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No.: **ICC-01/04-02/06**

Date: **22 June 2020**

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding
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 with Public Annexes A and B

Public Redacted Version of “Defence reply to “Prosecution response to ‘Defence Appeal Brief – Part II’”, 3 April 2020, ICC-01/04-02/06-2500”, 19 May 2020, ICC-01/04-02/06-2534-Conf

Source: Defence Team of Mr. Bosco Ntaganda

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Defence reply to “Prosecution response to ‘Defence Appeal Brief – Part II’”, 3 April 2020, ICC-01/04-02/06-2500

INTRODUCTION¹

1. There are some errors that, when made at first instance, cannot be remedied. Where a Trial Chamber bases legal findings on incorrect principles of law, or assesses evidence in a manner incompatible with the presumption of innocence and corresponding burden of proof, the resultant convictions are unsalvageable. When a Trial Chamber fails to accompany findings with reasoning that demonstrates the evidentiary basis and the Chamber’s analysis thereof, there is no prospect of retroactively filling in these gaps on appeal.

2. The Prosecution Response is a rescue attempt. However, rather than salvaging the Trial Chamber’s findings, its submissions serve to confirm the errors raised by Mr. Ntaganda. In order to justify Trial Chamber’s erroneous approach to fact finding, the Prosecution is required to distort established cardinal principles like “corroboration” and “the burden of proof”, stretching them far beyond their permissible reach. The Prosecution’s attempt to bolster central legal findings on Mr. Ntaganda’s intent does little more than expose the paucity of the Trial Chamber’s reasoning in the first place. The Prosecution’s approach of setting an evidential “backdrop” against which the Trial Chamber’s findings should be understood, highlights the lack of sufficient reasoning in the Judgment itself.

3. As such, Mr. Ntaganda maintains his original submissions, and requested relief. The absence of submissions on any aspect of the Prosecution Response is not a concession on his part to its validity. The length of this reply, and the scope of Mr. Ntaganda’s leave to file it, mean that the majority of the misrepresentations in the Prosecution Response Brief remain unaddressed in the written pleadings. This should not be understood as diminishing their importance.

SECOND ISSUE²

I. The Trial Chamber erred in its assessment of the evidence – corroboration

4. Fundamental errors in the assessment of the evidence were committed by the Trial Chamber. These errors were primarily caused by the Prosecution’s main witnesses being

¹ The reply is filed confidentially pursuant to regulation 23bis(1) of the RoC, as it refers to confidential material and evidence on the record. The Defence undertakes to submit a public redacted version in due course.

² [Defence-Request-2512](#), para.19, [Decision-2522](#), paras.9-10.

compromised in some respect, whether because they should have been considered “accomplice witnesses” (but were not) or because their credibility was subject to significant questions which needed to be properly addressed (but were not). An additional layer of concern was that their testimony on events or facts key to Mr. Ntaganda’s conviction were uncorroborated. None of these factors were properly assessed by the Trial Chamber.

5. In relation to corroboration, the Defence approach is straightforward and correct.³ Throughout its brief, the Defence notes that many of the findings on central events which underpin Mr. Ntaganda’s conviction are uncorroborated. For example, P-0017 is the only witness to claim that Mr. Ntaganda ordered that a grenade launcher be fired at a group dressed in civilian clothes in Sayo.⁴ P-0010 is the only witness to testify that, the night before Mr. Ntaganda left Bunia for Mongbwalu, he ordered troops to attack using the term *kupiga na kuchaji*.⁵ P-0768 is the sole source of evidence in respect of: (i) a UPC/FPLC attack on Nzebi;⁶ (ii) Mr. Ntaganda himself killing the *Abbé*; (iii) Mr. Ntaganda ordering that antipersonnel mines be planted at entry and exit points of Mongbwalu;⁷ and (iv) Mr. Ntaganda ordering his troops to “attack the Lendu” on the first day of the assault on Mongbwalu.⁸ Many more examples are discussed in the brief but all have one common denominator – that the specific event or fact relied on by the Trial Chamber to convict Mr. Ntaganda is not spoken to by any other witness or evidenced by any document. The events or facts are, thus, uncorroborated.⁹

6. The Defence approach to corroboration is, therefore, straightforward. Save in respect of one meeting (discussed below), none of the examples of uncorroborated findings identified in the brief concern witnesses speaking to the same event or fact subject to “minor discrepancies” in detail.¹⁰ Nor is the concern the failure of witnesses to give “mirror images of

³ *Contra* [Prosecution Response – Part II](#), paras.136,140-143.

⁴ [TJ](#), para.508.

⁵ [TJ](#), para.484.

⁶ [TJ](#), paras.509-510.

⁷ [TJ](#), para.524.

