number of "clients".⁶⁸³

315. P-0154's comment that he contemplated involving [REDACTED] to manage witnesses⁶⁸⁴ and that he invited family members to meetings,⁶⁸⁵ further widens the circle of disclosure of witness identities, and the opportunities for contamination and influence.

316. The Prosecution's assertion that P-0154 started monitoring the witnesses only after they had already provided a statement to the Prosecution,⁶⁸⁶ as if this might imply he could not have influenced them before the OTP interviews, is contradicted by notes of meetings prior to the OTP's interviews with P-0027⁶⁸⁷, P-0022⁶⁸⁸, P-0113⁶⁸⁹ and P-0792.⁶⁹⁰ At least one Prosecution investigator knew of this practice.⁶⁹¹ P-0154's apparent role in assisting witnesses to register as victims, fill out VAFs, and act as a VPRS intermediary⁶⁹² – which gives rise to duties of loyalty inconsistent with those of a Prosecution investigator – raises further concerns.⁶⁹³

⁶⁸¹ [DRC-OTP-2092-0207](#),p.0210("[REDACTED]");[DRC-OTP-2092-0207](#),p.0209("[REDACTED]").

⁶⁸² Response, para.144; [DRC-OTP-2092-0207](#); [DRC-OTP-2092-0213](#); [DRC-OTP-2092-0215](#); [DRC-OTP-2092-0207-R03](#),p.0211.

⁶⁸³ [DRC-OTP-2095-0113](#),p.0113,0114;[DRC-OTP-2095-0206-R01](#),p.0206,0207,0209; [DRC-OTP-2095-0217-R01](#).

⁶⁸⁴ [DRC-OTP-2095-0089](#),p.0093 ("[REDACTED]").

⁶⁸⁵ [DRC-OTP-2095-0206](#),p.0208("[REDACTED]").

⁶⁸⁶ Response paras.130,138,146.

⁶⁸⁷ [DRC-OTP-0096-0052](#),para.14(OTP statement commencing on [REDACTED] 2005; referring to annexed notes([DRC-OTP-0096-0068](#) of [REDACTED] 2005).

⁶⁸⁸ **P-0022**:[DRC-OTP-0104-0026](#),para.14(OTP statement commencing on [REDACTED] 2005;p referring to annexed notes ([DRC-OTP-0077-0012-R04](#)) as "[REDACTED]").

⁶⁸⁹ **P-0113**:T-119,20:8-24:3 ([DRC-OTP-0096-0036](#), OTP statement signed on [REDACTED] 2005); **P-0113**:T-119,22:8-9([DRC-OTP-0096-0049](#) dated [REDACTED] 2005).

⁶⁹⁰ [DRC-OTP-0077-0002](#)(as having contact in September 2013, **P-0792**:T-150,62:25-63:3); **P-0792**:T-150,85:1-3([DRC-OTP-2058-0132](#),OTP statement commencing on [REDACTED] 2013); **P-0792**:T-151,26:17-27:20.

⁶⁹¹ **P-0113**:T-119,25:5-6:10.

⁶⁹² [DRC-OTP-2095-0089](#),p.0093(*"A l'occasion, nous avons aussi expliqué comment saisir la CPI, comment remplir les formulaires de participation. A l'occasion, nous avons réussi à aider six victimes à remplir les formulaires à envoyer à la Division de Greffe: cfr art. 89.3 de Règlement de procédure. Nous avons mis à profit nos missions pour réunir d'autres informations complémentaires en rapport avec les dossiers précédents; lesquels dossiers revêtent les quatre éléments (cfr art.15.2.3.4) pour mériter le statut de 'victime' (Cfr art.68.3 de Statut de Rome)"*)(underline added); Prosecution's submission on P-0154,[ICC-01/04-02/06-1465-Conf-AnxII](#), Annex II, p.4.

⁶⁹³ [DRC-OTP-2096-0557](#)(*"Question: pouvez vous préciser votre rôle en tant que « Coordinateur des victimes répertoriées pour la CPI » ? Pouvez vous confirmer que les 10 demandes de participation de victimes que vous*

317. There is no evidential basis for the Prosecution's claim that P-0154 "honestly reported" that three witnesses wished to [REDACTED].⁶⁹⁴ Prosecution investigators, on the contrary, considered this to be a pretext to obtain money improperly.⁶⁹⁵
318. The assertion that the Defence only sought the disclosure of the identity of Intermediary P-0154 after P-0018's testimony is erroneous.⁶⁹⁶
319. The Prosecution is correct that [REDACTED]'s name was improperly translated when read to [REDACTED].⁶⁹⁷ Even the spelling of the witness's name was improperly translated when Counsel did so in order to be sure about the name. These should not prejudice the Defence. Furthermore, [REDACTED]'s lack of recognition of [REDACTED]'s name falls into a much broader pattern of false denials of associations that lead to the same conclusion.⁶⁹⁸

P-0300's role in the conflict and his influence on witnesses

320. Several witnesses affirmed⁶⁹⁹ that [REDACTED] organised village fighters⁷⁰⁰ and [REDACTED] specifically testified that P-0300 "[REDACTED]s"⁷⁰¹ during the conflict. The Prosecution is wrong that there is no evidence that P-0300 [REDACTED].
321. [REDACTED] explained that even before meeting with the Prosecution, he spoke with P-0300 about the events. [REDACTED] described P-0300 as "the one who used to speak a lot"⁷⁰² and "[e]ven when they went to [REDACTED], he was the one who talked about everything that happened during the war".⁷⁰³ Similarly, [REDACTED] spent the whole day at [REDACTED] prior to being interviewed by the Prosecution.⁷⁰⁴

avez soumis au Greffe ne correspondent pas à nos clients ? Priez d'éviter de confondre vos différents rôles dans les activités qui nous concernent").

⁶⁹⁴ Response, para.140.

⁶⁹⁵ [DRC-OTP-2090-0407](#) ("Investigators categorically rejected the proposal on security grounds, and understood it as a manoeuvre of the intermediary to obtain some profit").

⁶⁹⁶ Email from Stéphane Bourgon to Dianne Luping, 27 June 2016 at 10:18 ("First, we kindly ask you to disclose without delay the identity of Intermediary P-0154").

⁶⁹⁷ Response, para.127.

⁶⁹⁸ [REDACTED].

⁶⁹⁹ *Contra* Response, para.136.

⁷⁰⁰ [REDACTED].

⁷⁰¹ [REDACTED].

⁷⁰² [REDACTED].

⁷⁰³ [REDACTED].

⁷⁰⁴ DCB, para.861; [REDACTED].

