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Date: **28 May 2020**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public Document

Public Redacted Version of the "Observations of the Common Legal Representative of the Victims of the Attacks on the Defence Appeal Part II" (ICC-01/04-02/06-2525-Conf)

Source: **Office of Public Counsel for Victims (CLR2)**

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the "Legal Representative") hereby submits his observations on the Defence Appeal Brief – Part II[1] (the "Defence Appeal II" or the "Appeal"). It is submitted that the Defence Appeal II should be dismissed with regard to all Grounds as the Defence fails to demonstrate any error of law, procedure or fact which materially affected the Trial Judgment. Overall, the Appeal is unpersuasive. The Defence in most instances misrepresents the proceedings, facts and the Trial Chamber's findings, repeats its previous arguments already considered and dismissed by the Trial Chamber or simply disagrees with the Trial Chamber's assessment of the evidence. Given the page limit, the Legal Representative will only address some arguments put forward by the Defence, and supports, with some exceptions, the arguments presented by the Prosecution in relation to the remaining Grounds.

II. PROCEDURAL BACKGROUND

2. On 8 July 2019, Trial Chamber VI (the "Trial Chamber") rendered its judgment (the "Trial Judgment"), whereby it found Mr Ntaganda guilty on all 18 counts of war crimes and crimes against humanity.[2] Mr Ntaganda was subsequently sentenced to 30 years of imprisonment.[3]

3. On 9 September 2019, the Defence filed its notice of appeal against the Trial Judgment,[4] indicating that the appeal would be directed against the whole decision and setting out fifteen grounds of appeal.

4. On 8 October 2019, the Appeals Chamber issued its decision on victim participation in the appeals against the Trial Judgment.[5] In relation to the appeal

[1] See the "Defence Appeal Brief – Part II", No. ICC-01/04-02/06-2465-Conf, 31 January 2020 (the "Defence Appeal II"). A public redacted version was filed on 27 March 2020 as No. ICC-01/04-02/06-2465-Red.
[2] See the "Judgment" (Trial Chamber VI), No.ICC-01/04-02/06-2442, 8 July 2019 (the "Trial Judgment").
[3] See the "Sentencing Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019.
[4] See the "Mr. Ntaganda's Notice of Appeal against the Judgment pursuant to Article 74 of the Statute", No. ICC-01/04-02/06-2359, 9 September 2019.

initiated by the Defence, each of the legal representatives of victims was instructed to file observations in two parts of 50 pages in total within 30 days of the notification of each of the Prosecutor's responses to the Defence appeal brief.[6]

5. On 11 November 2019, the Defence filed the first part of its Appeal Brief in relation to the first and third grounds of appeal identified in its notice of appeal.[7]

6. On 31 January 2020, the Defence filed the second part of its Appeal Brief in relation to the remaining grounds of appeal identified in its notice of appeal (the "Defence Appeal II").[8]

7. On 3 April 2020, the Prosecution filed its Response to the Defence Appeal II (the "Prosecution Response").[9]

8. Since the Legal Representative did not file any response to the first part of the Defence Appeal, his observations on the Defence Appeal II are herewith presented within the page limit of 50 pages accorded to him in total.

III. CLASSIFICATION

9. Pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, the present submissions are classified as confidential, since they refer to the content of documents likewise classified as confidential. A public redacted version of these submissions will be filed in due course.

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[5] See the "Decision on victim participation" (Appeals Chamber), No. ICC-01/04-02/06-2439 A, 8 October 2019.
[6] *Idem*, p. 3.
[7] See the "Defence Appeal Brief - Part I", No. ICC-01/04-02/06-2443, 11 November 2019.
[8] See the Defence Appeal II, *supra* note 1.
[9] See the "Prosecution's Response to 'Defence Appeal Brief – Part II'", No. ICC-01/04-02/06-2500-Conf, 3 April 2020 (the "Prosecution's Response"). A public redacted version was filed on 15 April 2020 as No. ICC-01/04-02/06-2500-Red.

IV. SUBMISSIONS ON THE STANDARD OF APPELLATE REVIEW

10. It is the Legal Representative's submission that as a matter of legal certainty and procedural propriety the Appeals Chamber should apply the well-established standards of appellate review that have been authoritatively formulated and are firmly rooted in decades of jurisprudence both at the Court and the international *ad hoc* tribunals. Although both the Defence and the Prosecution advocate for the need to apply the well-established standards of appellate review,[10] the Legal Representative cannot agree with the parties' suggested interpretation of said standards.

11. While suggesting a new or different standard of review by emphasising that the margin of appreciation should be approached with caution,[11] the Defence fails to provide any legal basis for its suggestion or at least explain how the suggested approach should effectively apply.

12. The Legal Representative agrees with the Prosecution's stance to the extent that the Appeals Chamber's primary function is corrective.[12] It is submitted that it must necessarily remain this way. The established standards of appellate review set forth that the Appeals Chamber will not defer to a Trial Chamber's interpretation of the law, but rather it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law.[13] The Appeals Chamber should, however, only *intervene* if the error materially affected the impugned decision.[14] While the Prosecution is also correct in arguing that "[n]*ot all errors made by a Trial Chamber are sufficient to overturn a conviction or sentence*",[15] the Prosecution's understanding on the other hand seems to suggest that only material

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[10] See the Defence Appeal II, *supra* note 1, para. 4. See also the Prosecution's Response, *supra* note 9, para. 4.

[11] See the Defence Appeal II, *supra* note 1, para. 4. In the Legal Representative's appreciation, this statement was merely a recalling that an Appeals Chamber should not readily accept findings of the Trial Chamber but truly scrutinise them according to the appellate standards.

[12] See the Prosecution's Response, *supra* note 9, para. 5.

[13] See e.g. the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the Application for Judicial Review by the Government of the Union of the Comoros'" (Appeals Chamber), No. ICC-01/13-98, 2 September 2019, para. 26.

[14] *Ibid*.

[15] See the Prosecution's Response, *supra* note 9, para. 19.

errors should be *reviewed* by the Appeals Chamber.[16] In light of the applicable appellate standards, the Legal Representative cannot agree with this approach. In this regard, the Prosecution seems to effectively rely on its suggested approach in subsequently arguing, in the context of its observations on Ground 6,[17] that 'technical' or 'harmless' errors allegedly committed by the Trial Chamber should not be *addressed* by the Appeals Chamber at all, the matter being discussed *infra*.[18]

13. The Legal Representative submits that part of the Appeals Chamber's corrective function is that it should set out the correct interpretation of the law where a Trial Chamber misinterpreted and misstated the law[19] – regardless of whether a Trial Chamber's erroneous interpretation materially affected the decision or not. It is in this regard the Legal Representative cannot agree with the Prosecution's position that not all errors should be *addressed* by the Appeals Chamber.[20] In the Legal Representative's appreciation, this understanding is misconceived.

14. Accordingly, the Legal Representative neither agrees with the Prosecution nor the Defence on the interpretation of the appellate legal standards and respectfully requests that there be no deviation from the long-established appellate standards that require the Appeals Chamber to accord due deference to decisions of the Trial Chamber with regard to all alleged errors as mandated by these standards.

15. Especially with respect to decisions of credibility and reliability, a Trial Chamber is best placed to make the relevant assessments and hence enjoys broad discretion.[21] It is a Trial Chamber's function to observe the witnesses and assess their demeanour. Unless it committed a discernible error, such assessments should not be disturbed. In the words of the Appeals Chamber, the Appeals Chamber should not interfere with a Chamber's discretionary decision merely because the Appeals

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[16] *Ibid*.
[17] *Idem*, paras. 116-117.
[18] See *infra* paras. 61-62.
[19] See e.g. the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I's 'Decision on the Application for Judicial Review by the Government of the Union of the Comoros'", *supra* note 13, para. 26.
[20] See the Prosecution's Response, *supra* note 9, para. 19.
[21] See e.g. ICTY, *Popović et al*., Case No. IT-05-88-A, Appeals Judgment, 30 January 2005, para. 131.

Chamber, if it had the power, might have made a different ruling.[22] It should only disturb the exercise of a Trial Chamber's discretion where it is shown that an error of law, fact or procedure was made.[23]

16. As regards alleged errors of fact, it has previously been held by the Appeals Chamber that "*it will not interfere with factual findings of the first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the 'misappreciation of facts' , the Appeals Chamber has also stated that it 'will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts, just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it*.'"[24]

17. It is submitted that there is no cogent reason to depart from any of the above-standards of appellate review in the present case.

V. SUBMISSIONS ON THE DEFENCE'S GROUNDS OF APPEAL

A. GROUND 2: MR NTAGANDA'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY MANIFEST PROCEDURAL IRREGULARITIES

18. The Defence advances a number of arguments according to which the alleged procedural irregularities amount to such irregularities as to constitute serious violations of Mr Ntaganda's fair trial rights. It avers that the only available remedy in these circumstances is a new trial.[25] The Legal Representative will address the arguments in turn below. As regards the matters of alleged excessive resort to *ex parte* material,[26] alleged disclosure violations and the use of non-privileged telephone conversations,[27] however, it is submitted that the Prosecution is better placed to address said matters and the Legal Representative will refrain from making

[22] See the "Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparation pursuant to Article 76 of the Rome Statute" (Appeals Chamber), No. ICC-01/04-01/07-3778-Red, 9 March 2018, para. 43 (internal references omitted).
[23] *Ibid*.
[24] *Idem*, para. 41.
[25] See the Defence Appeal II, *supra* note 1, para. 5.
[26] *Idem*, paras. 6-20.
[27] *Idem*, paras. 21-41.

submissions thereon. As with other alleged infringements, it is averred that these matters were nevertheless duly considered by the Trial Chamber at the time, and the Legal Representative supports the arguments put forth by the Prosecution in this regard.[28]

i. THE RELEVANT CRITERIA FOR A NEW TRIAL ARE NOT MET

19. Article 83(2)(b) of the Rome Statute (the "Statute") bestows upon the Appeals Chamber the power to order a retrial. It sets out that a new trial may be ordered where the judgment is affected by issues of fairness, or errors of fact or law. Jurisprudence of the international *ad hoc* tribunals is further instructive on the above circumstances. For instance, the Appeals Chamber may order a retrial where the Trial Chamber committed an error of law arising from the application of a wrong legal standard. The Appeals Chamber will articulate the correct legal standard and, depending on the circumstances of the case, may then remand the case back for a new trial to the Trial Chamber were "*it would be inappropriate to conduct* [the factual analysis] *as* [the Appeals Chamber] *would have to analyse the entire trial record without having the benefit of having directly heard the witnesses*".[29] The Appeals Chamber may also order a re-trial where the Trial Chamber "*failed to exercise its powers appropriately*",[30] or when it finds "*aggregate errors*" which "*prevent the Appeals Chamber from determining whether the Trial Chamber assessed the entire evidence on this point exhaustively and properly*".[31] An order for retrial is an exceptional measure to which resort must necessarily be limited,[32] and which, it appears, would have to be requested by the parties[33] and be in the interests of justice.[34]

20. While the Defence, under various aspects of Ground 2 requests that a retrial be conducted to remedy the alleged procedural unfairness,[35] it elsewhere argues that

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[28] See the Prosecution's Response, *supra* note 9, paras. 24-37.
[29] See ICTY, *Stanišić and Simatović*, Case No. IT-03-69-A, Appeals Judgment, 9 December 2015, paras. 122-124.
[30] See ICTY, *Haradinaj et al.*, Case No. IT-04-84-A, Appeals Judgment, 19 July 2010, para. 48.
[31] See ICTR, *Muvunyi*, Case No. ICTR-2000-55A-A, Appeals Judgment, 29 August 2008, para. 148.
[32] *Ibid*.
[33] See ICTY, *Orić*, Case No. IT-03-68-A, Appeals Judgment, 3 July 2008, paras. 187-188.
[34] See ICTY, *Jelisić*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001, paras. 73-78.
[35] See the Defence Appeal II, *supra* note 1, paras. 5 and 57.

the alleged violations warrant the finding of a mistrial, or in the alternative that an inference be drawn in relation to the Trial Chamber's assessment of the credibility of P-0055 and P-0768.[36] Finally, still under the same ground of appeal, it states that the sole available remedy is a full acquittal,[37] or the reversal of individual findings resulting in convictions.[38] Although it needs to be pointed out that the above remedies are entirely different and it is therefore impossible to discern which relief is in fact requested, ultimately, the Defence fails to substantiate any one of the alleged errors and accordingly, none of the criteria of either remedy are met. The Legal Representative will address the different allegations in more detail below.

ii. THE DEFENCE'S RIGHT TO PREPARE WAS NOT VIOLATED

21. The Defence argues that the "*Chamber erred by unswervingly giving precedence to the trial calendar over resolving legitimate and significant obstacles to Defence preparations and presentation of its case*".[39] According to the Defence, in doing so, the Trial Chamber abused its discretion.[40]

22. The Appeals Chamber has previously held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based on an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[41] It is submitted that the Trial Chamber in this case did not abuse its discretion, but considered all relevant factors when reaching its decision. The

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[36] *Idem*, para. 20.
[37] *Idem*, para. 41.
[38] *Idem*, para. 47.
[39] *Idem*, para. 48.
[40] *Ibid*.
[41] See the "Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Decision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'" (Appeals Chamber), No. ICC-01/12-01/18-601-Red, 19 February 2020, para. 39.