⁸ [TJ](#), paras.1181,493.

⁹ *E.g.*, [Defence Appeal Brief – Part II](#), paras.63,64,83,102,111,149,193,209-210,247,258,340,364.

¹⁰ [Gbagbo-Dissenting-Opinion-Judge-Carbuccia-1263](#), para.126 (“Where the witnesses were able to recall the essence of the events in acceptable detail, minor discrepancies among witnesses are not a bar to their reliability”, citing to [ICTY-Milutinović-TJ](#), paras.49-50). *See also* [ICTR-Nahimana-AJ](#), para.428 (“[...] [T]he Appeals Chamber is of the view that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ

testimony”.¹¹ The problem is more fundamental. It is that, in relation to central events or facts which underpin the conviction, there is only one witness to speak directly to them. For example, P-0898 alone testified that Mr. Ntaganda had an escort called “Tipe”.¹² P-0758 alone testified about a person named “Nadège,” who was the victim of sexual violence.¹³ P-0963 alone testified that the UPC/FPLC fired on civilians during the assault on Mongbwalu.¹⁴

7. In relation to a meeting *en route* to Mongbwalu found to have been spoken to by **both** P-0017 and P-0963, the argument that no reasonable Trial Chamber, having considered the totality of the evidence, could have found beyond reasonable doubt that both witnesses received instructions at the same meeting conforms to the Defence’s straightforward approach to corroboration.¹⁵ The dispute is not about minor differences in detail. Rather, the argument is that the witnesses’ testimonies are so divergent (including on central questions such as location, content and attendees), that they could not be viewed as corroborative.

8. The Defence approach to corroboration is also correct.¹⁶ Save in respect of untested evidence,¹⁷ nowhere in the brief is it argued that corroboration is required as a matter of law at this Court.¹⁸ Rather, the arguments on corroboration are made in the context of the systematic failures to properly and reasonably assess the evidence. While “a Trial Chamber has full discretion to assess the appropriate weight and credibility to be accorded to the testimony of a witness”, it must still “consider relevant factors on a case-by-case basis”.¹⁹ In this regard, “[c]orroboration is [...] one of many potential factors relevant to the [...] assessment of a witness’s credibility.”²⁰ Corroboration was particularly relevant in this case. Given the serious credibility issues which arose in respect of numerous Prosecution witnesses (which issues spanned being accomplices, giving prior inconsistent statements, and/or concerns regarding the veracity of other parts of their evidence),²¹ the Trial Chamber was bound, at a minimum,

between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony”).

¹¹ [Prosecution Response – Part II](#), para.142.

¹² [TJ](#), para.388. This is despite the Prosecution calling witnesses who would have potentially been in a position to assist the Trial Chamber.

¹³ [TJ](#), para.410.

¹⁴ [TJ](#), para.494.

¹⁵ [Defence Appeal Brief – Part II](#), paras.83-87.

¹⁶ See, e.g., [Defence Appeal Brief – Part II](#), para.158.

¹⁷ See Seventh Issue.

¹⁸ *Contra* [Prosecution Response – Part II](#), para.141.

¹⁹ [ICTR-Nchamihigo-AJ](#), para.47 (footnotes omitted).

²⁰ [ICTR-Nchamihigo-AJ](#), para.47 (footnotes omitted). Also [Bemba-et-al-AJ-2275](#), para.1084; [Ngudjolo-AJ-271](#), para.168.

²¹ This list is not exhaustive.

to look for corroboration. If there was none, the Trial Chamber was bound to explain why such evidence could be accepted even without corroboration. It did neither of these things.

9. The Prosecution's motivation for advocating for as broad and flexible approach to corroboration as possible is self-evident.²² It is faced with a Judgment built on sand. However, when the Defence's straightforward approach to corroboration is fairly considered, the Prosecution's arguments are clearly diversionary and irrelevant. Rather than shore up the Judgment, their arguments, which resort to concepts as elastic as "thematic consistencies",²³ reveal its weaknesses. Accordingly, the Defence does not misapprehend fundamental evidentiary principles²⁴ and the Prosecution's arguments in response should be dismissed.

II. The Trial Chamber systematically failed to consider the accomplice status of Prosecution witnesses

10. The Prosecution submission that ICTY and ICTR Trial Chambers generally required witnesses to be **charged** with the same events as the accused to be considered an "accomplice" is not correct. Witnesses were properly considered accomplices despite not having been charged with the same events, and their testimony was appropriately viewed with caution, with reasons being given by the Chamber for any reliance thereon.²⁵

11. The Prosecution's misplaced emphasis on whether the witness has been **charged** with the same events as the accused also ignores context. In Rwanda, over 1.9 million people were charged before Gacaca with crimes arising from the 1994 genocide,²⁶ and 10,000 others were tried before domestic courts.²⁷ 161 accused were indicted by the ICTY,²⁸ and domestic courts in the Former Yugoslavia have charged nearly 1000 others.²⁹ It cannot be that Prosecution witnesses at the ICC are subject to less scrutiny because they come from states that are

²² [Prosecution Response – Part II](#), paras.140-143.