Section II - Invitation letters

322. The content of the “manifesto”⁷⁰⁵ is as scurrilous as *The Protocols as the Elders of Zion*, and the Prosecution’s reluctance to recognise this⁷⁰⁶ is inexplicable. The lack of “resemblance”⁷⁰⁷ of the content of the invitation letters and the manifesto is irrelevant: what matters is that the purported invitation letter appears just one page before in the same notebook, in the same hand-writing, and with the same distinctive ink, as the “manifesto.”⁷⁰⁸
323. The Prosecution misapprehends the significance of the notation of “[REDACTED]” on both the SALUMU invitation letter and the response,⁷⁰⁹ which is that both authors could not have been in the same small village – whichever village name is chosen – from one day to the next. This is incompatible with the narrative of other witnesses, including the purported author of the response. The dates of these two messages are, indeed, 22 and 23 February 2003, not 27 and 28 February.⁷¹⁰ Contrary to the Prosecution’s claim,⁷¹¹ [REDACTED]’s and [REDACTED]’s testimony are fundamentally inconsistent with the narrative of the purported pacification meeting offered by Lendu witnesses.⁷¹²

Section III - Banana photos

324. If the Prosecution is suggesting⁷¹³ that DYIKPANU’s body as seen in the burial photographs is obviously the same as the body wearing the red underwear in the banana field photos, then this claim is unsubstantiated and speculative. Any similarities are not so self-evident or unique to permit a determination that they are one and the same body. The body with the red underwear⁷¹⁴ has a large scar on the lower right side of the body, not visible on the burial photograph;⁷¹⁵ the latter shows a much smaller sized scar on the left middle side of the torso and two straight-lined scars, none of which are visible on

⁷⁰⁵ DCB,para.873.

⁷⁰⁶ Response,para.149.

⁷⁰⁷ Response,para.149.

⁷⁰⁸ [DRC-OTP-2055-1346](#); DCB,para.873.

⁷⁰⁹ DCB,para.876.

⁷¹⁰ DCB,para.876; [DRC-OTP-0065-0003](#).

⁷¹¹ Response,para.149,fn.552-553.

⁷¹² [REDACTED].

⁷¹³ Response,para.151.

⁷¹⁴ [DRC-OTP-0152-0240](#)(duplicates:[DRC-OTP-0077-0292](#), [DRC-OTP-2058-1110](#)).

⁷¹⁵ [DRC-OTP-2066-0012](#).

the body with the red underwear.⁷¹⁶ Finally, there is a possible difference of physical size of the two individuals.⁷¹⁷

325. Indeed, P-0868 himself, when shown the banana field photos, testified: “I did not recognise any of these photographs or where they were taken. I did not recognise any of the bodies in the photographs”.⁷¹⁸ The absence of identification is all the more significant given P-0868’s [REDACTED],⁷¹⁹ although it is unclear whether P-0868 maintained that he was present at the banana field.⁷²⁰

326. P-0301’s first statement makes no reference to the banana field photographs.⁷²¹ The omission is likely the result of non-recognition⁷²² because P-0301 insisted that he was shown them during that interview,⁷²³ and because the OTP received those photographs from [REDACTED] contemporaneous with the interview.⁷²⁴ The reasonable inference, not “misrepresentation”,⁷²⁵ is that the omission of any reference to these photographs in his first statement arises from P-0301’s failure to recognise them, not the failure to show them. P-0805’s non-recognition does, indeed, relate to one photograph⁷²⁶ that he previously stated he “did not recognize,”⁷²⁷ followed by a series of contradictions as to what he had or had not said during his 2013 interview.⁷²⁸

327. The Prosecution misunderstands the Defence’s submissions concerning the doubtful origins of the photographs. The issue is not the absence of formal authentication,⁷²⁹ but rather the extraordinary degree of contradictory evidence concerning the provenance of these photos — *i.e.* who took them and how they were developed.⁷³⁰ The unrealistic explanations concerning development,⁷³¹ the photographer,⁷³² and delivery,⁷³³ combined

⁷¹⁶ [DRC-OTP-0152-0240](#) (duplicates: [DRC-OTP-0077-0292](#), [DRC-OTP-2058-1110](#)).

⁷¹⁷ [DRC-OTP-2069-0012](#).

⁷¹⁸ **P-0868**:T-178,30:20-31:5(Shown photographs [DRC-OTP-0072-0473](#), [DRC-OTP-0077-0294](#), [DRC-OTP-0072-0478](#), [DRC-OTP-0072-0477](#), [DRC-OTP-0072-0474](#), [DRC-OTP-0077-0295](#) and [DRC-OTP-0072-0470](#)).

⁷¹⁹ [REDACTED].

⁷²⁰ **P-0868**:T-178,27:12-17.

⁷²¹ **P-0301**:T-150,24:11-13.

⁷²² *Contra* Response, para.150; DCB, para.885.

⁷²³ **P-0301**:T-150,22:20-25:10.

⁷²⁴ [DRC-OTP-0077-0293](#)(metadata); [DRC-OTP-0152-0239](#)(metadata); **P-0301**:T-150,22:10.

⁷²⁵ Response, para.150.

⁷²⁶ DCB, para.886; Duplicate [DRC-OTP-0077-0294](#).

⁷²⁷ **P-0805**:T-26,55:14-15.

⁷²⁸ **P-0805**:T-26,54:23-55:3,55:19-20.

⁷²⁹ *Contra* Response, para.152.

⁷³⁰ DCB, paras.879-884.

⁷³¹ DCB, para.879.

with the diffusion of these photos, complete with identifications, on television by a person⁷³⁴ who circulated photos of other massacres⁷³⁵ casts substantial doubt on the authenticity of these photographs.

Section IV - Witnesses claiming the bodies of their family members were buried in Kobu

328. The Prosecution is wrong that the Defence table summarising testimony of bodies purportedly buried in and around the banana field is “misleading”.⁷³⁶

329. [REDACTED]⁷³⁷ [REDACTED],⁷³⁸ [REDACTED].⁷³⁹ [REDACTED]”⁷⁴⁰ was.⁷⁴¹ P-0420 testified that he searched the area around [REDACTED]thoroughly “but [] didn’t find anything”.⁷⁴² Test excavations were also conducted in the area south, west and east of [REDACTED]⁷⁴³ but once again, “no other burials related to the incident were found”.⁷⁴⁴

330. [REDACTED].⁷⁴⁵ [REDACTED] without hesitation as “[REDACTED]” and “[REDACTED]”.⁷⁴⁶ Similarly, P-0100 testified that he buried [REDACTED] “[REDACTED]”,⁷⁴⁷ [REDACTED].⁷⁴⁸

331. The Prosecution team excavated these areas, naming it [REDACTED].⁷⁴⁹ No graves potentially connected with the purported Kobu massacre were found,⁷⁵⁰ even though a senior investigator⁷⁵¹ and witnesses⁷⁵² were on-site, with further consultation being

⁷³² DCB, paras.881-882,883.

⁷³³ [DRC-OTP-2096-0728](#); P-0301:T-150,28:13-15(“[REDACTED]”).

⁷³⁴ DCB, para.880.

⁷³⁵ DCB, para.884.

⁷³⁶ Response, para.153.

⁷³⁷ Response, para.154.

⁷³⁸ [REDACTED]; P-0857:T-193,83:23-25;T-194,33:21-34:3.

⁷³⁹ [REDACTED].

⁷⁴⁰ [REDACTED].

⁷⁴¹ [REDACTED].

⁷⁴² [REDACTED].

⁷⁴³ [REDACTED].

⁷⁴⁴ [REDACTED].

⁷⁴⁵ [REDACTED].

[REDACTED]⁷⁴⁷ [REDACTED].

⁷⁴⁷ [REDACTED].

⁷⁴⁸ [REDACTED].