Defence expresses mere disagreement with the Trial Chamber's decision. This is however not sufficient in order to demonstrate that the Trial Chamber abused its discretion.

23. In particular, the Defence argues that the rejection of its request to postpone the opening of the trial was so unreasonable as to amount to an abuse of the Trial Chamber's discretion and thus contends that Mr Ntaganda's right to adequate time and facilities to prepare was violated.[42]

24. First, the Legal Representative posits that the right to adequate time and facilities does not equate granting every defence request justified with reference to this right. This fundamental right guarantees, first and foremost, the right to adequate time to consult with counsel,[43] access to the file and the disclosure of evidence.[44] The facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence.[45] The question of whether time and facilities are adequate is assessed in light of the circumstances of each particular case.[46] This is what the Trial Chamber did in the present case.

25. Already at the time, the Legal Representative pointed out that the Defence mischaracterised the nature of the 'exceptional volume of disclosure' by omitting to mention that most of the disclosure at the time was re-disclosure of lesser redacted versions of material previously disclosed.[47] Now, the Defence simply repeats these arguments it unsuccessfully raised before the Trial Chamber in 2015. In its decision on the Defence's request, the Trial Chamber considered all arguments put forth by the Defence and weighed them against general interests of fairness and expeditiousness of the proceedings as such. The Trial Chamber for instance noted that "*a significant number of the arguments raised by the Defence were either already known*

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[42] See the Defence Appeal II, *supra* note 1, para. 50.
[43] See ECtHR, *Öcalan v. Turkey*, App. No. 46221/99, Judgment, 12 May 2005, para. 148.
[44] See ECtHR, *Rowe and Davis v. United Kingdom*, App. No. 28901/95, Judgment, 16 February 2000, para. 60.
[45] See ECtHR, *Mayzit v. Russia*, App. No. 63378/00, Judgment, 20 January 2005, para. 79.
[46] See ECtHR, *Iglin v. Ukraine*, App. No. 39908/05, Judgment, 12 January 2012, para. 65.
[47] See the "Victims' observations in response to the 'Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest", No. ICC-01/04-02/06-556, 14 April 2015, para. 11.

to it at the time it made submissions on the schedule for preparation for trial, or should reasonably have been anticipated by it at that stage".[48] This, the Trial Chamber underscored, included for example the status of Defence investigations at the time, the impact of changes in the composition of the Defence team and to some extent the potential volume of disclosure.[49] The Trial Chamber further considered that being provided with an updated document containing the charges and the Prosecution's Pre-Trial Brief, the Defence was provided with "*a clear outline and understanding of the Prosecution's case*".[50] The Defence now argues that the Trial Chamber's decision was unreasonable because it failed to take relevant factors into considerations.[51] The Defence does, however, not specify which factors exactly the Trial Chamber allegedly failed to take into consideration. In any event, a comprehensive reading of the Trial Chamber's oral decision of 22 April 2015 reveals that the Trial Chamber duly considered all factors brought to its attention. The Defence merely disagrees with the decision reached and seeks to re-litigate this issue under the guise of an alleged violation of Mr Ntaganda's right to have adequate time and facilities to prepare his defence. This sub-ground should be dismissed.

iii. THE DEFENCE'S REQUESTS FOR LEAVE TO APPEAL WERE RIGHTFULLY DENIED

26. The Defence argues that many procedural errors could have been rectified, had the Trial Chamber allowed appellate review.[52] It is submitted that this argument is first and foremost speculative. Secondly, the Trial Chamber denied said requests individually, after due consideration of the individual applications requesting leave to appeal. Making such a broad and hypothetical allegation that the fact that the Trial Chamber only granted three out of 21 requests for leave to appeal[53] is insufficient to substantiate the allegation of a violation of the accused's right to a fair trial.

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[48] See the transcript of the hearing held on 22 April 2015, No. ICC-01/04-02/06-T-19-ENG ET WT, p. 5, lines 19-24.
[49] *Ibid*.
[50] *Idem*, p. 6, lines 9-12.
[51] See the Defence Appeal II, *supra* note 1, para. 50.
[52] *Idem*, para. 5.
[53] *Idem*, para. 57.

iv. NO CASE TO ANSWER PROCEDURE

27. The Defence avers that Mr Ntaganda was prejudiced by having to testify while the appeal against the Trial Chamber's decision denying a 'no case to answer motion' was on-going.[54]

28. The Defence argues that the Trial Chamber erred when it rejected the Defence's request for an adjournment of the proceedings, following its denial of the Defence's motion[55] for a partial acquittal[56] and subsequently certification of the latter decision.[57] The Defence contends that "*in requiring Mr Ntaganda to testify when it was still possible that the charges would be reduced, the Chamber violated his right to be informed promptly and in detail of the charges, and to remain silent*".[58]

29. It is submitted that the arguments advanced in this regard are entirely speculative. The Defence's submission of what could have been the impact "[h]*ad the Appeals Chamber decided differently*"[59] cannot be the subject of an appeal. No actual prejudice arose, as the Appeals Chamber did not overturn the decision of the Trial Chamber denying the request to move for a partial judgment of acquittal. The charges laid against Mr Ntaganda remained the same.

30. Furthermore, since an accused has the right to remain silent,[60] and since the choice to testify lies alone with the accused in consultation with counsel, Mr Ntaganda knowingly took the decision to testify. At this point, given that he only notified of his intention to testify on 12 May 2017 when the Defence's motion for a partial judgment of acquittal was still pending before the Trial Chamber,[61] Mr Ntaganda was aware of the fact that there was a reasonable likelihood that the

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[54] *Idem*, para. 43.
[55] See the transcript of the hearing held on 29 May 2017, No. ICC-01/04-02/06-T-206-Red-ENG WT, p. 5, lines 1-4.
[56] See the "Request for leave to file a motion for partial judgment of acquittal", No. ICC-01/04-02/06-1879-Conf, 25 April 2017.
[57] See the transcript of the hearing held on 14 June 2017, No. ICC-01/04-02/06-T-209-Red-ENG WT, p. 4, lines 6-10.
[58] See the Defence Appeal II, *supra* note 1, para. 43.
[59] *Ibid*.
[60] See article 67(1)(g) of the Rome Statute.
[61] See the "Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the first two evidentiary blocks", No. ICC-01/04-02/06-1903, 12 May 2017, para. 3.

motion would be dismissed. He nevertheless decided to testify in his own defence. It was also the Defence's strategic choice to have Mr Ntaganda testify at the beginning of the Defence's case. Indeed, it already averred on 12 May 2017 that "*allowing Mr Ntaganda to testify at this time may result in the presentation of a shorter case of the Defence*".[62] In international criminal proceedings, there is no prescribed order of witnesses in relation to hearing the testimony of the accused. It is a question left to the discretion of the relevant Chamber in managing the trial proceedings pursuant to article 64(2) of the Statute and rule 140 of the Rules of Procedure and Evidence.[63] In the present circumstances, it was the Defence who requested that Mr Ntaganda be heard at the beginning of his case.[64] Trial Chamber II in the *Katanga and Ngudjolo* case further underlined that "*an accused who voluntarily testifies under oath,* […] *waives his right to remain silent and must answer all relevant questions, even if the answers are incriminating*".[65]

31. Secondly, Mr Ntaganda previously moved for suspensive effect before the Appeals Chamber.[66] His request was rejected.[67] The Appeals Chamber rightly pointed out that "*suspension involves the non-enforcement of a decision*",[68] and accordingly rejected Mr Ntaganda's request, finding that there was no 'decision' the enforcement of which could be stopped.[69] It is also noteworthy in this regard that the

[62] *Idem*, para. 6.
[63] See e.g. the "Initial Directions of the Conduct of the Proceedings" (Trial Chamber IX), No. ICC-02/04-01/15-497, 13 July 2016, para. 16; the "Decision on the conduct of the proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, para. 14; the "Directions for the conduct of the proceedings and testimony in accordance with rule 140" (Trial Chamber II), No. ICC-01/04-01/07-1665-Corr, 1 December 2009, para. 8
[64] See the "Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the first two evidentiary blocks", No. ICC-01/04-02/06-1903, 12 May 2017, para. 6.
[65] See the "Decision on the request of the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the accused" (Trial Chamber II), No. ICC-01/04-01/07-3153, 13 September 2011, para. 7.
[66] See the "Notice of appeal and urgent request for suspensive effect", No. ICC-01/04-02/06-1960, 14 June 2017.
[67] See the "Decision on suspensive effect" (Appeals Chamber), No. ICC-01/04-02/06-1968, 19 June 2017, p. 3.
[68] *Idem*, para. 9.
[69] *Ibid*.

Defence is now repeating the exact same arguments it previously made before the Appeals Chamber.[70] These arguments have been considered and rejected as such.[71]

32. Thirdly, the matter has already been considered and decided by the Appeals Chamber, since the first ground of appeal certified by the Trial Chamber in 2017 was the following: "*whether the Chamber erred in permitting the trial to proceed in respect of charges for which the Chamber declined to consider the sufficiency of the Prosecutor's evidence*".[72]

33. The Appeals Chamber ultimately rejected Mr Ntaganda's contention that his fair trial rights had been infringed by having to decide whether or not to testify in the absence of a 'no case to answer' procedure placed a burden on the exercise of the right to remain silent.[73] In particular, it found that Mr Ntaganda had failed to demonstrate that international human rights law required that a 'no case to answer motion' constituted an indispensable safeguard against interference with the right of accused persons not to incriminate themselves.[74] It considered that the domestic and international authorities relied upon by Mr Ntaganda were inapposite and generally found, having conducted a review of the UN Human Rights Committee and relevant jurisprudence of the European Court of Human Rights (the "ECtHR"), that no "'*no case to answer' procedure was necessarily required to protect any of the other rights of the accused pursuant to article 14 of the International Covenant on Civil and Political Rights and article 6 of the European Convention on Human Rights*".[75]

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[70] See the "Notice of appeal and urgent request for suspensive effect", *supra* note 66, paras. 17 and 21-25; and the "Appeal from decision denying leave to file a 'no case to answer motion'", No. ICC-01/04-02/06-1975, 27 June 2017, paras. 7-22. See also the "Decision on suspensive effect", *supra* note 67, para. 5.