²³ [Prosecution Response – Part II](#), para.142.

²⁴ [Prosecution Response – Part II](#), para.136.

²⁵ See, e.g. [ICTY-Popović-TJ](#), para.26: "The Trial Chamber heard from several witnesses who can be categorised as "accomplice witnesses" in so far as they were involved in the criminal events which underpin this Indictment. While **some have been prosecuted for their participation, others have not**. With all such witnesses the Trial Chamber has examined their evidence **with great caution**" (emphasis added); [ICTR-Ndindiliyimana-TJ](#), para.906: "The Prosecution called a number of witnesses, all of whom are former members of the *Interahamwe*, to support its allegation [...] The Chamber notes that **many of these witnesses** have been convicted of crimes related to the 1994 genocide. Due to their role as accomplices, the Chamber will treat their evidence **with caution**" (emphasis added).

²⁶ Republic of Rwanda, [National service of Gacaca courts](#), Gacaca courts in Rwanda, June 2012.

²⁷ [Rwanda: Justice After Genocide - 20 Years On](#), Human Rights Watch, 28 March 2016.

²⁸ [Key Figures of the Cases](#), ICTY Website, Updated August 2019.

²⁹ Balkan Insights, War Crimes Stats, [The Hague Tribunal indicted 161 individuals, 90 of whom where convicted](#), last update 30 September 2019.

unwilling or unable to investigate or prosecute. P-0768, P-0017 and P-0963 were accomplices. They were “involved in the criminal events which underpin [the] Indictment.”³⁰ They had an “association in guilt”.³¹ Treating their evidence with caution was not optional.³² Failing to do so when they were the only witnesses to key events for which the accused was convicted, was a legal error.

12. Even should the ICC adopt a more restrictive approach and link the term “accomplice” to witnesses **charged** with the same events, this does not absolve the Trial Chamber. The legal test at the Tribunals was framed in terms of applying caution to “accomplice evidence, **and, more broadly**, evidence of witnesses who might have motives or incentives to implicate the accused.”³³ That P-0768, P-0017 and P-0963 have not been charged with the same events as Mr. Ntaganda does not circumvent the fact that they were insiders, and designated as such.³⁴ They were members of the same army as Mr. Ntaganda, and participated in the crimes for which he was convicted, often claiming to have been right by his side.³⁵

13. Uncritical reliance on these witnesses at the Tribunals was a reversible error,³⁶ with ICTY and ICTR Trial Chambers going to great lengths to explain any reliance on their evidence.³⁷ Even where a witness’ evidence was consistent, plausible, and delivered in a

³⁰ See, e.g. [ICTY-Popović-TJ](#), para.26.

³¹ [Prosecution Response – Part II](#), para.138, fn.599.

³² [Bemba-et-al-AJ-2275](#), paras.1531,1534. See also [ICTR-Nchamihigo-AJ](#), para.48; [ICTR-Muvunyi-AJ](#), para.128.

³³ [ICTY-Karadžić-TJ](#), para.16 (emphasis added); [ICTY-Tolimir-TJ](#), para.42; [ICTY-Krajišnik-AJ](#), para.146; [ICTY-Popović-TJ](#), fn.36.

³⁴ The Trial Chamber, Prosecution and CLRs have all consistently referred to these witnesses as “insiders”: [TJ](#), paras.161,274,278,415,572,639, fns.1593,1735,1745,1784,1805,1821; [PCB](#), paras.69-74,336,497,686,1056,1097; [Prosecution-PTB](#), paras.265,280,418,600; [CLR2-Observations-2525](#), paras.75,81.

³⁵ **P-0768:T-33**,28:9-12,28:21-22,29:4-6,33:5-7,34:1-3,42:13-15,55:23-56:5;**T-35**,53:13-18,56:9-13,61:2-12,63:14-16,64:2-5; **P-0017:T-58**,23:7-11,71:15-17,73:9-12;**T-59**,22:12-17,24:3-8,24:12-15,30:24-31:4;**T-61**,106:5-7; **P-0963:T-78**,60:15-20,70:9-15,77:1-12,88:14-19;**T-80**,34:11-25,36:12-22.

³⁶ [ICTR-Muvunyi-AJ](#), paras.125-133; [ICTR-Nchamihigo-AJ](#), paras.301-314; [ICTR-Bizimungu-AJ](#), paras.64-69.