⁷⁴⁹ [REDACTED].

⁷⁵⁰ [REDACTED].

⁷⁵¹ [REDACTED]

⁷⁵² [REDACTED].

undertaken by telephone with The Hague in case of doubt about where to test.⁷⁵³ The inference arising from all these circumstances, combined with the extensive test-trenching,⁷⁵⁴ sonographic testing,⁷⁵⁵ and analysis of satellite imagery,⁷⁵⁶ is that any other burial locations in or around the areas of [REDACTED] and [REDACTED] would have been found. None were.

332. [REDACTED]. [REDACTED],⁷⁵⁷ [REDACTED].⁷⁵⁸ It is difficult to believe that the Prosecution would not diligently inquire as to the location of these alleged graves and seek them out, which leads to the likely inference that the Prosecution was told by these witnesses that their relatives were buried at the locations where searching was undertaken, and not elsewhere. As P-0420 testified, he excavated thoroughly where he had reason to suspect that there would be a grave.⁷⁵⁹

Section V - Credibility of rape allegations during the *Second Attack*

333. The Prosecution's submissions fail to address the key issues of unreliability of Witnesses P-0018, P-0019 and P-0113. The fact that all three witnesses would simultaneously come forward with allegations of rape in their [REDACTED] statements, whereas all three did not in [REDACTED]⁷⁶⁰ is highly coincidental.⁷⁶¹ Indeed, it is highly unlikely that not one would have reported rape in the first instance, and that not one would have not reported rape during the second interview.

334. PTSD is a far-fetched explanation⁷⁶² for a person forgetting that their [REDACTED].⁷⁶³ P-0113 was found to not have PTSD in July 2013⁷⁶⁴ when she misstated the date of death of [REDACTED]. The fact that P-0113's [REDACTED] advised her not to speak about it⁷⁶⁵ illustrates the potential extent of witness contamination in this case.

⁷⁵³ [REDACTED].

⁷⁵⁴ [REDACTED].

⁷⁵⁵ [REDACTED].

⁷⁵⁶ DCB, para. 931, fn. 2674.

⁷⁵⁷ [REDACTED].

⁷⁵⁸ [REDACTED].

⁷⁵⁹ **P-0420**:T-123,107:21-108:24.

⁷⁶⁰ Response, paras. 155-156, 161.

⁷⁶¹ DCB, paras. 946.

⁷⁶² Response, para. 161.

⁷⁶³ DCB, para. 956; **P-0113**:T-119,61:16-21.

⁷⁶⁴ **P-0938**:T-114,54:22-11.

⁷⁶⁵ **P-0113**:T-118,64:11-21.

335. P-0933's testimony that counsellors and therapists can be a common source of suggestions,⁷⁶⁶ combined with the highly coincidental belated reporting of rape by all three witnesses after an interview with a Prosecution counsellor,⁷⁶⁷ raises yet further doubts about the reliability of their testimony.
336. The Prosecution's claim that P-0019 was "too scared to look [REDACTED] in the eye"⁷⁶⁸ is inconsistent with her testimony that she saw his face.⁷⁶⁹
337. The Prosecution incorrectly states that the second element of sexual slavery does not require proof of coercion.⁷⁷⁰ The French version of the Elements of Crimes of articles 7(1)(g) and 8(2)(e)(vi) explicitly mention the notion of force or coercion.⁷⁷¹ This is consistent with jurisprudence.⁷⁷²
338. The Prosecution attempts to justify the inconsistencies in P-0113's testimony on the basis that she was distressed, or because the questions were confusing.⁷⁷³ This is simply not true. The questions put were straightforward: "Q. Did you ever receive money from anyone in the ICC?", "Did anyone ever help secure accommodation for you?", "Did anyone ever provide you with a mobile telephone?"⁷⁷⁴ When P-0113 did not understand a question she would ask,⁷⁷⁵ and her demeanour was calm and self-possessed.
339. P-0790 was [REDACTED] P-0018, P-0019 and P-0113,⁷⁷⁶ and testified that he overheard exactly "three" women who were allegedly raped in [REDACTED].⁷⁷⁷ Although the reference to exactly three women might just be a coincidence, when all the circumstances are considered it is at least very possible, if not likely, that P-0790's reference to exactly three women was informed by his knowledge of the alleged

⁷⁶⁶ **P-0933**:T-87,37:15-17;T-87,11:23-24("We know that all of us are susceptible to creating memories under the right or, if you prefer, wrong circumstances"), 33:4-5 ("I think probably more likely that this is where created memories come about is through suggestion"). See examples **P-0933**:T-87,11:24-12:3,30:7-31:9.

⁷⁶⁷ **P-0933**:T-87,37:15-17; See also other witness contamination: T-88,19:4-7("is cross-contamination between different people who may be witnesses to an event just as much a source of potential contamination as suggestive questions by an interviewer? A.It can be, yes").

⁷⁶⁸ Response,para.157.

⁷⁶⁹ **P-0019**:T-116,6:22-24("Madam, while [REDACTED] was raping you, did you see his face? A.I saw it").

⁷⁷⁰ Response,para.159.

⁷⁷¹ Art.7(1)(g)(2) and 8(2)(e)(vi)("L'auteur a contraint") (underline added).

⁷⁷² [Bemba TJ](#),paras.106,112; [Katanga TJ](#),paras.965.

⁷⁷³ Response,paras.160-161.

⁷⁷⁴ **P-0113**:T-119,18:23.

⁷⁷⁵ See for example,**P-0113**:T-119,19:3.

⁷⁷⁶ [DRC-OTP-2092-0325](#).

⁷⁷⁷ **P-0790**:T-54,32:10-12.

[REDACTED] rape witnesses in this case. His testimony is yet another indication of the lasting impact of P-0154's practices, yet another indication that the contamination and coaching arising therefrom continued right up to the moment of trial.

PART V – SUBMISSIONS RELATED TO COUNTS 6,9,14,15 AND 16

CHAPTER I – CHILD SOLDIERS WITNESSES

The purported child soldier witnesses are not credible

340. The Prosecution asserts that it is impermissible or contradictory to rely on the testimony of P-0888,⁷⁷⁸ P-0898's⁷⁷⁹ and P-0911's⁷⁸⁰ for some purposes, while also claiming that they were untruthful about having been child soldiers. This argument contradicts the Prosecution's own position⁷⁸¹ and well-established jurisprudence⁷⁸² that witnesses may give unreliable testimony on some subjects but not others. Personal motives, as exist in respect of each of these witnesses, can be a reason for a person lying on some subjects but not others.⁷⁸³
341. P-0758's first victim application was rejected [REDACTED] on the basis that she had not substantiated, and not even claimed, that she was under 15 years of age at the time of the events.⁷⁸⁴ The Prosecution's suggestion to the contrary, and that the Defence's submission "mischaracterises" this decision, is wrong.
342. The Prosecution asserts that "[REDACTED]".⁷⁸⁵ However, P-0761 testified that "[REDACTED]".⁷⁸⁶ The Defence acknowledges that this might be somewhere other than [REDACTED], but the salient point remains the same: [REDACTED].⁷⁸⁷ This leads, in turn, to the inference that P-0761 continues to this day to [REDACTED] exercise influence over P-0758.