[71] See the "Decision on suspensive effect", *supra* note 67, paras. 5 and 9-10.

[72] See the transcript of the hearing held on 14 June 2017, *supra* note 57, p. 24, lines 15-25 (Emphasis added).

[73] See the "Judgment on the appeal of Mr Ntaganda against the 'Decision on Defence request for leave to file a 'no case to answer motion' (Appeals Chamber), No. ICC-01/04-02/06-2026, 5 September 2017, paras. 47-50.

[74] *Idem*, paras. 49-50.

[75] *Idem*, para. 49.

34. Given the above, this sub-ground of appeal should accordingly be dismissed, as it constitutes no more than a mere disagreement with the decision[76] and an attempt to re-litigate the matter before a differently constituted Appeals Chamber.

v. THE RIGHT TO A FAIR TRIAL WAS NOT BREACHED BY THE PACE OF PROCEEDINGS

35. The Defence contends that the "*Chamber erred by systematically prioritising the expeditious conduct of the proceedings at the expense of fairness*."[77] The Defence, for instance, argues that it was prejudiced when the Trial Chamber "*rejected a Defence request to modify the schedule of witnesses*"[78] after Co-counsel had to withdraw [REDACTED]. What the Defence fails to mention is that the Trial Chamber did take measures [REDACTED].[79] The Trial Chamber just did not accede to the request in full and set out its reasons for deciding that way. It thus considered the arguments put before it and exercised its discretion. The Defence does not demonstrate that this decision was so unreasonable that no reasonable Chamber could have decided that way. This is insufficient to support an allegation of an abuse of discretion.

36. Likewise, the Defence submits that the Trial Chamber's rejection of its request to recall P-0290 for cross-examination was erroneous and impermissibly motivated by considerations of expeditiousness.[80] However, the Trial Chamber, in its decision on the matter, [REDACTED].[81][REDACTED].[82] Again, the matter at hand was within the discretion of the Trial Chamber, which did set out in detail all the arguments it considered and weighed in arriving at its decision. The Defence has neither demonstrated that the Trial Chamber failed to take relevant considerations into

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[76] See the "Judgment on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu'" (Appeals Chamber), No. ICC-01/05-01/13-559, 11 July 2014, para. 21. See also the "Jugdment on the appeal of Mr Callixte Mbarushimana against the decision of pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the Defence Request for interim Release'" (Appeals Chamber), No. ICC-01/04-01/10-283, 14 July 2011, para. 32.
[77] See the Defence Appeal II, *supra* note 1, para. 48.
[78] *Idem*, para. 55.
[79] See the "Decision on the Defence request to modify the schedule for the third and fourth evidentiary blocks" (Trial Chamber VI), No. ICC-01/04-02/06-1115-Conf, 28 January 2016, paras. 7-8.
[80] See the Defence Appeal II, *supra* note 1, para. 57.
[81] See the "Decision on Defence request to recall Witness P-0290" (Trial Chamber VI), No. ICC-01/04-02/06-1791-Conf, 17 February 2017, paras. 9-11.
[82] *Idem*, paras. 12-13.

account, nor that it reached a conclusion that was so unreasonable that no reasonable Chamber could have reached. The Defence's challenge is a mere disagreement with the Trial Chamber's decision.

vi. CONCLUSION

37. The Defence has not demonstrated that the Trial Chamber abused its discretion in managing the trial proceedings. It advances nothing but speculation and disagreement, both of which are insufficient to establish that the Trial Chamber erred by abusing its discretion. Ground 2 should therefore be dismissed in its entirety.

B. GROUND 5: NO ATTACK DIRECTED AGAINST A CIVILIAN POPULATION[83]

38. The Defence argues that the Trial Chamber erred in law and in fact when it found that the UPC/FPLC directed an attack against a civilian population.[84] In particular, the Defence avers that "*the Chamber failed to find that a civilian population was the primary object* [sic] *the UPC/FPLC's military operations*", erred by limiting its evidentiary analysis to six UPC/FPLC operations, failed to accord sufficient weight to the legitimate purpose of the UPC/FPLC military operations, and failed to consider relevant evidence going beyond the allegations of the Prosecution. Lastly, it argues that the Trial Chamber erred in finding that orders were issued to attack civilians.[85]

39. As regards the alleged failure to make a finding as to the civilians being the primary object of the attack, it is submitted that the Defence misrepresents the relevant parts of the Trial Judgment. Contrary to the submissions of the Defence, the Trial Chamber considered the indoctrination of recruits that the Lendu were their enemy, the fact that the military operations resulted in murders and rapes of the civilian population, orders to loot and attack civilians, and "[t]*aking into account the above factors,* […] [found] *beyond reasonable doubt that the attack was directed against a*

[83] In keeping with the order of grounds chosen by the Defence, Ground 5 is addressed before Ground 4.
[84] See the Defence Appeal II, *supra* note 1, para. 58.
[85] *Ibid*.

civilian population".[86] Moreover, the Trial Chamber referred to its further more detailed findings on these individual factors.[87]

40. There is nothing in the finding of the Trial Chamber that suggests, let alone demonstrates that it did not find beyond reasonable doubt that the civilian population was targeted as such. For instance, the Trial Chamber's review of the applicable law and its references to the requirements of 'IHL',[88] that preceded the above finding, indicates that the Trial Chamber was guided by the correct legal standard and that it applied it to the facts before it. While it may be unfortunate that the Trial Chamber's analysis is somewhat concise, there is no indication that it took irrelevant factors into account or failed to take relevant factors into account. There is hence no basis for the Defence's challenge regarding this finding in relation to the contextual elements of the article 7 crimes.

41. The Defence further argues that the Trial Chamber erred in conducting only a limited analysis when it considered only the First and Second Operations and focused on the 'assault' on Songolo, Zumbe and Komanda only.[89] It further contends that the Trial Chamber erred because it did not take its own finding into account, namely that it "*may consider whether a military operation alleged to form part of the alleged attack against a civilian population, complied with the requirement of IHL*".[90] The Defence simply asserts that the Trial Chamber did not take into account its own finding without demonstrating that this is indeed the case. As set out in paragraphs 39-40 *supra*, there is nothing in the Trial Chamber's analysis that suggests that it failed to consider these requirements. To the contrary, the Trial Chamber refers to the way in which recruits and UPC/FPLC soldiers were instructed to target Lendu civilians[91] before it concludes that it is satisfied beyond reasonable doubt that the attacks were directed against a civilian population. The Trial Chamber did not have to articulate

[86] See the Trial Judgment, *supra* note 2, para. 672.
[87] *Idem*, para. 671.
[88] *Idem*, paras. 668-669.
[89] See the Defence Appeal II, *supra* note 1, para. 60.
[90] *Idem*., referring to the Trial Judgment, *supra* note 2, para. 668.
[91] See the Trial Judgment, *supra* note 2, para. 671.

every step of its reasoning.[92] By setting out the law correctly and moving on to the considerations of individual facts thereafter before concluding that it was satisfied beyond reasonable doubt that the attack was directed against a civilian population, the Trial Chamber carried out a correct analysis. Unless it could be demonstrated that it took into account irrelevant factors or failed to take into relevant ones, the Appeals Chamber should defer to the Trial Chamber's decision. The Defence does not demonstrate that the Trial Chamber erred in such a way.

42. The Defence contends that the Trial Chamber also erred by failing to attach sufficient weight to the legitimate aim and purpose of the six military operations it considered[93] and failed to consider that the aim of these operations was to ensure that the APC and Lendu combatants would not be able to stage a counter-attack.[94] In this respect, the Defence cites its previous submissions before the Trial Chamber.[95] It is submitted that the Defence simply disagrees with the Trial Chamber's reasoning without demonstrating any error in the exercise of its discretion in the assessment of the evidence. The reading of the Trial Judgment as a whole demonstrates that the Trial Chamber was satisfied beyond reasonable doubt that the primary object, and thus, the common plan, was to "*drive out the Lendu*".[96] It found that the military operations conducted were the means of implementing this common plan and based its conclusion on the evidence it received on the conduct of the military operations, during which Lendu civilians were brutally murdered and raped.[97] The Defence mostly repeats arguments already rejected at trial and does not demonstrate that the Trial Chamber committed an error warranting the intervention of the Appeals Chamber. In particular, the Defence advances a number of individual challenges to the Trial Chamber's interpretation of the evidence and related findings. It alleges that, in relation to Songolo and Zumbe, the Trial Chamber failed to "*refer to its own*

[92] See ICTR, *Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appeals Judgment, 14 December 2015, para 1862.
[93] See the Defence Appeal II, *supra* note 1, para. 61.
[94] *Idem*, para. 62.
[95] *Idem*, para. 62, footnote 152.
[96] See the Trial Judgment, *supra* note 2, para. 808.
[97] *Idem*, paras. 452-457, 464, 521 and 809-811.

findings" that the UPC/FPLC's aim was to dislodge Lompondo.[98] It further alleges that the Trial Chamber failed to give any consideration to the fact that the commission of crimes during an operation does not mean that the objective of the operation is not the stated military objective,[99] and failed to consider the evidence of Mr Ntaganda in this regard.[100] All of the aforementioned are examples of simple repetition of previous arguments and a mere disagreement with the Trial Chamber's interpretation of the evidence and related findings.[101] The Trial Chamber correctly considered and found that the way in which the attacks were carried out was such as to demonstrate that they were unlawfully directed against a civilian population.[102] Whether an attack could have a legitimate military advantage or objective is irrelevant where, due to its nature, it was unlawfully directed against a civilian population.[103] The "*issue at hand is whether the way the military action was carried out was criminal or not*".[104] The Trial Chamber found that it was. The exact same considerations apply in relation to the Defence's challenges regarding the Second Operation, in relation to which the Defence claims the Trial Chamber ignored the evidence and failed to find that the Second Operation was a purely military operation to open the road "*for the benefit of the civilian population without discrimination*".[105]

43. The Defence also reiterates its previous arguments on the allegedly 'harsh living conditions' in Mongbwalu and the UPC/FPLC's alleged objective of liberating the civilian population and alleges that the Trial Chamber ignored the "*wealth of evidence*" regarding the same.[106] It is submitted that the purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and

[98] See the Defence Appeal II, *supra* note 1, paras. 63-64.
[99] *Ibid*.
[100] *Idem*, para. 64.
[101] In each of the mentioned instances the Defence refers to nothing but its Closing Brief.
[102] See the Trial Judgment, *supra* note 2, para. 671.
[103] See e.g. ICTY, *D. Milošević*, Case No. IT-98-29/1-A, Appeals Judgment, 12 November 2009, para. 264.
[104] See ICTY, *Martić*, Case No. IT-95-11-A, Appeals Judgment, 8 October 2008, para. 268 referring to ICTY, *Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 452.
[105] See the Defence Appeal II, *supra* note 1, paras. 66-68, referring to the Defence Closing Brief.
[106] *Idem*, para. 65, referring to the Defence Closing Brief.

arguments submitted before the Trial Chamber.[107] This challenge, along with the others under this ground of appeal should be dismissed since the Defence simply repeats earlier submissions and fails to concretely demonstrate that no reasonable Trial Chamber could have come to the same conclusion.