³⁷ See, e.g. [ICTY-Tolimir-TJ](#), para.466: “many witnesses who were involved in the detentions and killings have reason to minimise their own involvement in and contributions to such events. The Chamber is of the view that such an incentive does not necessarily compromise the entirety of such witnesses’ testimony, **but it exercises caution when considering their testimony on other points**” (emphasis added); See also [ICTY-Karadžić-TJ](#), fn.4524: “While Vidović also testified that the facility was under the control of the paramilitaries despite the presence of the Karakaj TO, the Chamber has treated this conclusion with caution. In making that assessment the Chamber noted that **Vidović’s evidence was marked by indicators that he was trying to remove himself from any responsibility and to place all blame on Pivarski**. His evidence in this regard was marked by indicators of insincerity and partiality and **the Chamber cannot rely on it for this purpose**”(emphasis added); See also para.4955: “In considering these witnesses’ testimony, the Chamber noted that as members of the commands at various levels of the VRS, each were—to some extent—connected to this campaign and would therefore have **had an incentive to portray as legitimate** the means employed therein.**The Chamber thus treated their testimony with caution**” (emphasis added, footnote omitted). See also para.5766, fns.10717,19616; [ICTY-Đorđević-TJ](#), paras.1228,1357-1358; [ICTY-Limaj-TJ](#), paras.29,576; [ICTR-Bizimungu-TJ](#), paras.366,833,954; [ICTR-Nqirabatware-TJ](#), para.934; [ICTR-Kordić-TJ](#), para.629; [Mbarushimana-](#)

credible manner, their motive for testifying was necessarily part of the credibility equation. Did *this* witness have a reason to give *this* testimony against *this* accused? This question must form part of the fact-finding process,³⁸ regardless of the witness' formal designation as "accomplice" or "insider".

14. Even when P-0768, P-0017 and P-0963 were the **only** witnesses to **central** events for which Mr. Ntaganda was convicted, who blamed their alleged criminal involvement in these events squarely on the accused,³⁹ the idea that caution should be applied on this basis is missing from the Trial Chamber's reasoning. P-0017 claimed to have committed a war crime [REDACTED]. His potential motivation for shifting blame to the accused was never considered. Even with the broadest discretion afforded to the fact finder, an analysis of whether in these circumstances a witness has a reason to be (un)truthful cannot be completely absent. This critical aspect of the assessment of witness credibility – which ICTY and ICTR Trial Chambers negotiated so painstakingly and carefully – was just abandoned.

15. The Prosecution points to the Chamber's dismissal of other credibility challenges to P-0768, P-0017 and P-0963 as somehow neutralising this failure.⁴⁰ Credibility problems are cumulative. Dismissing one does not entitle a Chamber to disregard others. The Prosecution then concludes its argument with the double negative "the Judgment gives **no** indication that the Chamber **did not** exercise such caution".⁴¹ The Tribunals' "common-sense rationale"⁴² lauded by the Prosecution required Trial Chambers not only to state that they exercised caution when assessing this evidence, but to "establish that they in fact did so."⁴³ Setting the standard for ICC Trial Chambers as "**not** indicating that they **did not** exercise caution" would be lowering the bar to the point that an essential safeguard to ensuring the proper assessment of evidence simply disappears. It would also be inconsistent with the position urged by the

[Confirmation-D Decision-465](#), para.50, recognizing "the risks that attach to the statements of insider witnesses"; [Bemba-TJ-3343](#), paras.306-307; See also [Del Ponte](#), p.547: "the Prosecution must certainly approach the evidence provided by insider witnesses with caution".

³⁸ See e.g. [Lubanga-TJ-2842](#), para.106; [Katanga-TJ-3436](#), para.85; [Bemba-et-al-AJ-2275](#), para.1020; [TJ](#), para.77.

³⁹ See, e.g. [TJ](#), para.508; [P-0017:T-58](#), 70:12-71:23; [TJ](#), para.493; [P-0768:T-33](#), 37:2-16.

⁴⁰ [Prosecution Response – Part II](#), para.137.

⁴¹ [Prosecution Response – Part II](#), para.139 (emphasis added).

⁴² [Prosecution Response – Part II](#), para.138.

⁴³ [ICTR-Nchamihigo-AJ](#), para.46; See also [ICTR-Kanyarukiga-TJ](#), para.52; [ICTY-Krajišnik-AJ](#), paras.146-147.