⁷⁷⁸ Response, para.166.

⁷⁷⁹ Response, paras.165-166.

⁷⁸⁰ Response, para.173.

⁷⁸¹ PCB, para.28.

⁷⁸² [Bemba TJ](#), para.231; [Nizeyimana AJ](#), paras.17,93,108; [Šainović et al. AJ](#), paras.294,336,342; [Lukić and Lukić AJ](#), para.92; [Setako AJ](#), para.48.

⁷⁸³ See e.g. [Popović TJ](#), paras.51-53.

⁷⁸⁴ Response, para.167; [REDACTED].

⁷⁸⁵ Response, para.167.

⁷⁸⁶ **P-0761**:T-163,7:9-10.

⁷⁸⁷ The Prosecution is on notice of the relevance of this issue to the Defence and should, accordingly, review whether it has discharged its Article 67(2) and Rule 77 obligations.

343. The Prosecution offers no support or explanation for its astonishing claim that lack of corroboration “should be disregarded”.⁷⁸⁸ On the contrary, “corroboration of evidence [is] an important factor in assessing the probative value of much of the evidence presented by the Parties, in particular where only one testimony was presented in support of certain facts.”⁷⁸⁹ The Prosecution’s claim that no corroboration could be obtained of purported widespread and systematic rape [REDACTED] is incorrect. P-0758’s testimony included allegations of such public and notorious events as that: (i) soldiers abducted women at roadblocks and brought them to live with them as wives inside [REDACTED];⁷⁹⁰ (ii) “all soldiers who wanted to could sleep with us”;⁷⁹¹ (iii) the rape and death of a [REDACTED]-year old;⁷⁹² and (iv) the women recruits at [REDACTED] were “all raped”.⁷⁹³ The lack of corroboration from other Prosecution witnesses who were present at [REDACTED] at the time is not “absurd”;⁷⁹⁴ rather, the Prosecution’s failure to adduce corroborative evidence underscores the insufficiency of its uncorroborated evidence from an unreliable witness.

344. P-0758’s lack of visual identification of the two rapists at [REDACTED] [REDACTED] is relevant. Contrary to the Prosecution’s submissions,⁷⁹⁵ one of those two individuals corresponds to [REDACTED]; the lack of any formal charge against [REDACTED] by the Prosecution or any other authority for this event is irrelevant.⁷⁹⁶

345. UPC forces did not have uniforms in the summer of 2002⁷⁹⁷ and, accordingly, could not have been present at [REDACTED], as she testified, wearing uniforms when P-0758 said that she was abducted.

⁷⁸⁸ Response, para.168.

⁷⁸⁹ [Musema TJ](#), para.42; See [Nzabonimana TJ](#), paras.292,506,550,575,629 (“Although the Chamber may rely on the testimony of a single witness to prove an allegation beyond a reasonable doubt, the evidence of Witness CNAY, absent corroboration, failed to establish Nzabonimana’s involvement in the attack”), 635,662,983,1334,1454; [Mpambara TJ](#), para.124 (“Witness AHY testified that twenty to thirty people gathered around Mpambara’s vehicle after he arrived at Paris Centre. None of them appeared before the Chamber to testify. The present situation is not one in which the lack of corroboration may be readily discounted because of the lack of potential witnesses. Accordingly, the witness’s testimony must be treated with caution in light of the lack of corroboration, combined with its highly incriminating content”).

⁷⁹⁰ **P-0758**:T-161,22:21-23:11.

⁷⁹¹ **P-0758**:T-161,31:13.

⁷⁹² **P-0758**:T-160,89:14-25.

⁷⁹³ **P-0758**:T-161,6:15.

⁷⁹⁴ Response, para.168.

⁷⁹⁵ Response, para.168.

⁷⁹⁶ Response, para.168.

⁷⁹⁷ **P-0963**:T-80,18:17-21; **D-0300**:T-215,68:11; *Contra* Response, para.202.

346. The Prosecution, rather than attempting to rehabilitate P-0883's testimony, should declare its commitment to investigate her for potential offences under Article 70, in order to preserve the integrity of this, and future, proceedings before this Court.
347. The Prosecution optimistically interprets the Defence's submission that P-0898 "may have gone to Mandro for some short period"⁷⁹⁸ as a concession that he was a child soldier.⁷⁹⁹ This interpretation reflects the Prosecution's erroneous view that anyone who showed up at Mandro, as it also claims in respect of Rwampara, must have been trained and enlisted. This is untrue, as the testimony of D-0210,⁸⁰⁰ D-0080,⁸⁰¹ D-0300,⁸⁰² and documentary evidence⁸⁰³ demonstrates. Not all individuals who showed up at training centres were accepted for training or accepted for enlistment in the FPLC. The fact that P-0898 may have reached Mandro for long enough to see others being trained, and to testify about the location, does not mean that he was trained or enlisted or that he was under 15.
348. The Prosecution's assertion that it is "incorrect" that the expression "FPLC"⁸⁰⁴ appears for the first time, and by a significant margin, on the "[REDACTED]" is unexplained and wrong. That name does not appear on any document pre-dating or even contemporaneous with the "[REDACTED]." The name consistently used during that period on documents was "*L'armée de l'UPC-RP*."⁸⁰⁵ The Prosecution submission that efforts to organise an armed group were started prior to August 2002⁸⁰⁶ is misplaced and irrelevant; what matters is the use of a name that was not in use until later.⁸⁰⁷
349. The Prosecution is unclear whether it submits that its own witness, P-0911, was truthful when he testified:

When a recruit came, the first thing, [REDACTED] how old the recruit was. If it was under 18, [REDACTED] that person to return home.

⁷⁹⁸ DCB, para. 1260.

⁷⁹⁹ Response, para. 170.

⁸⁰⁰ D-0210: T-206, 47:5-10.

⁸⁰¹ D-0080: [DRC-D18-0001-6163](#), paras. 48, 49.

⁸⁰² D-0300: T-213, 79:17-80:23.

⁸⁰³ [DRC-OTP-0208-0284](#), Entry #19; [DRC-OTP-0152-0274](#), Entry #7.

⁸⁰⁴ Response, para. 172.

⁸⁰⁵ DCB, para. 1254.

⁸⁰⁶ Response, para. 172.

⁸⁰⁷ DCB, para. 1254.

[REDACTED]. When a young person arrives under 18, then you have to make that person return home.⁸⁰⁸

350. The Prosecution sidesteps this issue by asserting vaguely that this testimony “[REDACTED].”⁸⁰⁹ If the Prosecution’s view is that P-0911 was lying, then this should be stated clearly, as it would impact on the reliability that should be reposed in the witness in general.

351. P-0010’s self-identification on the Rwampara video is eminently “assailable”⁸¹⁰ and is, in fact, assailed by several witnesses.⁸¹¹ Her testimony as a whole is obviously mendacious.⁸¹² The Prosecution should open an Article 70 investigation rather than attempting to maintain any reliance on her.