44. In addition, the Defence argues that the Trial Chamber erred by "*declining to make factual findings going beyond the Prosecution's allegations*",[108] namely by "*failing to consider relevant evidence regarding other UPC/FPLC operations*".[109] It is submitted that the Decision on the Confirmation of Charges, together with the Document Containing the Charges and the Prosecution's Pre-Trial Brief form the basis of the charges against Mr Ntaganda. It was the Trial Chamber's duty to remain within the boundaries of the charges and to consider the evidence submitted to support the same, together with the Defence's evidence answering these charges. Had the Trial Chamber ventured out of these parameters, it would have committed an error. To invoke this as a failure on the part of the Trial Chamber is improper.

45. Moreover, amongst the evidence cited by the Defence through reference to its Closing Brief, is the uncorroborated evidence of D-0017, a witness whom the Trial Chamber found to have been "*evasive*", "*uncooperative*" and whom it found to have "*received financial assistance from* [Mr Ntaganda]".[110] The Defence goes on to make further allegations that "*evidence was led but ignored*"[111] in relation to further UPC/FPLC operations during which, the Defence submitted, no crimes were committed. Again, the only basis for these arguments is the testimony of D-0017 and/or Mr Ntaganda, as well as the Defence's previous submissions in its Closing Brief.[112] As demonstrated above, the Trial Chamber considered the credibility and trustworthiness of D-0017, which ultimately affected the weight it attached to his evidence. While the Defence may be correct in pointing out that the Trial Chamber

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[107] See ICTR, *Nyiramasuhuko et al.*, *supra* note 92, para. 563. See also ICTR *Ntawukulilyayo*, Case No. 05-82-A, 14 December 2011, Appeals Judgment, para. 32. See also ICTY, *Mucić et al.*, Case No. IT-96-21-A, Appeals Judgment, 20 February 2001, para. 837.
[108] See the Defence Appeal II, *supra* note 1, para. 69
[109] *Ibid*.
[110] See the Trial Judgment, *supra* note 2 paras. 251-252.
[111] See the Defence Appeal II, *supra* note 1, para. 70.
[112] *Idem*, para. 70, footnotes 179-181.

erroneously stated that the Defence did not refer to specific events,[113] the Defence nevertheless fails to demonstrate a clear error of reasoning. Moreover, it fails to demonstrate that any prejudice flows from this statement.

46. The Defence further refers to its previous submissions on the significance of various logbook entries, and Mr Ntaganda's evidence thereon alleging that the Trial Chamber "*ignored the prevailing situation in Mongbwalu*"[114] and "*ignored*" the logbook,[115] once more offering its own reading of the messages therein. It is submitted that the Trial Chamber extensively considered the logbooks in its Judgment. Not only did it dedicate an entire section on this evidence, it also specifically pointed out that it "*considered the item carefully in relation to each question of fact for which it is relevant, and has borne in mind the submissions of the parties and Mr Ntaganda's testimony*".[116] However, the Trial Chamber also underlined that "*it consider*[ed] *that there are limitations to the conclusions that can be drawn from the logbooks*".[117] Once again, the simple repetition of previous arguments unsuccessful at trial is insufficient to demonstrate that the Trial Chamber erred in its assessment of the evidence. The Defence's challenges should therefore be dismissed.

47. The Defence also argues that the Trial Chamber erroneously interpreted the expression '*kupiga na kuchaji*', contrary to the testimony of eleven witnesses. It is submitted that the Defence misrepresents both the Trial Chamber's finding, as well as the relevant testimony. In relation to the testimony and the Defence's submissions as to what the expression '*kupiga na kuchaji*' meant, it needs to be underlined that the witnesses were specifically asked and spoke about the literal meaning of the term, *i.e.* each of these terms. This does in no way negate or undermine the finding of the Trial Chamber that this term was *used* in a particular way and, in doing so, came to attain a specific meaning within the context of the implementation of the common plan. It was transformed into an order to attack and kill Lendu, irrespective of its literal

[113] See the Defence Appeal II, *supra* note 1, para. 69, referring to the Trial Judgment, *supra* note 2, para. 665.
[114] *Idem*, paras. 71-73.
[115] *Idem*, para. 72.
[116] See the Trial Judgment, *supra* note 2, para. 65.
[117] *Idem*, para. 66.

meaning or origin as a 'military' command used in various armed groups. While the Defence is trying to portray the Trial Chamber's conclusion as wilfully taking P-0963's and P-0901's testimony out of context,[118] it is doing precisely that. It is misconstruing the testimony on this expression, trying to paint it in a neutral and innocent way. The Trial Chamber, on the other hand, viewed the evidence in its entirety and in light of all the evidence in the case, which is apparent from the relevant passages of the Trial Judgment. The Defence fails to demonstrate that the Trial Chamber erred in this regard.

48. The Defence claims that the Trial Chamber "*merged the divergent testimonies of P-0963 and P-0017, incredibly finding that they attended the same meeting*"[119] and that it "*performed an incomplete analysis of the similarities between the meetings*".[120] In the Legal Representative's submission, it is to be presumed that a trial chamber evaluated all the evidence presented to it, as long as there is no indication that the trial chamber completely disregarded any particular piece of evidence.[121] There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the trial chamber's reasoning.[122] The Defence does not point to any evidence the Trial Chamber would have disregarded as such. Once more, the Defence's submissions do not go beyond a disagreement with the Trial Chamber's assessment of the evidence. The Trial Chamber was under no obligation to articulate every step of its reasoning.

49. Finally, the Defence contends that the Trial Chamber committed multiple errors in relation to the 'seven orders'.[123] It raises several arguments as to the allegedly erroneous conclusions the Trial Chamber drew from the testimony of P-

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[118] See the Defence Appeal II, *supra* note 1, para. 82.
[119] *Idem*, para. 84.
[120] *Idem*, para. 85.
[121] See MICT, *Karadžić*, Case No. MICT-13-55-A, Appeals Judgment, 20 March 2019, para. 396, referring to ICTY, *Prlić et al.*, Case. No. IT-04-74-A, Appeals Judgment, 29 November 2017, para. 187. See also ICTY, *Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Judgment, 28 February 2005, para. 23.
[122] See MICT, *Karadžić*, *supra* note 121, para. 396, referring to ICTY, *Prlić et al.*, *supra* note 121, para. 187. See also ICTY, *Kvočka et al.*, *supra* note 121, para. 23.
[123] See the Defence Appeal II, *supra* note 1, para. 91.

0010,[124] P-0017 and P0963,[125] and P-0768,[126] merely offering an alternative interpretation of the evidence. This is insufficient to demonstrate that the Trial Chamber erred. In this regard, the Legal Representative supports the respective arguments presented by the Prosecution.[127]

50. Accordingly, Ground 5 should be dismissed in its entirety.

C. GROUND 4: NO ORGANISATIONAL POLICY

51. The Defence contends that the Trial Chamber erred in finding that the contextual elements of article 7 of the Statute were fulfilled, and in particular, in finding that there was an organisational policy pursuant to which widespread or systematic attacks were committed. The Defence argues that the Trial Chamber committed seven distinct errors in inferring from the evidence before it that "*there was a policy of the UPC/FPLC to attack and to chase away the Lendu civilians as well as those who were perceived as non-Iturians*."[128] It further contends that, in any event, the Trial Chamber erred in drawing this inference, since for making findings based on inferences, the inference in question must be the only reasonable inference on the basis of the evidence presented. It argues that it was not.[129] The Legal Representative notes that as to the seven alleged errors, the Defence, again, mainly reiterates previous argument unsuccessfully brought before the Trial Chamber,[130] even duplicated arguments of its Ground 5,[131] and generally disagrees with the findings of the Trial Chamber and the latter's interpretation of the evidence[132] to support its contention.

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[124] *Idem*, para. 93.
[125] *Idem*, paras. 94 and 96-100.
[126] *Idem*, para. 95.
[127] See the Prosecution's Response, *supra* note 9, paras. 90-92.
[128] See the Defence Appeal II, *supra* note 1, para. 106, referring to the Trial Judgment, *supra* note 2, para. 689.
[129] *Idem*, para. 105.
[130] *Idem*, paras. 116-118 and 125-126.
[131] See the repetition of arguments with regard to the expression '*kupiga na kuchaji*'. See the Defence Appeal II, *supra* note 1, para. 114.
[132] See e.g. the Defence's discussion of the Trial Chamber's failure to consider (and accept) the evidence of P-0005. See the Defence Appeal II, *supra* note 1, paras. 112 and 122-123.

52. It is submitted that the organisational policy requirement of article 7 of the Statute may be inferred. The policy need not be formalised. Indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.[133] The Trial Chamber inferred the existence of an organisational policy from a number of factual findings.[134]

53. Under this ground of appeal, the Defence makes extensive allegations of how the Trial Chamber "*failed to consider*"[135] the "*highly significant*"[136] evidence of Chef Kahwa's speech in Mandro, as well as Mr Ntaganda's evidence concerning this event.[137] It is submitted that the Trial Chamber did not fail to consider this evidence.[138] The Trial Chamber merely reached a different conclusion as to the evidence and its significance. The Defence, for instance, points to the Trial Chamber's purported failure to explain how the 'parallel goal of chasing away the RCD/K-ML' led it to conclude that there was a policy to attack and chase away the Lendu.[139] It is submitted that this argument is without merit. A comprehensive look at the findings of the Trial Chamber in this part of the Trial Judgment reveals that the Trial Chamber did not conclude *from* the parallel goal to chase away the RCD/K-ML that Lendu were targeted. Rather, the chasing of the RCD/K-ML is but one part of the Trial Chamber's findings. More significant for the conclusion reached are the other

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[133] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo" (Pre-Trial Chamber II), No. ICC-01/05-01/08-424, 15 June 2009), para. 81, referring to ICTY, *Tadić*, Case No. IT-84-1-T, Opinion and Judgment (Trial Chamber), 7 May 1997, para. 653: "*Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not*." See also the "Decision on the Confirmation of Charges" (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 14 October 2008, para. 396: "*The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this criterion*." See also ICTR, *Musema*, Case No. ICTR-96-13-A, Judgement and Sentence (Trial Chamber I), 27 January 2000, para. 204: "*It is not essential for such policy to be adopted formally* […]. *However, there must exist some form of preconceived plan or policy*."

[134] See the Trial Judgment, *supra* note 2, paras 682 *et seq*.

[135] See the Defence Appeal II, *supra* note 1, para. 119 *et seq*.

[136] *Idem*, para. 122.

[137] *Idem*, para. 124.

[138] See e.g. the Trial Judgment, *supra* note 2, paras. 305. See also footnote 789 which clearly sets out that the Trial Chamber considered the Defence's submissions regarding the 'Mandro video', but reached a different conclusion on the basis of all evidence presented as well as both parties' submissions.

[139] See the Defence Appeal II, *supra* note 1, para. 115, referring to the Trial Judgment, *supra* note 2, paras. 686 and 689.

findings in this section, namely the manner in which the UPC/FPLC planned and conducted its operations and the way in which it taught its recruits that the Lendu were the enemy.[140]

54. The Defence also contends that the Trial Chamber failed to consider the multi-ethnic composition[141] of the UPC and the UPC's "*greatest achievement*", namely the conclusion of a peace agreement in Ituri.[142] It presents a number of previous submissions and references to evidence in support thereof,[143] and states that the Trial Chamber further failed to consider other significant evidence to show that the UPC/FPLC's goal was to defend the population as a whole, *inter alia*, demonstrated by an exchange of soldiers of different groups[144] and that, accordingly, no reasonable trial chamber could have come to the conclusion beyond reasonable doubt that the UPC/FPLC's goal was to target civilians.[145] It is submitted that not only is this another attempt to offer its own interpretation of the evidence, but, moreover, the Defence ignores the fact that the Trial Chamber did consider this evidence and the relevant submissions in its Judgment, and drew another, differing conclusion. As such, there is no basis for challenging the propriety of the Trial Chamber's finding in this regard.