ICC Prosecution in the *Gbagbo* case, and its repeated references to the “caution the Chamber should exercise when assessing evidence from insider witnesses”.⁴⁴

THIRD ISSUE⁴⁵

16. The Prosecution accepts that the “established process of fact-finding” requires a Trial Chamber to assess “whether the Prosecution evidence should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the accused’s evidence and that of other Defence witnesses”. It then claims that the Trial Chamber followed this “established process” in reaching findings in this case.⁴⁶

17. The Trial Chamber repeatedly said it was doing something else. In relation to the uncorroborated testimony of P-0768 about Nzebi, for which Mr. Ntaganda was convicted of murder, attempted murder and persecution,⁴⁷ the Trial Chamber reasoned as follows:

The Chamber has carefully assessed the testimony of P-0768 against that of Mr Ntaganda and, noting that P-0768 provided a sufficiently clear and detailed account of what he saw, and that he generally acknowledged when he could not clearly remember something or when there was something that he did not see, the Chamber has retained the internally consistent testimony of P-0768 in this respect, as opposed to Mr Ntaganda’s account.⁴⁸

18. In relation to the uncorroborated testimony of P-0017 about Sayo, for which Mr. Ntaganda was convicted of intentionally attacking civilians, the Trial Chamber reasoned as follows:⁴⁹

The Chamber has thus carefully assessed the testimony of P-0017 against that of Mr Ntaganda and, noting that P-0017 provided a sufficiently clear and detailed account of what he saw, the Chamber has retained the internally consistent testimony of P-0017 in this respect, as opposed to Mr Ntaganda’s account.⁵⁰

The Defence did not “merely parse out the established process of fact finding”.⁵¹ The Trial Chamber offered nothing else. This was the process of fact finding in which the Trial Chamber said it was engaged. According to the Judgment, the Trial Chamber did not direct its

⁴⁴ [Gbagbo-Prosecution-Response-1207](#), paras.64-66,70-71,1584: “when testifying, some insiders may try to minimize their own conduct to avoid incriminating themselves or to protect others [...] particularly the case when they are asked to testify on evidence which indicates their own complicity with or, at minimum, tacit acquiescence as of the commission of crimes.”

⁴⁵ [Defence-Request-2512](#), para.20, [Decision-2522](#), paras.9-10.

⁴⁶ [Prosecution Response – Part II](#), para.123.

⁴⁷ See convictions for Counts 1, 2 and 10.

⁴⁸ [TJ](#), fn.1507.

⁴⁹ See conviction for Count 3.

⁵⁰ [TJ](#), fn.1494.

⁵¹ [Prosecution Response – Part II](#), para.123.

mind to whether the accused's evidence, in the context of the evidence as a whole, raised a reasonable doubt as to his guilt. It never engaged with the central task of assessing whether the Defence evidence cast doubt on that of the Prosecution's. The Trial Chamber's analysis was limited to "retaining" one version, and "rejecting" the other.

19. The approach is incompatible with the burden of proof, because it presumes that a Trial Chamber is required to accept the accused's version of events before it entertains reasonable doubt as to his guilt. A version of events "put forward by an accused may nevertheless give rise to a reasonable doubt about the guilt of the accused without being positively or affirmatively accepted."⁵² This is not only the domestic position, it has guided fact finding in international criminal cases since the first ICTY Judgement, in which the *Tadić* Trial Chamber explained:

Giving full weight to these Defence submissions, there is nevertheless, opposed to the accused's denial of any part in these three incidents the subject of paragraph 6, much evidence from many witnesses of the accused having been seen by them in the Omarska camp on 18 June 1992 and on other occasions, evidence which the Trial Chamber **accepts as truthful**. Once it is accepted that the accused **is untruthful** in his denial of ever having visited Omarska, the Defence case is placed in jeopardy. **However, it remains, as ever, for this Trial Chamber to determine whether, notwithstanding the criticism of the Prosecution evidence made by the Defence, it is satisfied beyond reasonable doubt of the guilt of the accused of each of the detailed acts alleged.**⁵³

This reasoning is clear: (i) the Trial Chamber finds the Prosecution witnesses to be truthful; (ii) the contradictory Defence case is placed in jeopardy; (iii) the Trial Chamber must nonetheless "determine whether, notwithstanding the criticism of the Prosecution evidence made by the Defence, it is satisfied beyond reasonable doubt of the guilt of the accused for each of the detailed acts". The either/or approach to fact finding skips this third step. The *Ntaganda* Trial Chamber skipped this third step. At best, the Trial Chamber failed to meet its obligation to ensure that its reasons for making a particular finding were "clear, comprehensive and comprehensible."⁵⁴ At worst, it failed to respect the presumption of innocence. Regardless, the affected findings cannot stand.

20. In the alternative, the Prosecution submits that where a Trial Chamber sets out the standard and onus of proof correctly at the outset of a Judgment, the Appeals Chamber must

⁵² [R. v. Dowling](#), para.19. See also [R. v. Kereliuk](#), para.6.

⁵³ [ICTY-Tadić-TJ](#), para.234.