CHAPTER II - P-0046’S TESTIMONY IN RESPECT OF AFFILIATION OF ALLEGED CHILD SOLDIERS WITH THE FPLC OR UPC FORCES IS ANONYMOUS HEARSAY; HER TESTIMONY CONCERNING AGE IS BASED ON A MIXTURE OF ANONYMOUS HEARSAY AND UNRELIABLE “CROSS-CHECKING” OF AN UNSPECIFIED, BUT SMALL, PROPORTION OF HER INTERVIEWEES

352. The Defence acknowledges that, at one point during her testimony, P-0046 did state that she believed that some individuals gave an age that was younger than their actual age.⁸¹³ Elsewhere, however, P-0046 testified that she could discern “no reason” for anyone under-stating their age;⁸¹⁴ spontaneously cited only examples of individuals over-stating their age;⁸¹⁵ and could not recall a single person having lied to her about their association with an armed group.⁸¹⁶ This confirms that P-0046 was a credulous interviewer who P-0046 it necessary to “cross-check” age in very few cases indeed.⁸¹⁷

353. The Defence acknowledges that P-0046 did not specifically concede that she had not cross-checked the ages of the 50 who are indicated on DRC-OTP-0208-0284 as being under 15; however, she did concede that she did no cross-checking of the 34 individuals

⁸⁰⁸ P-0911:T-157,19:17-20.

⁸⁰⁹ Response,para.173.

⁸¹⁰ *Contra* Response,para.174; DCB,para.1277.

⁸¹¹ DCB,para.1277.

⁸¹² DCB,paras.1261-1282.

⁸¹³ P-0046:T-100,24:10.

⁸¹⁴ P-0046:T-101,104:4.

⁸¹⁵ P-0046:T-101,103:20-24.

⁸¹⁶ P-0046:T-102,62:14-64:10. P-0046 did later provide one example of a person whom she believed lied to someone else about having been associated with an armed group. P-0046:T-102,103:9-18.

⁸¹⁷ DCB,paras.1384-1385.

listed in the “*Histoires Individuelles*” document (all of whom are also listed in DRC-OTP-0208-0284).⁸¹⁸ Furthermore, DRC-OTP-0208-0284 itself shows “cross-checking” in respect of only six entries.⁸¹⁹ The Prosecution is, accordingly, wrong to imply⁸²⁰ that P-0046 systematically cross-checked the information appearing on DRC-OTP-0208-0284, let alone that this “cross-checking” consisted of any meaningful verification of age.⁸²¹

354. The Defence has not “misrepresent[ed]”⁸²² the numbers to which P-0046 testified. On the contrary, it is the Prosecution during its examination that selectively presented P-0046’s *Lubanga* testimony. To be precise, the Prosecution only put to P-0046 the portion of her *Lubanga* testimony where she testified that the number of sub-15 year olds claiming to have been affiliated with UPC forces was 167.⁸²³ The following morning during her *Lubanga* testimony, P-0046 gave a substantially lower number:

Q. My last question yesterday before the hearing finished was about the proportion of the 167 children who were under 15 and served with the UPC that had been recruited or used between mid-2002 and mid-2003. Have you had an opportunity to recall that information? A. Among the 167 cases, 167 interviews I had with the children, 71 of the children were under 15 when they were recruited.⁸²⁴

355. The Prosecution in this case did not put this testimony to P-0046 during direct examination.⁸²⁵ It was left to the Defence to do so.⁸²⁶ P-0046 reluctantly acquiesced to the latter numbers.⁸²⁷

356. The Prosecution seems to accept⁸²⁸ that the change of number was prompted by P-0046 checking her notes overnight during her testimony in the *Lubanga* case.⁸²⁹ The record does not reveal which notes she checked, but a comment from Judge FULFORD

⁸¹⁸ P-0046:T-102,55:6-20; [DRC-OTP-0152-0274](#); Response,para.180.

⁸¹⁹ [DRC-OTP-0208-0284](#), Entries #81,84,82,86,113,116; DCB,para.1405.

⁸²⁰ Response,para.180.

⁸²¹ [DRC-OTP-0208-0284](#), Entries #81,82,84,86,113,116; DCB,para.1405.

⁸²² Response,para.178.

⁸²³ P-0046:T-100,45:25-46:8.

⁸²⁴ P-0046:T-101,99:20-102:9.

⁸²⁵ P-0046:T-100,45:19-46:8(citing to [DRC-OTP-2054-6568](#), being P-0046’s *Lubanga* testimony of 7 July 2009).

⁸²⁶ P-0046:T-101,99:20-101:13.

⁸²⁷ P-0046:T-101,101:10-16.

⁸²⁸ Response,para.178.

⁸²⁹ [DRC-OTP-2054-6568](#),pp.6640:24-6641:25(Not in evidence but referred to in Response,para.178,fn.682([DRC-OTP-2054-6568](#),p.6639:22-6641:1)).

suggests that she could not have checked any database on her computer.⁸³⁰ P-0046's corrected answer tracks closely the numbers appearing in DRC-OTP-0208-0284, which contains a list of 172 entries, of which approximately 71 could be deemed as being under 15 if all duplicates, erroneous affiliations, and entries of individuals who did not train or were not interviewed are included. The Prosecution suggestion that perhaps the higher number given by P-0046 is based on a "recollection, and her computation" of some document other than DRC-OTP-0208-0284,⁸³¹ or that she looked at some other document, is speculative and unfounded.

The Prosecution's failure to disclose the names on DRC-OTP-0204-0284 is a large-scale violation of Article 67(2), making this trial unfair on counts 6, 9, 14, 15 and 16; the minimum necessary remedy is to place no reliance on any UN document or UN witness

357. The Defence re-affirms its submission that P-0046's testimony and other UN documents purporting to record the age of her interviewees should be accorded no weight because of the deliberate and systematic redaction of sources in that document, [REDACTED].⁸³² The damage arising from the non-disclosure of this vital exculpatory information is in no way remedied by the Prosecution's assertion [REDACTED]”⁸³³ Furthermore, the Prosecution affirmation appears to demonstrate that the Prosecution possesses the names of all alleged child soldier interviewees in all UN documents, including DRC-OTP-0208-0284. This makes the non-disclosure a direct violation of Article 67(2), and compels a robust remedy to prevent a violation of the rights of the accused and to provide a serious disincentive for such investigative practices in the future.

358. Before turning to the circumstances and purported justification for this non-disclosure, as well as the Prosecution's purported substitute disclosure, its scale and significance needs to be appreciated. The Prosecution possesses, and has withheld, the names of at least 167 individuals whom it suggests were under 18 when they were affiliated with UPC forces, of whom approximately 70 are alleged to have been under 15. The latter is more than 17 times the number of alleged child soldiers who testified in this case. The damage to fairness flows not only from the Defence being prevented from identifying

⁸³⁰ DRC-OTP-2054-6723, pp.6724:2-17 (Not in the but referred to in Response, para.178, fn.682 (DRC-OTP-2054-6723, p.6724, l.22-p.6725, l.7)).

⁸³¹ Response, para.178.

⁸³² DCB, paras.1413-1414.

⁸³³ Response, para.181.

contradictions with Prosecution evidence, but also from the parties' unequal access to this vast quantity of material vital to conducting investigations.