55. Lastly, the Defence argues that the Trial Chamber failed to consider "*that the UPC/FPLC policy to,* inter alia, *protect the civilian population as a whole*" was communicated to the troops and enforced through a disciplinary system.[146] To support this allegation the Defence reiterates its previous arguments and refers to the testimony of Mr Ntaganda.[147] Contrary to the Defence's contentions, the Trial Chamber did indeed consider the above arguments, but came to the conclusion that "*Mr. Ntaganda's testimony on this point lacked credibility*" and that the alleged disciplinary system was nothing but a number of isolated instances, which stood in

[140] See the Trial Judgment, *supra* note 2, para. 687.
[141] See the Defence Appeal II, *supra* note 1, para. 118, referring to the Trial Judgment, *supra* note 2, footnote 777.
[142] *Idem*, para. 117, referring to the Defence Closing Brief.
[143] *Idem*, para. 118.
[144] *Idem*., para. 118, referring to the Trial Judgment, *supra* note 2, para. 325.
[145] *Idem*, para. 120, referring to the Trial Judgment, *supra* note 2, para. 686.
[146] *Idem*, para. 126.
[147] *Ibid*.

contrast with other compelling evidence, such as the fact that no soldiers were punished for killing and raping, that looted items of high value were distributed among commanders.[148] The Trial Chamber also, specifically addressed the Defence's submission that the execution of a soldier for looting from a Nande civilian.[149] It found that the execution was rather based on *inter alia* non-authorised exit, failure to observe instructions, waste of war ammunition and public drunkenness.[150] The Trial Chamber specifically rejected this evidence in light of the evidence on the non-punishment of soldiers after the First Operation.[151] It can therefore not be said that the Trial Chamber "*failed to consider*" this evidence.[152]

56. Finally, the Defence argues that no reasonable trier of fact could infer that a policy to target civilians was actively promoted by the UPC/FPLC and that it ignored other reasonable inferences.[153] However, when reading the Trial Chamber's discussion of the evidence, it becomes clear that the Trial Chamber considered and weighed all the evidence before it and properly explained how it came to the conclusion that the evidence pointed to a policy targeting civilians. There is nothing in the Trial Chamber's analysis that points to it drawing unreasonable conclusions on the evidence before it.

57. Accordingly, Ground 4 should be dismissed in its entirety.

D. GROUND 6: ERROR IN FINDING THAT ORDERING DISPLACEMENT AS A WAR CRIME WAS COMMITTED

58. The Defence challenges Mr Ntaganda's conviction for ordering displacement as a war crime, by arguing that the Trial Chamber committed a series of errors, which warrants the reversal of his conviction.[154] It contends that the Trial Chamber committed an error of law in the interpretation of the requirements of article 8(2)(e)(viii) of the Statute. It argues that a pre-requisite for fulfilling the requirements

[148] See the Trial Judgment, *supra* note 2, footnote 893.
[149] See the Defence Appeal II, *supra* note 1, para. 126.
[150] See the Trial Judgment, *supra* note 2, footnote 893.
[151] *Ibid*.
[152] See the Defence Appeal II, *supra* note 1, para. 126.
[153] *Idem*, paras. 127.
[154] *Idem*, para. 129.

of article 8(2)(e)(viii) of the Statute is territorial control, basing itself on article 49 of the Fourth Geneva Convention and article 17 of Additional Protocol II.[155] It contends that the Trial Chamber erred in applying article 8(2)(e)(viii) of the Statute in advance of territorial control,[156] and that there must be territorial control before the crime can be committed.[157] It avers that an order to displace can only be given if the person issuing it is in a position to give effect to the order. It states that "[c]*onverting this term to mean ordering acts that might result in population movement, i.e., indiscriminate shelling, would be an error*".[158]

59. Pre-Trial Chamber II, in the *Yekatom and Ngaïssona* case, held that article 8(2)(e)(viii) of the Statute is not limited to 'ordering' but also encompasses instructions to attack that will lead to the displacement of civilians.[159] It reached this conclusion on the teleological reading of the provision and the corresponding elements of crimes. The commentary to the Rome Statute further draws attention to the fact that the term 'ordering' refers to the requirement that "*only acts which are directly aimed at removing the civilian population from a given area are prohibited*", in contrast to other acts which do not possess this character, such as the intentional starvation that *may lead* to forcing the civilian population out of the area.[160] A requirement for the perpetrator to exercise territorial control over the area in which the civilians live whom he seeks to expel, is not found within the text of the provision and would run counter to the prohibition of using force to expel – this would clearly also cover the indiscriminate shelling scenario raised by the Defence. If territorial control were required, the prohibition would necessarily be one that would only criminalise a direct order directed against the population to leave the territory. This is, however, not what the prohibition seeks to criminalise. The fact that the perpetrator is in a position to order unlawful measures aimed at dispelling civilians,

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[155] *Idem*, paras. 130-132.
[156] *Idem*, para. 133.
[157] *Idem*, para. 132.
[158] *Ibid*.
[159] See the "Decision on the Confirmation of Charges" (Pre-Trial Chamber II), No. ICC-01/14-01/18-403-Red, 20 December 2019, para. 94.
[160] See TRIFFTERER (O.), AMBOS (K.) (Eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd edition, Verlag C.H. Beck / Hart Publishing, Munich / Oxford, 2016, p. 566.

such as indiscriminate shelling, is the starting point. Whether the perpetrator has already seized the territory or not is irrelevant in the circumstances.

60. Even if, *arguendo*, there were such a requirement, this requirement would still be fulfilled in the brief moment of the effected takeover of a specific place which results in the chasing away of the population.

61. The Legal Representative disagrees with the Prosecution's submission that the Trial Chamber committed a 'technical' error.[161] He further cannot endorse the Prosecution's suggestion that the Appeals Chamber "*decline to rule on this issue in the judgment*".[162] It is submitted that having been seized with a challenge to the Trial Chamber's interpretation of article 8(2)(e)(viii) of the Statute – a provision that has not yet been widely charged and discussed in proceedings before the Court to this date – it would be erroneous for the Appeals Chamber to decline to rule on this issue for a variety of reasons. First, as a matter of procedure and in accordance with well-established standards of appellate review,[163] when an error of law, procedure or fact has been raised on appeal, it must be adjudicated regardless of whether the alleged error may, or may not, materially affect the impugned decision. Second, because an authoritative interpretation of the law by the Appeals Chamber will clarify the legal position that has been called into question both by the Defence's challenge and by the Prosecution's position advanced in the context thereof. The Legal Representative is of the view that appeals proceedings are not an appropriate forum for simply suggesting a conflicting legal interpretation and then leaving the matter unresolved. This would particularly run counter to principles of fairness[164] and judicial economy, and create legal uncertainty as well as a basis for future litigation on this issue. All of the above will be avoided by the adjudication of this part of the appeal.

62. Moreover, the authoritative ruling of the Appeals Chamber is particularly important to the thousands of victims who have been displaced as a result of the unlawful acts committed by Mr Ntaganda.

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[161] See the Prosecution Response, *supra* note 9, para. 116.
[162] *Idem*, para. 117.
[163] See *supra* paras. 10-17.
[164] Including the legitimate interests of victims affected by the conviction in question.

63. In the Legal Representative's submission, however, the Trial Chamber did not err in interpreting article 8(2)(e)(viii) of the Statute as requiring the issuance of *an order* within a political or military chain of command, and that such order does not need to be made against the civilian population.[165] This interpretation was entirely in line with the covering "*acts which are directly aimed at removing the civilian population from a given area are prohibited*".[166] The Trial Chamber further considered that the order itself needs only to instruct another person in any form to: (i) displace a civilian population; or (ii) perform an act or omission as a result of which such a displacement would occur.[167] Again, such interpretation did not offend the intent and purpose of the provision. No prior territorial control is required for the resulting effect of the order on the civilian population.

64. The Trial Chamber found that Mr Ntaganda gave the order to advance towards Mongbwalu and that before the commencement of the assault Mr Ntaganda provided a briefing on the operations to be conducted on the Aru-Mongbwalu axis.[168] It further found that Mr Ntaganda spoke to the troops who were going to attack Mongbwalu and told them to attack the Lendu,[169] and a third briefing prior to the Mongbwalu attack in which he spoke about the importance of driving out the Lendu.[170] It further took into account the fact that prior to the attack the majority of inhabitants of Mongbwalu were Lendu.[171] It made similar findings in relation to the Second Operation.[172] Driving out the Lendu was the objective and aim of the instructions given by Mr Ntaganda; whether or not the Lendu who were to be driven out as a result of the order were resident in villages already under UPC/FPLC control, or those villages about to be taken over by the UPC/FPLC is irrelevant for the order giving effect to forcing out and displacing the civilians in question.

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[165] See the Trial Judgment, *supra* note 2, para. 1081.
[166] See TRIFFTERER (O.), AMBOS (K.) (Eds.), *op. cit. supra* 160, p. 566.
[167] See the Trial Judgment, *supra* note 2, para. 1081.
[168] *Idem*, para. 1084.
[169] *Idem*, para. 1085.
[170] *Idem*, para. 1086.
[171] *Idem*, para. 1087.
[172] *Idem*, paras. 1089-1094.

65. Accordingly, it is submitted that the Trial Chamber did not err in law, but interpreted the requirements of article 8(2)(e)(viii) of the Statute in line with their object and purpose and correctly applied this interpretation to the facts before it.

66. Ground 6 should therefore be dismissed.

E. GROUND 7: IN ASSESSING THE EVIDENCE, THE CHAMBER COMMITTED MIXED ERRORS OF LAW AND FACT

67. The Defence argues that the Trial Chamber, despite finding Mr Ntaganda's evidence generally detailed and comprehensive, preferred other evidence over that of Mr Ntaganda on nearly all significant disputed issues.[173] It contends that the Trial Chamber impermissibly shifted the burden of proof when considering whether Mr Ntaganda had an incentive to lie.[174]

68. An accused who chooses to testify, is generally treated like any other witness.[175] This in turn, however, also implies that the general considerations apply with respect to the Chamber's inquiry as to the credibility of the witness who is testifying before it. In *Nahimana*, the ICTR Appeals Chamber set out various factors that may be taken into account when assessing the credibility of a witness, namely: (i) the witness's demeanour in court; (ii) the role of the witness in the events in question; (iii) the plausibility and clarity of his/her testimony; (iv) whether there were contradictions or inconsistencies in his/her successive statements or between his/her testimony and other evidence; (v) whether there were any prior examples of false testimony, any motivation to lie; (vi) the witness's responses during cross-examination.[176] The ICTR Appeals Chamber, in *Bikindi* and *Nchamihigo*, adopted the same approach.[177] Moreover, in *Kvočka et al.*, the ICTY Appeals Chamber recalled that "*an accused who chooses to testify as a witness is not to be treated* qua *witness but as an*

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[173] See the Defence Appeal II, *supra* note 1, para. 136.
[174] *Idem*, para. 137.
[175] See SAFFERLING (C.), *International Criminal Procedure*, Oxford University Press, Oxford, 2012, p. 452.
[176] See ICTR, *Nahimana et al.*, Case No. ICTR-99-52-A, Appeals Judgment, 28 November 2007, para. 194 (Emphasis added).
[177] See ICTR, *Nchamihigo*, Case No. ICTR-01-63-A, Appeals Judgment, 18 March 2010, paras. 47 and 285.

accused testifying qua *witness*".[178] The tribunal had pointed out earlier that "[t]*here is a fundamental difference between being an accused who might testify as a witness if he so chooses, and a witness*".[179] It is submitted that the Defence's contention that the fact that Mr Ntaganda testified before other Defence witnesses should have been considered in his favour[180] is without merit. Since both the fact *that* an accused testifies and *when* an accused testifies[181] in relation to his other witnesses is a matter of defence strategy, neither testifying first nor last can carry any sort of entitlement to credit. It should also be recalled that it was the Defence's choice to call Mr Ntaganda as the *second* witness in his Defence, particularly with a view to significantly shorten the Defence's case.[182] It was a strategic choice; it was not a clear decision to have him testify first to avoid any impression of him tailoring his evidence a certain way.