⁵⁴ [Statute](#), article 74(5); [Bemba-Separate-Opinion-3636](#), para.6 (emphasis added).

assume that this accurately describes the approach adopted.⁵⁵ This principle cannot be without limits. Where a Trial Chamber consistently says it is doing something different, the Appeals Chamber cannot be prevented from intervening on the basis that the legal standard was correctly pasted into the Judgment's opening paragraphs.

21. The Prosecution's third line of attack is that this may have been "inappropriate language."⁵⁶ It wasn't. The Trial Chamber was describing exactly what it was doing. This language was not an aberration, or an unfortunately-phrased paragraph that somehow made its way through to the final draft. This approach to presumptions and burdens is echoed throughout the Judgment. Looking no further than Nzebi, according to the Trial Chamber, contemporaneous UPC/FPLC records produced by the Defence that make no mention of Nzebi "**do not demonstrate** that an assault on that village **did not** occur".⁵⁷

22. But more importantly, this is a case before the International Criminal Court, in which an accused was sentenced to 30 years in prison, effectively depriving him of the remainder of his life. At some point, a Trial Chamber does not deserve to be excused for failing to "appropriately" articulate the cardinal principles of presumption of innocence and burden of proof which are central to an understanding of the rule of law. The Appeals Chamber should not be invited to look the other way under the guise that it was bad drafting.

23. Mr. Ntaganda's submissions did not hide its reliance on authorities from domestic jurisdictions in which juries are the finders of fact.⁵⁸ These mirrored the international authorities cited.⁵⁹ Whether juries or professional judges, the burden cannot shift. In citing domestic cases which criticised the either/or procedure, the Defence is not advocating an "inflexible approach to fact-finding".⁶⁰ It is saying that a Trial Chamber cannot find that a

⁵⁵ [Prosecution Response – Part II](#), para.125.

⁵⁶ [Prosecution Response – Part II](#), para.125.

⁵⁷ [TJ](#), fn.1505 (emphasis added).

⁵⁸ [Prosecution Response – Part II](#), para.124.

⁵⁹ [Defence Appeal Brief – Part II](#), fn.420, citing: [ICTY-Vasiljević-TJ](#), para.13; [SCSL-AFRC-TJ](#), para.117; [SCSL-RUF-TJ](#), para.477.

⁶⁰ [Prosecution Response – Part II](#), para.124. *R. v. Dinardo*, relied upon by the Prosecution to allege an "overly rigid" approach by the Defence, is authority for the principle that "the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt." This approach is advocated as the correct alternative to slavishly following the three steps described in the previous national jurisprudence. This case does not call into question the need to depart from an either/or approach. On the contrary, it stresses the need to adopt the correct standard, properly articulated.

Prosecution witness is capable of reliance, and then use that to say the accused cannot be believed.

FOURTH ISSUE – GROUND 5⁶¹

24. The Prosecution’s submissions in response to “Ground 5 – No Attack Directed Against a Civilian Population”⁶² misunderstand the law applicable to crimes against humanity in general and more particularly in respect of the contextual elements that must be proved before a conviction can be entered pursuant to article 7 of the Statute.

25. Crimes against humanity and war crimes address different concerns.⁶³ The distinction between the two is important and must be maintained.⁶⁴ War crimes are acts prohibited by treaty or customary law, committed during an armed conflict, the purpose of which is to protect the victims of war and govern the conduct of hostilities. The body of treaty and customary law, which provides the legal underpinnings for war crimes is referred to as IHL. The concept of crimes against humanity on the other hand, is much more recent. It is basically a twentieth century development and its first application in a criminal setting, precipitated by the mistreatment by Germany and its allies of their own nationals or the nationals of their co-belligerents, was in the context of the post-World War II war crimes cases. There is no treaty devoted exclusively to crimes against humanity but it is generally accepted that article 7 of the Statute is a codification of existing customary international law.⁶⁵

26. Although IHL can be of assistance in determining the legality of acts, in particular of military assaults, alleged to have given rise to crimes against humanity, neither war crimes nor IHL is an adequate substitute for the prohibition on crimes against humanity.⁶⁶

27. The notion of ‘attack’, which appears in the definitions of both war crimes and crimes against humanity deserves special attention. Whereas pursuant to IHL the term ‘attack(s)’ is defined as “acts of violence against the adversary, whether in offence or in defence”,⁶⁷ an attack pursuant to article 7 of the Statute means “a course of conduct involving the multiple

⁶¹ [Defence-Request-2512](#), para.21(1), [Decision-2522](#), paras.11-12.

⁶² [Defence Appeal Brief – Part II](#), paras.58-103; [Prosecution Response – Part II](#), paras.70-93.