359. Article 67(2) requires disclosure of information in the Prosecution's "possession or control" that "may affect the credibility of Prosecution evidence" and that "shows or tends" to "mitigate the guilt of the accused." This includes not only prior statements of a Prosecution witness, but any information that may otherwise affect the credibility of Prosecution evidence or mitigate guilt. Furthermore, this "fundamental obligation" is in no way conditional upon requests by the Defence.⁸³⁴
360. The obvious ways in which the undisclosed information "may affect the credibility of prosecution evidence" include: (i) the reliability of DRC-OTP-0208-0284 itself, on which the Prosecution continues to rely as incriminating evidence;⁸³⁵ and (ii) the reliability of P-0046's testimony and investigation, which appears to have been based largely on DRC-OTP-0208-0284.⁸³⁶ The less obvious, but no less concrete, ways in which non-disclosure may affect the credibility of Prosecution evidence include testing the reliability of evidence of any witness who gave the name or a description of an alleged child soldier – *e.g.* "[REDACTED]"⁸³⁷ or other persons named and unnamed⁸³⁸ – by cross-referencing that information against the undisclosed names on DRC-OTP-0208-0284. Accordingly, the Prosecution affirmation that none of the names on DRC-OTP-0208-0284 are witnesses in this case is not close to satisfactory substitute disclosure.
361. [REDACTED]. The basis for this understanding – which is reflected in the Defence Closing Brief⁸³⁹ – is an exchange of email correspondence with the Prosecution prior to P-0046's testimony. On 13 May 2016, the Defence requested the lifting of all redactions from 20 documents related to the testimony of P-0046,⁸⁴⁰ including DRC-

⁸³⁴ [Niyitegeka](#), Decision on Request for Review, para.55.

⁸³⁵ See *e.g.* Response, paras.178-181.

⁸³⁶ P-0046:T-102,57:2-7("I'm always, you know, not begging you, but I mean please refer to my note at that time because my memory is not, is not to be good. And again, I mean I have met all these children, I have taken information about all of them, so you know, really -- Q. And -- A. Please refer to my documents that I've got").

⁸³⁷ PCB, para.110.

⁸³⁸ See *e.g.* DCB, paras.1415-1498(addressing some of the Prosecution evidence concerning purported child soldiers named and unnamed).

⁸³⁹ DCB, para.1414.

⁸⁴⁰ Email from the Defence to the Prosecution, 13 May 2016, 12:26("In addition, I note that several UN documents related to P-0046 contain significant redactions. Moreover, these redactions were applied without

OTP-0208-0284. The Prosecution responded on 19 May 2016: “in relation to the 20 documents which you state contain significant redactions ([REDACTED]), [REDACTED]”.⁸⁴¹ At the bottom of DRC-OTP-0208-0284 appears a smaller ERN number that reads “DRC-00001-143.” This may be interpreted as a reference to “DRC-OTP-0001-0143”, but a Ringtail search for that number yields only DRC-OTP-0001-0143-R01, which is a four-page extract from the 68-page DRC-OTP-0208-0284. The Defence, accordingly, did not understand that DRC-OTP-0001-0143 was a duplicate of DRC-OTP-0208-0284 and that, accordingly, the redactions to the latter document had been applied by the OTP itself.

362. [REDACTED]. Aside from the fact that this does not conform to the usual form of OTP redactions,⁸⁴² the Defence now knows that these redactions were ordered by the *Lubanga* Trial Chamber,⁸⁴³ which meant that the Prosecution was required under Regulation 42(2) of RoC⁸⁴⁴ and the *Protocol on Redactions*,⁸⁴⁵ to indicate “F redaction” on the document itself. It did not do so.

363. The Prosecution also failed, in its communication of disclosure of evidence of 5 September 2013, to indicate that DRC-OTP-0208-0284 was subject to protective measures ordered in another case.⁸⁴⁶ A follow-up query by the Defence caused the Prosecution to notify the Defence of all documents subject to F redactions; again, neither DRC-OTP-0001-0143, nor DRC-OTP-0208-0284, are listed.⁸⁴⁷ Once again, if these redactions had been applied properly, the Defence would have known that the redactions had been performed by the OTP, and that the OTP possessed all the names on document DRC-OTP-0208-0284.

any redaction codes contrary to the protocol on redactions. In particular, I refer to the following documents : [...] – DRC-OTP-0208-0284”).

⁸⁴¹ Email from the Prosecution to the Defence, 19 May 2016, 09:35.

⁸⁴² Redactions by the OTP, even when not applying a redaction code, are applied with electronic block-outs. [REDACTED].

⁸⁴³ [ICC-01/04-01/06-T-171-CONF-ENG CT](#), 40:13-41:5 (“[REDACTED]. They have agreed that it should be provided confidentially in full, subject to certain protective measures. We grant the application for protective measures, and we order disclosure in the full form that has been proposed to the Defence”).

⁸⁴⁴ Regulation 42(2) (“shall inform the defence to whom the disclosure is being made of the nature of these protective measures”).

⁸⁴⁵ Decision on the Protocol, [ICC-01/04-02/06-411](#), para.8 (“shall be marked with letter code ‘F’”).

⁸⁴⁶ Prosecution’s Communication, [ICC-01/04-02/06-102-Conf-AnxB](#), p.2 “DRC-OTP-0208-0284”.

⁸⁴⁷ Email from Prosecution to Defence, 29 September 2016, 17:58. On 7 October 2016, the Prosecution disclosed a chart with category ‘F’ redactions and on 26 October 2016, the Prosecution provided an updated chart. Email from Prosecution to Defence, 7 October 2016, 18:23; Email from Prosecution to Defence, 26 October 2016, 17:34; Annex E Chart.

364. The Defence's (mis-)understanding of the status of the redactions on DRC-OTP-0208-0284 is reflected in its follow-up email to the Prosecution of 8 June 2016 in which the Defence "[REDACTED]".⁸⁴⁸ DRC-OTP-0152-0274 is the "*Histoires Individuelles*" document recording the interviews conducted at Rwampara by P-0046 and NGO representatives.

365. The Prosecution responded to this email as follows:

Your request appears to be based on the conclusion that "the Defence has already received disclosure of these identities" and accordingly, in your view, [REDACTED].⁸⁴⁹

366. The Defence did not understand, based on either of these emails, that the Prosecution possessed the names appearing on DRC-OTP-0152-0274 or DRC-OTP-0208-0284. [REDACTED].

367. [REDACTED] does not alter the negative impact of the non-disclosure on the Defence's preparation for trial. The difference, however, is that the OTP's possession of the information means that its non-disclosure squarely violates Article 67(2), and gives the Prosecution an unfair advantage in these proceedings in using the information for investigations and evaluating the reliance that can be placed on the material. [REDACTED]⁸⁵⁰ [REDACTED].

368. The only appropriate remedy in light of the Prosecution's non-disclosure of this substantial quantity of Article 67(2) material is to dismiss all charges in relation to Counts 14, 15 and 16. The remedy must also apply to Counts 6 and 9, which rely on the same age element as Counts 14, 15 and 16.

369. In the alternative, the Defence reiterates its request that no reliance be placed on the testimony of P-0046 and DRC-OTP-0208-0284 [REDACTED] purporting to report the ages of alleged child soldiers). The non-disclosure of all the source and victim information on this document requires a meaningful remedy to ensure compliance with the basic requirements of a fair trial.