69. Since "*a trial chamber may rely on part of a witness's testimony and reject other parts*",[183] there is no contradiction between the Trial Chamber relying on some parts of Mr Ntaganda's testimony and rejecting others, where they found his explanations lacked credibility or were implausible.

70. It follows from the above that the Trial Chamber did not err when it, at times, did not rely on the explanations of the Accused. It was entitled to take into account his incentive to portray a certain version of the events, or as put by the Trial Chamber, "[…] *the possibility that Mr Ntaganda had an incentive to provide exculpatory evidence*".[184] The Defence's contention that "[t]*he Chamber's erroneous standard meant that it systematically dismissed Mr Ntaganda's testimony when it contradicted Prosecution evidence*"[185] is therefore unfounded and should as such be dismissed.

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[178] See ICTY, *Kvočka et al.*, *supra* note 121, para. 125.
[179] See ICTY, *Delalić et al.*, Case No. IT-96-21-T, Decision of the President on the Prosecution's Motion for the Production of Notes Exchanged between Zejnil Delalić and Zdravko Mucić (President), 11 November 1996, para. 35.
[180] See the Defence Appeal II, *supra* note 1, para. 140.
[181] See e.g. *Popović et al.*, *supra* note 21, para. 228.
[182] See *supra*, Ground 2, para. 30.
[183] See ICTY, *Haradinaj et al.*, *supra* note 30, para. 201; ICTY, *Kupreškić et al.*, Case No. IT-95-16-A, Appeals Judgment, 23 October 2001, para. 333. See also ICTR, *Kamuhanda*, Case No. ICTR-99-54A-A, Appeals Judgment, 19 September 2005, para. 248; ICTR, *Ndahimana*, Case No. ICTR-01-68-A, Appeals Judgment, 16 December 2013, para. 183.
[184] See the Trial Judgment, *supra* note 2, para. 262.
[185] See the Defence Appeal II, *supra* note 1, para. 139.

71. The Defence also alleges that the Trial Chamber erred in dismissing the evidence of D-0017,[186] and submits that the Trial Chamber adopted an approach of a "*blanket refusal to consider any of his evidence*".[187]

72. Contrary to the Defence's contentions, the Trial Chamber conducted general credibility assessments of a number of witnesses at the outset of the Trial Judgment. In relation to D-0017, the Trial Chamber stated that it found him evasive and uncooperative, not answering in a straightforward manner, and inconsistent. Overall, the Trial Chamber considered "*that his testimony reflecte*[d] *a concern not to provide any incriminating evidence with regard to the accused*".[188]

73. It is submitted that a Trial Chamber enjoys considerable discretion in assessing the credibility of witnesses appearing before it. The ICTR Appeals Chamber in *Simba* stated that "*there is no guiding principle on the question to determine the extent to which a Trial Chamber is obliged to set out its reasons for accepting or rejecting a particular testimony*".[189] A Trial Chamber's discretion in weighting and assessing evidence is nevertheless limited by its duty to provide a reasoned opinion in writing, although it is not required to articulate every step of its reasoning for each particular finding it makes.[190] The Trial Chamber adhered to these principles by providing a reasoned opinion as to why it generally rejected the evidence of D-0017. The Defence merely disagrees with the Trial Chamber's assessment, which, in itself merits the rejection of this ground of appeal. Furthermore, and contrary to the Defence's interpretation, the instances it picked from the Trial Judgment in which the Trial Chamber expressly chose other evidence over that of D-0017 are further examples of the Trial Chamber's weighing of the evidence, for instance where the Trial Chamber found that his evidence "*stands in contrast to the consistent evidence provided by a*

[186] *Idem*, para. 142.
[187] *Idem*, para. 143.
[188] See the Trial Judgment, *supra* note 2, para. 252.
[189] See ICTR, *Simba*, Case No. ICTR-01-76-A, Appeals Judgment, 27 November 2007, para. 152.
[190] See ICTR, *Nyiramasuhuko et al.*, *supra* note 92, para. 18.

number of credible witnesses".[191] The Defence's challenges do not demonstrate error on the part of the Trial Chamber.

74. Accordingly, Ground 7 should be dismissed.

F. GROUND 8: THE CHAMBER ERRED IN FINDING THAT THE UPC/FPLC AND HEMA CIVILIANS COMMITTED CRIMES DURING THE FIRST OPERATION

75. Under this ground of appeal, the Defence first challenges various factual findings unrelated to the use of 'Hema civilians'. Rather, its challenges concern the Trial Chamber's reliance on the uncorroborated testimony of a number of insider witnesses. The Defence contends that the Trial Chamber made legal and factual errors in the assessment of evidence by accepting as reliable the uncorroborated evidence of three accomplice witnesses, namely P-0017, P-0768, and P-0963.[192] According to the Defence, the alleged errors invalidate a number of findings, including (i) the killings in Nzebi, (ii) the killing of Abbé Bwanalongwa, (iii) anti-personnel mines in Mongbwalu, (iv) the launching of a grenade in Sayo, and (v) Mr Ntaganda's role in the killings at the *Appartements*.[193]

76. The Appeals Chamber has previously set out that "*trial chambers have a significant degree of discretion in considering all types of evidence. Nothing in the Statute, the Rules or the Regulations prohibits a trial chamber from relying on the testimony of certain categories of witnesses. In the Appeals Chamber's view, whether a particular witness is considered credible will depend on a case-by-case assessment of the evidence, in light of all relevant circumstances*."[194] It further stated that "[t]*he condition of a witness as an 'accomplice' is a circumstance that needs to be carefully considered when assessing the*

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[191] See the Trial Judgment, *supra* note 2, para 254. See also the Defence Appeal II, *supra* note 1, para. 145.

[192] See the Defence Appeal II, *supra* note 1, para. 151.

[193] *Ibid*.

[194] See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red, 8 March 2018 (the "*Bemba et al.* Appeal Judgment"), para. 1019.

reliability of his or her evidence, but […] *does not make this evidence unreliable* per se *or in need of corroboration as a matter of law*".[195] The same approach has been taken by the international *ad hoc* tribunals. In *Popović et al*., the ICTY Appeals Chamber set out the relevant jurisprudence in the following way:

> *"134. […] a trial chamber has the discretion to rely upon evidence of accomplice witnesses. However, when weighing the probative value of such evidence, 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 lie. The Appeals Chamber also recalls that evidence of witnesses who might have motives or incentives to implicate the accused is not* per se *unreliable, especially where such a witness may be thoroughly cross-examined, therefore, reliance upon this evidence does not, as such, constitute an error of law. However, a trial chamber must explain the reasons for accepting the evidence of such a witness. Particularly relevant factors for the assessment of accomplice witnesses' credibility include: the extent to which discrepancies in the testimony were explained; whether the accomplice witness has made a plea agreement with the Prosecution; whether he has already been tried, and, if applicable, sentenced for his own crimes or is still awaiting the completion of his trial; and whether the witness may have any other reason for holding a grudge against the accused.*
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> *135. A trial chamber's discretion to rely on uncorroborated, but otherwise credible, witness testimony applies equally to the evidence of witnesses who may have* [sic] *motive to implicate the accused, provided that appropriate caution is exercised in the evaluation of their testimonies".*[196]

77. It is submitted that the Trial Chamber conducted thorough credibility assessments of the three witnesses in question wherein it discussed their testimony and demeanour at length and further addressed the Defence's challenges to their credibility – some of which the Defence now repeats on appeal. In relation to P-0017, the Trial Chamber found that the evidence on his participation in the operations "*was rich in detail, in particular in relation to subjects where the witness possessed personal knowledge and expertise*".[197] It found that the witness "*readily conceded when he was not*

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[195] See the *Bemba et al*. Judgment, *supra* note 194, para. 1531.

[196] See ICTY, *Popović et al*., *supra* note 21, paras. 134-135, referring to ICTR, *Bizimungu*, Case No. ICTR-00-56B-A, Appeals Judgment, 30 June 2014, para 47; ICTY, *Šainović et al*., Case No. IT-05-87-A, Appeals Judgment, 23 January 2014, para. 1101; ICTY, *Krajišnik*, Case No. IT-00-39-A, Appeals Judgment, 17 March 2009, para. 146; ICTY, *Lukić and Lukić*, Case No. IT-98-32/1-A, Appeals Judgment, 4 December 2012, para. 128; ICTR, *Nchamihigo*, Case No. ICTR-01-63-A, Appeals Judgment, 18 March 2010, para. 47.

[197] See the Trial Judgment, *supra* note 2, para. 107.

able to answer a question" and that he "*provided a detailed and logical account* […] [that were] *consistent with the testimony of other witnesses*".[198] Importantly, the Trial Chamber also considered that "*the Defence failed to substantiate any lack of plausibility in P-0017's testimony that he did not go to Kilo after the operation in Sayo*"[199] and further held that "*the witness's evidence about having received an order to shoot at civilians* [was] *detailed, consistent throughout his testimony, and plausible*".[200] The Trial Chamber's careful and thorough approach is further illustrated by the fact that it also rejected parts of the witness testimony where it found a "*significant discrepancy*" between his previous statement and the in-court testimony.[201] The Trial Chamber concluded its credibility assessment by stating: "[…] *particularly having considered that none of the aforementioned Defence challenges affect the general credibility of the witness, the Chamber considers P-0017 to be credible*".[202]

78. With respect to P-0768, the Trial Chamber also conducted a lengthy and detailed credibility assessment and addressed the numerous Defence's challenges to the witness's credibility. It found that "*the witness generally provided detailed evidence, explained the basis of his knowledge, and acknowledged when he did not directly witness certain events, or when his testimony was based on information received from others*".[203] It further noted that "*many aspects of P-0768's testimony are corroborated by, and consistent with, other evidence on the record*"[204] and, in particular, addressed the Defence's allegation that the witness held a 'malignant grudge' against Mr Ntaganda.[205] The Trial Chamber concluded in this regard, that "*these factual allegations are based on the testimony of Mr Ntaganda alone and otherwise not supported by other evidence. These claims have also been convincingly denied by the witness in court*".[206]

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[198] *Idem*, para. 108.
[199] *Idem*, para. 111.
[200] *Idem*, para. 112.
[201] *Idem*, para. 115: "[…] *in light of this significant discrepancy, the Chamber finds that it cannot rely on this specific aspect of P-0017's evidence.*"
[202] *Idem*, para. 117.
[203] *Idem*, para. 162.
[204] *Ibid*.
[205] *Idem*, para. 163.
[206] *Ibid*.