⁶³ [Akhavan](#), pp.24-25 “Notwithstanding its link with international armed conflict, the UN War Crimes Commission clarified that the underlying basis for inclusion of this crime in the Charter was an exceptional degree of moral turpitude, justifying an international normative response”.

⁶⁴ [Fenrick \(1999\)](#), p.785; [Fenrick \(2004\)](#), p.4 “Attack, for crimes against humanity purposes, is not the same thing as an attack in a combat context involving the use of force to seize or defend a position”.

⁶⁵ [Fenrick \(1999\)](#), p.777; [Fenrick \(2004\)](#), pp.3-4.

⁶⁶ [Fenrick \(1999\)](#).

⁶⁷ [API](#), article 49(1).

commission of acts referred to in paragraph 1 [...]”. The difference is significant as the former refers to acts of hostilities in combat⁶⁸ while the latter has been interpreted as referring to a campaign or operation amounting to a series or overall flow of events,⁶⁹ which “need not constitute a military attack”.⁷⁰ More importantly, the commission of an attack for the purposes of proving a war crime is an essential ingredient of the *actus reus* of the crime whereas the existence of an attack in relation to crimes against humanity is one of the contextual elements, which needs to be proved as a preliminary step, considering that acts charged pursuant to article 7 must take place within the ‘attack’.

28. An article 7 attack must also fulfill three preliminary contextual requirements before the legality of any alleged acts contrary to article 7(1) can be addressed, namely that it was (i) widespread or systematic; (ii) directed at any civilian population; and (iii) committed pursuant to or in furtherance of a State or organizational policy to commit such attack.⁷¹ Although these three requirements are distinct, they are interdependent and cannot be assessed in isolation.⁷²

29. Before addressing whether the contextual elements have been proved, it is necessary to consider the nature of the ‘article 7 attack’ charged and the Trial Chamber’s finding in this regard. Pre-Trial Chamber II found substantial grounds to believe that “[f]rom on or about 6 August 2002 to on or about 27 May 2003, **an attack** against the non-Hema civilian population pursuant to the organizational policy depicted above took place in several locations in Ituri” and that “[t]his attack is more specifically demonstrated by a series of assaults [...] [which] viewed **as a whole, form a course of conduct** involving the multiple commissions of acts referred to in article 7(1) of the Statute and, consequently, constitute **an attack** within the meaning of that provision”.⁷³ As for the Trial Chamber, having assessed the evidence at trial, it found that “the UPC/FPLC conducted an attack directed against a civilian population between the assault on Bunia in August 2002 and the assault on the same city in May 2003”.⁷⁴

⁶⁸ [Commentary API](#), article 49(1), para.1880.

⁶⁹ [Bemba-TJ-3343](#), para.149.

⁷⁰ [Elements of Crimes](#), article 7(3).

⁷¹ [Statute](#), articles 7(1) and 7(2)(a).

⁷² Triffterer, para.22, p.172, para.109, p.245, para.111, p.250; [Gbagbo-Confirmation-Decision-656](#), para.208; [Katanga-TJ-3436](#), paras.1111-1112.

⁷³ [Confirmation-Decision-309](#), para.22 (emphasis added).

⁷⁴ [TJ](#), para.690.

30. There was thus **one** “article 7 attack” charged and **one** “article 7 attack” found to have been committed. This is the “attack”, from August 2002 until May 2003, which the Trial Chamber was required to assess to determine if the three additional contextual requirements, including whether the “article 7 attack” was directed at any civilian population, were met. The analysis the Trial Chamber was required to perform was entirely different from determining whether civilians not taking part in the hostilities were the object of any combat action undertaken by the UPC/FPLC, even if the evidence related to such combat was relevant to determine the nature of the attack.⁷⁵

31. Notably, Pre-Trial Chamber II agreed with the Prosecution’s strategy of adducing evidence of UPC/FPLC assaults in which no charged crimes took place for the purpose of proving the contextual elements, holding that “the Prosecutor is free to present further additional acts to the ones charged, with a view to demonstrating that an ‘attack’ within the meaning of articles 7(1) and 7(2)(a) of the Statute took place”.⁷⁶ That the Defence would not be entitled to present similar evidence of other UPC/FPLC combat activities to demonstrate that the contextual elements were **not** proved is legally wrong. At a minimum, the Trial Chamber had to consider the evidence in this regard and its refusal to do so⁷⁷ was a reversible error.

32. Although the Trial Chamber correctly held that “[t]he requirement that the attack be directed against the civilian population however means that the civilian must be the **primary, as opposed to an incidental, object** of the attack”⁷⁸ it did not enter a finding to this effect and the Prosecution’s submissions on this issue are inapposite.⁷⁹ Moreover, even if the Chamber was entitled to consider whether any military operation, alleged to form part of the attack, complied with the requirements of IHL, this was, in and of itself, insufficient in light of the Chamber’s failure to consider some of its own findings relevant to making the necessary determination,⁸⁰ failure (refusal) to consider the totality of the evidence⁸¹ and failure to provide a reasoned opinion.⁸²

⁷⁵ [ICTY-Kunarac-TJ](#), para.91; [Fenrick \(2004\)](#), pp.11-13.