⁸⁴⁸ Email from the Defence to the Prosecution, 8 June 2016, 18:24 (underline added).

⁸⁴⁹ Email from the Prosecution to the Defence, 9 June 2016, 21:01 (underline added).

⁸⁵¹ Response, para. 190.

CHAPTER III - THE PROSECUTION'S APPROACH TO VISUAL EVIDENCE REVERSES THE BURDEN OF PROOF, AND IGNORES THE REQUIREMENT OF PROOF BEYOND REASONABLE DOUBT

370. The correct standard of proof for this Trial Chamber to make a finding based on video or photographic evidence that someone is under 15 is that it can say that an age estimate of 15 or above is unreasonable. This is a higher standard than “unlikely.” The Defence has not taken any ICC judicial decision out of context in putting forward this standard.⁸⁵¹ On the contrary, the Prosecution inappropriately and repeatedly takes Defence submissions out of context, including by incorrectly implying that the Defence is asking the Trial Chamber to depart from existing standards and adopt a “more stringent approach” than applied in previous cases,⁸⁵² whereas the Defence’s submission was that “an even more stringent approach”⁸⁵³ should be adopted as compared to P-0046’s and P-0116’s testimony as to the margin of error that they would apply to visual observations. The Defence accurately summarised P-0116’s testimony, contrary to the Prosecution unsubstantiated submission.⁸⁵⁴ Furthermore, the annexation of screenshots from videos admitted in this case is not for the purpose of limiting the Chamber’s analysis to video stills,⁸⁵⁵ but in order to identify — in contrast to the Prosecution’s consistently vague submissions in relation to the videos — the specific individuals on the admitted videos about whom an age assessment needs to be made.

371. The Prosecution, citing the standard above, offers the following argument: “If true, the Chamber must consider whether it is unreasonable to exclude that a person identified as 15-17 in videos could actually be 13-14.”⁸⁵⁶ This proposes a flagrant reversal of the burden and standard of proof applicable to criminal proceedings to criminal proceedings in any civilised legal system.

372. The Prosecution fails to address the impact of poor video or photographic quality on ability to assess age.⁸⁵⁷ However, the Prosecution appears to tacitly accept this

⁸⁵¹ Response, para. 190.

⁸⁵² Response, para. 187.

⁸⁵³ DCB, para. 1292.

⁸⁵⁴ Response, para. 188.

⁸⁵⁵ Response, para. 186.

⁸⁵⁶ Response, para. 189 (underline added).

⁸⁵⁷ Response, paras. 185-197; cf. DCB, paras. 1292, 1309, 1313 (referring to [DRC-OTP-0127-0061](#)) (“The video is of poor quality and dark, making evaluation of facial features impossible or difficult”), 1319 (referring to [DRC-OTP-0080-0002](#)), 1330 (referring to [DRC-OTP-0082-0016](#)).

submission (“poor quality; [...] photograph is too dark and he is wearing a hat”)⁸⁵⁸ when it comes to the non-identification by a victim of her rapist in a photograph.

373. The Prosecution suggests that this Chamber should shut its eyes to the practice of national authorities in adjudicating age.⁸⁵⁹ This material is properly considered under: (i) Article 21(1)(a) so that the Trial Chamber understands how the age element in Article 8(2)(e)(vii) is to be adjudicated; (ii) Article 21(1)(c), to the extent that common principles can be deduced from that national practice; and (iii) Article 21(3) as reflective of the minimum requirements of IHRL, which substantially informs the content of that national practice in respect of asylum law. Indeed, the Prosecution itself cites to decisions of national jurisprudence concerning age assessment,⁸⁶⁰ as did the *Lubanga* Appeal Judgment.⁸⁶¹
374. The photographs of asylum seekers are related to legal submissions about this national practice⁸⁶² and need not have been previously admitted as evidence. Parties often cite to matters of public record to support legal, as opposed to factual, submissions.⁸⁶³ The Prosecution itself, albeit erroneously, tried to do so in another case before the ICC on 4 July 2018.⁸⁶⁴
375. Whether evidence of age is categorised as “direct” or “indirect” is much less important than understanding the basis of reports of age that are in evidence: self-reports of age; estimates of age based on visual observation; and/or hearsay. There can be little dispute that self-reports of age should usually be the most reliable type of evidence of age. The striking unreliability of self-reports of age in this case and in the *Lubanga* case are relevant to the caution with which hearsay evidence, in particular, should be assessed.⁸⁶⁵ The thorough unreliability of the evidence that is most directly subject to

⁸⁵⁸ Response, para. 157.

⁸⁵⁹ Response, para. 188.

⁸⁶⁰ Response, para. 185.

⁸⁶¹ [Lubanga AJ](#), paras. 221-222.

⁸⁶² First article: Germany, Landgericht Freiburg, 6KLs 101 Js 37818/16 jug; Second article: France, Cour administrative de Lyon, 2ème Chambre, paras. 3-8; Fourth article: United_Kingdom, The Queen v Ahmed Hassan, para. 16.

⁸⁶³ [Haradinaj Retrial Closing Submissions, 25 June 2012](#), 2798:16-19 (referring to information written in a book published by Carla del Ponte).

⁸⁶⁴ [ICC-01/05-01/13-T-59](#), 21:1-23:8 (arguing that transcripts from another case could be considered by a Trial Chamber in re-sentencing, even though those transcripts formed part of the *res gestae* of the alleged criminal conduct).

⁸⁶⁵ *Contra* Response, paras. 192-195.

verification, through cross-examination, must inform the Trial Chamber's approach to evidence which is less susceptible of verification. The widespread prevalence of such lies informs the likelihood that such lies were told to P-0046 and other hearsay witnesses.

CHAPTER IV - DOCUMENTARY EVIDENCE

376. The Prosecution fails to address or even deny the lack of information surrounding the 12 February 2003 document on which it continues to place such heavy reliance.⁸⁶⁶ The Prosecution offers no explanation as to why, knowing the heavy reliance that it was placing on this document in this case, more information was not adduced about its author including his potential biases, role, functions, associations, or capacity to observe FPLC forces. Merely repeating his title, and his ethnicity, is of little real assistance.⁸⁶⁷ The Prosecution does not respond to the query as to why the letter would, if meant as a statement of fact, exclude the 17 year-olds whom the Prosecution says were also enrolled in the FPLC.⁸⁶⁸

377. Mr NTAGANDA's testimony is in no way inconsistent⁸⁶⁹ with the various demobilization directives, followed by orders, issued by UPC and FPLC authorities. The Prosecution would have the Chamber believe that orders are insincere whenever they have to be repeated to ensure compliance, which is unrealistic given the changing fortunes of the FPLC over the course of the year between October 2002 and June 2003, and the ongoing activities of local self-defence forces in certain areas.

PART VI – SUBMISSIONS ON ART. 28 – COMMAND RESPONSIBILITY

378. The Prosecution misunderstands the nature of command responsibility pursuant to Article 28, which is an exceptional mode of liability that makes it possible for commanders to incur criminal liability for a crime even though they were neither involved in the *actus reus* nor possessed the required *mens rea*. The ICC Statute reflects the exceptional character of superior responsibility, which is a standalone mode of liability found in Art.28.