79. Significantly, the Trial Chamber carried out an assessment of the fact that – as alleged by the Defence – the witness had actively sought to provide testimony against Mr Ntaganda. It reasoned that "*although the fact that a witness volunteered to provide testimony may be a relevant factor when examining a witness's motivation to testify, it does not, in itself, reveal bias or an intention to fabricate evidence*".[207] The Trial Chamber further explained why it did not accept the Defence's challenge of fabrication in relation to P-0768's arrival and participation in the Mongbwalu attack. It noted that "*P-0768 provided a detailed account concerning his participation* […] *which he upheld in cross-examination.* […] *He explained or acknowledged and corrected certain potential discrepancies*".[208] Moreover, the Trial Chamber found with respect to the latter that "*P-0768's participation in the Mongbwalu operation is largely corroborated by other evidence*"[209] and that "*the relevant part of his testimony* [was] *credible*".[210] It also found his "*testimony on seeing dead bodies in Mongbwalu and Sayo, as well as his unique account on the assault on Nzebi, and his evidence on the killing of two Lendu persons by Mr Ntaganda's bodyguards, and the killing of an* abbé *to be credible*".[211] The Trial Chamber considered further challenges to the credibility of the witness with respect to those events when discussing the events in other parts of the Trial Judgment.[212] Finally, the Trial Chamber specifically addressed the Defence's challenges to P-0768's testimony regarding the placing of anti-personnel mines and "*found no reason to doubt the truthfulness of P-0768's account*".[213]

80. With respect to P-0963, the Trial Chamber assessed him as "*credible*"[214] after discussing several major parts of his testimony and the related challenges by the Defence. It found that the witness's testimony with respect to his participation in the operations was "*rich in detail, particularly in relation to subjects where the witness possessed personal knowledge. He openly admitted when he did not know certain things,*

[207] *Idem*, para. 166. The Trial Chamber, in any event, could not reach a conclusive finding on the sequence of contacts with the Prosecution, as alleged by the Defence.
[208] *Idem*, para. 168.
[209] *Idem*, para. 169.
[210] *Ibid*.
[211] *Ibid*.
[212] *Idem*, para. 509, footnotes 1498, 1505 and para. 510, footnote 1507.
[213] *Idem*, para. 171.
[214] *Idem*, para. 249.

clarified when he was relying on information provided by others, or could not remember certain facts".[215] Regarding the Defence's challenge that the witness was coached, the Trial Chamber found "*no indication that the witness was coached*"[216] after discussing these allegations in some detail.

81. In the Legal Representative's submission, it is clear from the manner in which the Trial Chamber carried out its assessment, that it duly took into account the individual circumstances of the witnesses, as well as their role in the events, and provided sufficient reasons regarding their credibility. As such, the Defence's challenge that the Trial Chamber improperly relied on the sole uncorroborated evidence of accomplice witnesses cannot succeed, as (i) the Trial Chamber was entitled to rely on their testimony, given that it found them to be credible on the events in question; and (ii) the term 'accomplice' is in any event a far stretch. None of the witnesses was at the same leadership level as Mr Ntaganda. Their 'interest' in testifying against him would in any event not have been that of a co-accused shifting blame, or a similar level accused having made a plea bargain with the Prosecution. Accordingly, it is submitted that the Trial Chamber was not required to engage in the explicit exercise of 'considering their accomplice status'. It was sufficient, as the Trial Chamber did, to assess the role of the insider witness in the events and its potential impact on the testimony of the respective witness. Moreover, a careful review of the Trial Judgment further reveals that the Defence is merely repeating its challenges to the witnesses' credibility. This in itself calls for this part of the appeal to be dismissed. Given the fundamental flaw in the Defence's argument, it is unnecessary to make specific submissions in relation to Nzebi, the killing of the *Abbé*, the placing of anti-personnel mines, the 'firing at everyone', the shooting of a grenade, and the killing of prisoners at the *Appartements*.[217] Moreover, the specific six findings that the Defence is challenging under this Ground of Appeal have been discussed in detail by

[215] *Idem*, para. 236. See also *idem*, paras. 246 and 248.
[216] *Idem*, para. 242.
[217] See the Defence Appeal II, *supra* note 1, paras. 152-225.

the Prosecution in its Response. The Legal Representative generally concurs with the Prosecution's submissions in this regard.[218]

82. Ground 8 should therefore be dismissed.

G. GROUND 13: THE CHAMBER ERRED IN CONVICTING MR NTAGANDA AS AN INDIRECT CO-PERPETRATOR

83. The Defence argues that the Trial Chamber erred in convicting Mr Ntaganda on the basis of a common plan it asserts he was not charged with.[219] It contends that Mr Ntaganda was charged with contributing to a common plan to assume the military and political control of Ituri, occupying the non-Hema dominated areas in Ituri and expelling the non-Hema civilian population, through the commission of identified crimes.[220] It then avers that the Trial Chamber's finding that the common plan to drive out all the Lendu from the localities targeted during their military campaigns actually meant the destruction and disintegration of the Lendu community, was erroneous.[221] The Defence argues that the Trial Chamber "*impermissibly exceeded the Prosecution's case and mould*[ed] *its own*."[222]

84. The Legal Representative submits that the Defence's challenge is baseless as it in fact omits part of the Trial Chamber's reasoning and findings.

85. At the outset of the section dedicated to the charges pursuant to the mode of liability as an indirect co-perpetrator, the Trial Chamber recalled the charges, namely in form of the Pre-Trial Chamber's finding: "*Mr Ntaganda was part of a common plan amongst members of the UPC/FPLC to assume political and military control over Ituri. [The Pre-Trial Chamber] held that 'as part of the common plan, Mr Ntaganda and other sought to take over non-Hema dominated areas and expel the non-Hema civilian population,* ***particularly the Lendu****, from Ituri' and that the 'common plan contained an element of*

[218] See the Prosecution Response, *supra* note 9, paras. 144-173.
[219] See the Defence Appeal II, *supra* note 1, paras. 278-282.
[220] *Idem*, para. 278.
[221] See the Defence Appeal II, *supra* note 1, para. 278, referring to the Trial Judgment, *supra* note 2, paras. 809-810.
[222] *Idem*, para. 282.

criminality as evidenced by the crimes described previously'."[223] The Defence omits to mention the entire formulation of both the charges and the Trial Chamber's recalling thereof before it went on to consider whether the Prosecution had discharged its burden of proof. It is submitted that on this basis alone, the Defence's challenge should be dismissed insofar as it mischaracterises the Trial Judgment.

86. The Defence further challenges the Trial Chamber's individual findings in relation to the common plan on the basis that it allegedly erred in finding a common plan in the absence of direct evidence and having failed to exclude other reasonable inferences.[224] In particular, the Defence argues that there was no evidence of any meetings or manifesto or written orders that would testify to the existence of a common plan.[225] In its view, the absence of such direct evidence precluded the Trial Chamber from finding that a common plan existed. It is submitted that this is an erroneously narrow view of the law and recourse to examples of other cases is inapposite, as establishing the existence of a common plan is a highly fact-sensitive issue and cannot readily be compared to cases from other regions, the political and military structures prevalent and the like.

87. It is also erroneous for the Defence to allege that a common plan or common purpose can only be established on the basis of direct evidence of the agreement as such. In *Šainović et al*., for instance, the ICTY Appeals Chamber held that "[s]*uch a common plan, design, or purpose may 'be inferred from the facts', including events on the ground*".[226] The Appeals Chamber in the *Lubanga* case has also previously held that such agreement or common plan can be implied.[227]

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[223] See the Trial Judgment, *supra* note 2, para. 765 referring to the Decision on the Confirmation of Charges, paras. 105 and 108 and the Updated Document Containing the Charges, para. 16 (Emphasis added).
[224] See the Defence Appeal II, *supra* note 1, paras. 283-300.
[225] *Idem*, para. 284.
[226] See ICTY, *Šainović et al*., *supra* note 196, para. 611, referring, *inter alia*, to ICTY, *Vasiljević*, Case No. IT-98-32-A, Appeals Judgment, 25 February 2004, para. 100 and ICTY, *Tadić*, Case No. IT-94-1-A, Appeals Judgment, 15 July 1999, para. 227(ii).
[227] See the "Public redacted Judgment on the appeal of Mr Thomas Lubanga-Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121, 1 December 2014 (the "*Lubanga* Appeal Judgment"), para. 445.

88. It is submitted that the Trial Chamber correctly recalled the Appeals Chamber's interpretation of the "indirect co-perpetration" set out in the *Lubanga* Appeal Judgment, namely, that "*it has to be established that two or more people worked together in the commission of the crime. This requires an agreement between these perpetrators, which led to the commission of one or more crimes under the jurisdiction of the Court. It is this very agreement that – express or implied, previously arranged or materialising extemporaneously – that ties the co-perpetrators together and that justifies the reciprocal imputation of their respective acts. This agreement may take the form of a 'common plan'*."[228] The Appeals Chamber further specified that it was as such correct that all that was required was for the common plan to involve a 'critical element of criminality'.[229] The Trial Chamber also acknowledged this in the Trial Judgment.[230] The Trial Judgment further indicates that the Trial Chamber had regard to the Appeals Chamber's ruling in the *Bemba et al*. case, in which it held that "[d]*epending on the circumstances, co-perpetration may cover situations in which, at the time the common plan is conceived, the exact contours of all the crimes or offences that will be committed are not yet known*".[231] This jurisprudence by which the Trial Chamber was obviously guided, clearly endorses that a Trial Chamber is entitled to infer the existence of a common plan. This is what the Trial Chamber did. There is no error in its approach. Although the Defence, in paragraph 287 of its Appeal, acknowledges that the existence of a common plan may be inferred, it, nevertheless, goes on to argue that the Trial Chamber drew erroneous conclusions.[232]

89. The Defence alleges that the Trial Chamber, without scrutiny, "*harnessed any evidence of criminal behaviour, at any point in time, by any member of the UPC/FPLC including the rank and file, and relied on this apparent evidence from which to infer a common plan*."[233] It specifically disputes the validity of the Trial Chamber's inference

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[228] See the Trial Judgment, *supra* note 2, para. 775, referring to the *Lubanga* Appeal Judgment, *supra* note 227, para. 445.
[229] See the *Lubanga* Appeal Judgment, *supra* note 227, para. 446.
[230] See the Trial Judgment, *supra* note 2, para. 776.
[231] See the *Bemba et al.* Appeal Judgment, *supra* note 194, para 821 referred to in the Trial Judgment, *supra* note 2, para. 779, footnote 2358.
[232] See the Defence Appeal II, *supra* note 1, para. 288.
[233] *Ibid*.

of a common plan based on its other findings on the evidence of individual crimes and unlawful instructions of Mr Ntaganda to target and drive out the Lendu. In the Legal Representative's submission it was this overall picture of the systematic nature, the sequence, context, and manner of the implementation of all the different aspects of UPC/FPLC's leadership's plan from which the Chamber ultimately inferred the common plan.[234] According to the relevant jurisprudence, the Trial Chamber was entitled to do so. Indeed, contrary to the Defence's contention,[235] the Trial Chamber was not obliged to take into account subsequent concerted action by the co-perpetrators. It is submitted that while Chambers, depending on the circumstances of the relevant case, certainly may draw inferences from relevant subsequent action, this is not requirement *per se,* which is abundantly clear from the cited authority by the Defence in support of its argument.

90. The remainder of the arguments under this ground should be dismissed on the basis that the Defence merely disagrees with the way in which the Trial Chamber interpreted its own findings on the different facets and elements of the common plan it thus found established. Indeed, the Defence fails to demonstrate that the conclusions drawn were such that no reasonable trier of fact could have made such findings, and its general challenge to the Trial Chamber's interpretation and hence significance of the expression '*kupiga na kuchaji*' has already been dealt with *supra*. Since, in the Legal Representative's submission, the Defence has failed to demonstrate that the Trial Chamber erred in its interpretation of this expression, the Trial Chamber's further interpretation of the significance of this term in relation to the common plan must necessarily withstand the Defence's renewed challenge. Likewise, the repetition of arguments as to Chef Kahwa's speech, has already been dealt with *supra*. In the absence of the demonstration of a clear error of reasoning on the Trial Chamber's part, this amounts to no more than simply disagreeing with its findings and should accordingly be dismissed.

[234] See the Trial Judgment, *supra* note 2, paras. 793-807.
[235] See the Defence Appeal II, *supra* note 1, para. 290, footnote. 763.

91. The Defence presents similar arguments, alleging a lack of reasoning on the part of the Trial Chamber in relation to the *mens rea* element for the common plan crimes and convictions. It argues that in the absence of direct evidence, such as written or testimonial evidence providing direct evidence of such agreement,[236] the Trial Chamber "*impermissibly expanded the common plan*".[237] It further avers that the Trial Chamber erred in relying on inferences and that it erred in not providing a reasoned opinion in relation to why the co-perpetrator's intent for each of these crimes was the only reasonable conclusion available.[238]

92. It is submitted that the Defence once more ignores the fact that while direct evidence of the conclusion of an agreement at a meeting or written orders can be a particularly compelling kind of evidence in this regard, it is not a requirement *sine qua non*. As set out *supra*, a Trial Chamber is entitled to infer the existence of a plan from the evidence of the commission of the crimes and that is precisely what the Trial Chamber did. It made numerous findings on the systematic targeting of the Lendu population during the First and Second Operations and the compelling evidence on the teaching of young recruits *vis-à-vis* the targeting of the Lendu.[239] As such, the Defence fails to demonstrate an error in the Trial Chamber's reasoning.

93. The Legal Representative, in general, concurs with the Prosecution's submissions in relation to this Ground of Appeal.[240] For the reasons set out above, and those advanced by the Prosecution, Ground 13 should be dismissed in its entirety.

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[236] *Idem*, para. 304.
[237] *Ibid*.
[238] *Ibid*.
[239] See the Trial Judgment, *supra* note 2, paras. 779-810.
[240] See the Prosecution's Response, *supra* note 9, paras. 216-244.

H. GROUND 14: MR NTAGANDA DID NOT POSSESS THE REQUIRED *MENS REA* FOR THE CRIMES FOUND TO HAVE BEEN COMMITTED DURING THE FIRST OPERATION

94. The Legal Representative will not address any of the Defence's submissions that are duplicated under other grounds of appeal, such as the killing of the *Abbé* or the meaning and interpretation of the expression '*kupiga na kuchaji*'.[241]

95. The Defence argues that the Trial Chamber erroneously relied on the uncorroborated evidence of P-0010 as the sole witness for Mr Ntaganda's instruction, using the term '*kupiga na kuchaji*' prior to the Mongbwalu attack. In relation to the Defence's challenges regarding the testimony of P-0010 and the Trial Chamber's reliance thereon, the Legal Representative defers to the Prosecution's submissions, which he supports.[242] With respect to the Defence's challenge of P-0768's evidence and the allegation that he did not participate in the operation, the Legal Representative refers to his submissions in relation to Ground 8 *supra*. These challenges should be dismissed accordingly.

96. Additionally, the Defence, as in previous grounds discussed *supra*, contends that the Trial Chamber should have considered the logbook, Chef Kahwa's speech and the 'reality of the disciplinary system', as other reasonable inferences, but failed to do so, thereby shifting the burden of proof. The Legal Representative has discussed these challenges at length *supra*,[243] and considers that the same considerations apply in relation to the challenges regarding the Trial Chamber's findings in relation to Mr Ntaganda's *mens rea*. The resolution of these matters under Ground 4 will necessarily have an impact on the Defence's challenges under Ground 14. The Legal Representative therefore refers to his relevant submissions *supra* and posits that these submissions sufficiently illustrate that Ground 14 should be dismissed accordingly. In his view, the Trial Chamber did not commit errors in its appreciation of these facts. Accordingly, having dismissed the Defence's arguments on the significance of these events, and found that contrary to the arguments put

[241] See *supra*, Grounds 8 and 5, respectively.
[242] See the Prosecution Response, *supra* note 9, paras. 247-253.
[243] See *supra*, Ground 4.

forth by the Defence, the Trial Chamber did not have to consider them as 'other reasonable inferences'.

97. As regards the video, which the Defence terms "[p]*erhaps the best evidence of Mr Ntaganda's 'presence, actions and directives'*",[244] said video was considered by the Trial Chamber and led it to conclude that Mr Ntaganda instilled fear amongst the troops and the population.[245] In the absence of a concrete showing of the Trial Chamber reaching an unreasonable interpretation of this evidence, which no reasonable Trial Chamber could have reached, the Defence merely advances its own interpretation thereof and disagrees with the Trial Chamber's finding. This is insufficient for showing that the Trial Chamber committed an error.

98. Ground 14 should therefore be dismissed.

I. GROUND 15: ERROR IN FINDING THAT MR NTAGANDA POSSESSED THE *MENS REA* FOR THE SECOND OPERATION CRIMES

99. The Defence argues that the Trial Chamber's overall approach was erroneous in that it looked at Mr Ntaganda's contributions to the First Operation as if they were made in relation to the Second Operation, when the two Operations were distinct in time and place.[246] It further avers that Mr Ntaganda's contributions to the Second Operation were *de minimis*,[247] and contends that the Trial Chamber overstated Mr Ntaganda's degree of contribution and control and thereby committed a further error. In its view, the subsidiary findings of the Trial Chamber "*indicate no such control*" let alone knowledge thereof.[248] In particular, the Defence alleges that the Trial Chamber erroneously relied on the testimony of P-0055 and also failed to provide a reasoned opinion in this regard,[249] especially in light of contradictory evidence provided by P-0317.[250] Ultimately, the Defence argues, the Trial Chamber misapplied

[244] See the Defence Appeal II, *supra* note 1, para. 357.
[245] See the Trial Judgment, *supra* note 2, para. 322.
[246] See the Defence Appeal II, *supra* note 1, para. 362.
[247] *Idem*, para. 361.
[248] *Idem*, para. 363.
[249] *Idem*, paras. 364 and 399-411.
[250] *Idem*, paras. 403-406.

the 'control over the crime' requirement and erroneously concluded that Mr Ntaganda bore responsibility for the Second Operation.[251]

100. In its argumentation that Mr Ntaganda's contributions to the Second Operation were only minimal and that the Operations were erroneously found to be part of the same conduct, the Defence refers to paragraph 664 of the Trial Judgment in which the Trial Chamber found interrelatedness of the two Operations.[252] However, that specific paragraph of the Trial Judgment does not relate to the Trial Chamber's findings on Mr Ntaganda's *mens rea*, but rather to its findings on the contextual elements of the crimes. The Defence also takes issue with paragraph 793 of the Trial Judgment, which it also quotes out of context and in isolation.[253] Indeed, the Trial Chamber's findings in this section of the Trial Judgment are part of a full analysis and explanation as to how the Trial Chamber found that the First and Second Operations were the result of the implementation of the common plan.

101. It is submitted that the Defence's contentions as to the Trial Chamber's allegedly erroneous legal approach of looking at the connection between the two Operations to infer *mens rea*[254] are without merit. Indeed, Mr Ntaganda was convicted on the basis of a common plan and his prominent position and contribution to the plan; the Trial Chamber did not have to find *mens rea* for each specific crime committed as a result of the intended implementation of the common plan. As such, there is nothing erroneous in the Trial Chamber's reasoning.[255]

102. As regards the Defence's arguments in relation to Mr Ntaganda's alleged minimal contribution, as evidenced by the logbook entries, the Defence merely repeats arguments that were unsuccessful at trial[256] and disagrees with the Trial Chamber's finding on one logbook entry. The Trial Chamber indicated that Mr Ntaganda's response to the information he had received was "*in the chamber's*

[251] *Idem*, paras. 395-398.
[252] *Idem*, para. 389.
[253] *Ibid*.
[254] *Idem*, para. 363.
[255] In this regard, the Legal Representative supports the Prosecution's submissions in paras. 280-286 of the Prosecution Response, *supra* note 9.
[256] See the Defence Appeal II, *supra* note 1, paras. 377 and 379 referring to the Defence Closing Brief.

assessment […] *reinforcing the chain of command within the group, he made sure that the forces deployed were carrying out the project as planned*".[257] It is submitted that the Trial Chamber was not required to find that Mr Ntaganda contributed to each criminal act, but rather that "*he made a significant contribution to the common purpose and that each of the crimes for which he was held responsible formed part of that purpose*".[258]

103. In the Legal Representative's submission, Mr Ntaganda's different contribution to the *actus reus* of crimes committed in the Second Operation – namely prior instruction, oversight, and post-factum approval – does not cancel out or put into question his overall contribution to the common plan and the crimes, for which the Trial Chamber had correctly assessed his *mens rea*. Since the Trial Chamber found that the First and Second Operations were part of the same plan, it was entitled to assess Mr Ntaganda's role therein comprehensively.[259]

104. It is also submitted in this regard that the Defence's reference to the *Gbagbo* Reasons is mistaken. The quoted excerpt refers to the loss of the capacity to direct and contribute to the common plan.[260] This 'loss of capacity to direct' cannot be equated with Mr Ntaganda's simple physical absence during the *actus reus* of the crimes committed during the Second Operation. The Trial Chamber dedicated an entire section of the Trial Judgment to the events prior to the Second Operation in which it set out Mr Ntaganda's crucial role in the planning and instructing of troops for the Second Operation,[261] which included two briefings, and strategic instructions. It is therefore incorrect to claim, as the Defence does, that the Trial Chamber attached all of Mr Ntaganda's involvement to a single logbook entry wherein he stated that no commander was to disregard orders.

105. As regards the Defence's challenge to the Trial Chamber's reliance on P-0055 testimony about the words spoken by Mr Ntaganda after the completion of the

[257] See the Trial Judgment, *supra* note 2, para. 846.
[258] See ICTR, *Karemera and Ngirumpatse*, Case No. ICTR-98-44-A, Appeals Judgment, 29 September 2014, para. 153. See also ICTR, *Simba*, *supra* note 189, para. 296.
[259] See the Trial Judgment, *supra* note 2, para. 838.
[260] See the Defence Appeal II, *supra*, note 1, para. 396, referring to the "Reasons of Judge Geoffrey Henderson", No. ICC-02/11-01/15-1263-AnxB-Red, 16 July 2019, para. 1913.
[261] See the Trial Judgment, *supra* note 2, paras. 550-561.

Second Operation, it is submitted that this challenge should likewise be dismissed. Indeed, it has been held that "[a]*ny words of or conduct by the accused which point to or identify a particular state of mind on his part is relevant to the existence of a state of mind. It does not matter whether such words or conduct precede the time of the crime charged, or succeed it*".[262] The Trial Chamber was entitled to rely on Mr Ntaganda's words of endorsement for the conduct employed during the Second Operation. The credibility challenges the Defence mounts in relation to P-0055 are nothing more than a disagreement with the Trial Chamber's assessment of that witness's credibility without demonstrating an error. As set out by the Prosecution in some detail,[263] the basis for the Defence's challenge is a misrepresentation of the testimony of P-0317 and a repetition of previous submissions. This challenge should therefore be dismissed.

106. In the Legal Representative's submission the Defence fails to demonstrate that the Trial Chamber erred in its findings as to Mr Ntaganda's contribution to the common plan and hence the crimes committed during the Second Operation.

107. Accordingly, this Ground 15 should be dismissed.

VI. CONCLUSION

108. The Legal Representative submits that the Defence failed to demonstrate any discernible errors in the Trial Judgment that would call upon the Appeals Chamber to overturn any findings contained therein. Accordingly, the Defence Appeal II should be dismissed in its entirety.

[262] See ICTY, *S. Milošević*, Case No. IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (Appeals Chamber), 18 April 2002, para. 31.
[263] See the Prosecution Response, *supra* note 9, paras. 298-299.

RESPECTFULLY SUBMITTED

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 28th Day of May 2020

At The Hague, The Netherlands