⁸⁶⁶ Response, paras.198-199; DCB, paras.1366-1373.

⁸⁶⁷ Response, para.199.

⁸⁶⁸ DCB, paras.1368-1373; PCB, paras.633,748.

⁸⁶⁹ Response, para.204.

379. Pursuant to Art.28, commanders are not found guilty for the underlying crimes committed by their subordinates but rather for their failure to command.⁸⁷⁰ Art.28 expressly recognizes the unique character of superior responsibility, in comparison with other modes of liability, by introducing a causal link requirement whereby, superiors incur liability ‘as a result of their failure to exercise control properly over such forces’. The causal link requirement, which was not included in Art.7(3) of the ICTY Statute, was plainly and deliberately introduced in Art.28 and is therefore not subject to interpretation.

CHAPTER I – EFFECTIVE CONTROL

380. The burden of proving beyond reasonable doubt that Mr NTAGANDA was a military commander or person effectively acting as a military commander rests on the Prosecution.

381. To this end, in arguing that Mr NTAGANDA exercised effective command and control over the FPLC, the Prosecution ignores that command responsibility as a mode of liability finds its origin in the notion/status of combatant. Art. 4 of the GC III defines combatant, one requirement of which is to be “commanded by a person responsible for his subordinates”. Consequently, the Prosecution misunderstands that there cannot be two commanders, at the same level, for one subordinate.

382. Mr NTAGANDA, in his capacity as Chef-EMG-adjoint-FPLC, a staff position as opposed to a line position, neither exercised *de jure* nor *de facto* effective command and control over the FPLC. From a *de jure* stand point, Mr NTAGANDA was not in the vertical chain of command from KISEMBO to OpSec Commanders to Bde Comds and so on.⁸⁷¹ From a *de facto* point of view, even though Mr NTAGANDA had considerable influence over the FPLC, he did not exercise effective command and control. When Mr NTAGANDA issued orders and/or meted out punishments and other measures, he did so on behalf of KISEMBO who was the Chef-EMG-FPLC. Moreover, no state practice or judicial authority supports the theory that substantial influence, as a

⁸⁷⁰ GC API, art.87; [Bemba AJ](#), Separate opinion, para.33.

⁸⁷¹ [DRC-D18-0001-5528](#); [DRC-D18-0001-5527](#); [DRC-D18-0001-5525](#).

means of exercising effective control is a rule of customary law, particularly by which criminal responsibility will be imposed.⁸⁷²

383. Mr NTAGANDA's status changed when he was formerly entrusted with command authority or the command '*bâton*' as he testified.⁸⁷³

384. Consequently, Mr NTAGANDA exercised effective command and control, *albeit* for a limited period of time,⁸⁷⁴ over FPLC members involved in the First Attack.⁸⁷⁵ Mr NTAGANDA certainly did not however exercise effective command and control over FPLC members involved in the Second Attack. His travel to Rwanda from 14-17 February has no bearing on this conclusion.⁸⁷⁶ As regards to the so-called Hema civilian supporters, the Prosecution failed to prove that anyone in the FPLC exercised effective command and control over them. Hema civilian supporters were plainly not subordinates.

385. Significantly, the Prosecution misunderstands Mr NTAGANDA's testimony regarding his level of knowledge of the situation within FPLC forces deployed over a vast geographic area.⁸⁷⁷ Mr NTAGANDA did his utmost to acquire a maximum of information and he obtained a lot of information as illustrated for example, in the Ntaganda-Logbooks. It was impossible however for Mr NTAGANDA to have knowledge of everything as the Prosecution implies. Nonetheless, Mr NTAGANDA explained that it was important for subordinates to believe that he was aware of everything they did, as this was a meaningful preventive measure. When a punishment meted out by Mr NTAGANDA was noted in the Ntaganda-Logbooks, he knew that it would have a deterrent effect on FPLC Comds who had access to these messages and their subordinates.

CHAPTER II – KNEW OR SHOULD HAVE KNOWN

386. The *mens rea* incorporated in Art.28 is "knew or, owing to the circumstances at the time, should have known". As previously argued, the 'should have known' standard has

⁸⁷² [Mucić et al. AJ](#), para.266.

⁸⁷³ D-0300:T-216,44:4-45:16.

⁸⁷⁴ D-0300:T-217,80:17-82:8.

⁸⁷⁵ [DRC-D18-0001-5526](#).

⁸⁷⁶ Response, para.260.

⁸⁷⁷ Response, paras.2,3,27,233-234,237,242-244,262-264.

been expressly rejected in the jurisprudence of the *ad hoc* tribunals.⁸⁷⁸ Consequently, ‘should have known’ coupled with ‘owing to the circumstances at the time’ can only be interpreted as being the equivalent of ‘had reason to know’, the governing criteria for command responsibility *mens rea* in the ‘*ad hoc* tribunals’ case law.

387. Thus, the applicable *mens rea* pursuant to Art.28 is ‘knew’ or ‘had reason to know’, the latter meaning ‘whether a superior had sufficiently alarming information to put him on notice that crimes might be committed and to justify further inquiry’.⁸⁷⁹ In this case, the Prosecution failed to prove the crimes charged in the UDCC, which ends the matter. Nonetheless, should the Chamber find otherwise, the multiple preventive and repressive measures taken by Mr NTAGANDA, as soon as he was informed of any breach of discipline or other violation, demonstrate that he never reached this threshold in relation to the crimes charged in the UDCC.

CHAPTER III – FAILURE TO TAKE MEASURES

388. The Prosecution failed to take stock of the multiple, general and specific, preventive measures and repressive measures taken by the FPLC and Mr NTAGANDA in particular, as soon as he was informed of any breach of discipline or other crimes. The measures taken further attest that the crimes charged in the UDCC were not committed. When crimes were attempted, committed or brought to the attention of Mr NTAGANDA, he immediately took measures to investigate; to punish when warranted; and to take measures to prevent further breaches or violations from being committed.

CHAPTER IV – CAUSAL LINK

389. Should the Chamber find, despite the arguments to the contrary raised by the Defence, that crimes charged in the UDCC were committed and that the requirements have been met for Mr NTAGANDA to bear criminal responsibility pursuant to Art.28, the evidence reveals that such crimes could not have been committed as a result of Mr NTAGANDA’s failure to command or to exercise command and control properly over FPLC members. Indeed, the acts and conduct of Mr NTAGANDA during the temporal scope of the UDCC, illustrate a commander: devoted to the military profession; who strongly believed in the *raison d’être* of the military *i.e* to protect the entire civilian

⁸⁷⁸ DCB,para.800; Response,para.263.

⁸⁷⁹ [Stugar AJ](#),para.304; [Hadžihasanović & Kubura AJ](#),para.31; [Bemba AJ](#),Separate opinion,para.42.

population and their goods without distinction; who had a reputation for being a courageous and effective Comd; who applied the distinction principle;⁸⁸⁰ who enforced discipline by all possible means; who believed in the importance of training; and who did not hesitate to investigate, punish or take other measures in respect of subordinates who committed breaches of discipline or other violations.

390. The Prosecution has failed to prove the Art.28 causal link requirement.

⁸⁸⁰ GC,APII,Art.13.