⁷⁶ [Confirmation-Dcision-309](#), para.23.

⁷⁷ [TJ](#), para.665; [Defence Appeal Brief – Part II](#), paras.69-74.

⁷⁸ [TJ](#), para.668 (emphasis added).

⁷⁹ [Prosecution Response – Part II](#), paras.75-108.

⁸⁰ [Defence Appeal Brief – Part II](#), paras.60-68.

⁸¹ [Defence Appeal Brief – Part II](#), paras.69-74.

⁸² [Defence Appeal Brief – Part II](#), para.74; [TJ](#), paras.667-672.

33. In assessing whether a civilian population was the primary object of an article 7 attack, the words target, purpose and objective have a similar meaning, which is altogether different from the existence of a motive, which the Defence did not argue.⁸³ Based on the totality of the evidence related to all UPC/FPLC actions between August 2002 and May 2003, both combat and non-combat, the UPC/FPLC's primary aim/target/object was well identified and it was not a civilian population.⁸⁴ For the purpose of article 7, whether war crimes were committed during this period, possibly including unlawful attack on civilians, might be relevant in determining the overall object of the attack⁸⁵ but it is an altogether different question.

34. Against this backdrop, the Prosecution's reference to the proposition that the inquiry 'whether the civilian population was the *primary object* of the attack' should be replaced by the inquiry 'whether the civilian population was *intentionally targeted* in the attack' might be interesting but it is unconvincing. First, it is firmly established in ICL jurisprudence that the requirement that an attack – as a contextual elements of crimes against humanity⁸⁶ – be directed against a civilian population means that the civilian population must be the **primary object of the attack**.⁸⁷ Second, the proposed test fails to address the relevant issue, namely whether the overall article 7 attack was directed at a civilian population or a different objective and if so, to what extent. Third, the proposed test – focusing on the intentional targeting of civilians – conflates war crimes with crimes against humanity. Notably, the idea that crimes against humanity could replace war crimes is generally not accepted.⁸⁸ Fourth, whereas focusing on the intentional targeting of civilians to establish the contextual elements of crimes against humanity might be feasible if the article 7 attack factually overlaps one military attack against civilians, similar to the factual matrix in the *Katanga* case,⁸⁹ it would not yield appropriate results in situations where an alleged article 7 attack involves numerous military operations and numerous non-combat actions over a period of time, such as in this case. Fifth, and lastly, the proposed test would not address the required link between an attack directed at a civilian population and the existence of a policy,⁹⁰ i.e. whether this attack was

⁸³ [Prosecution Response – Part II](#), para.71.

⁸⁴ [DCB](#), paras.586-605,822-849,1008-1010; [Defence Appeal Brief – Part II](#), paras.58-103.

⁸⁵ [ICTY-Kunarac-AJ](#), para.91; [Katanga-TJ-3436](#), para.1104.

⁸⁶ [Statute](#), article 7, [ICTY Statute](#), article 5, [ICTR Statute](#), article 3, [SCSL Statute](#), article 2.

⁸⁷ [Bemba-TJ-3343](#), para.154; [Katanga-TJ-3436](#), para.1104; [ICTY-Kunarac-AJ](#), para.91; [ICTY-Blaškić-AJ](#), para.106 citing [ICTY-Kunarac-AJ](#), para.91; [ICTR-Semanza-TJ](#), para.330; [ICTR-Bisengimana-TJ](#), para.50 citing [ICTR-Semanza-TJ](#), para.330; [ICTY-Milošević-AJ](#), para.58; [ICTY-Mrkšić-AJ](#), paras.30-31.

⁸⁸ [Fenrick \(1999\)](#), p.785.

⁸⁹ The article 7 attack ([Katanga-TJ-3436](#), para.1167) and the attack against civilian ([Katanga-TJ-3436](#), para.879) refer to the same attack, i.e. the attack lead on 24 February 2003 against the population of Bogoro.

⁹⁰ [Katanga-TJ-3436](#), paras.1115-1116.

committed ‘pursuant to or in furtherance’ of a State or organizational policy to commit such an attack⁹¹ and whether this policy was actively promoted.⁹²

35. It follows that whether a civilian population was the primary object of an article 7 attack is the appropriate test and a correct reading of the law applicable to crimes against humanity, properly applied to the facts of this case, yields the conclusion that the Trial Chamber committed a reversible error in finding that “the UPC/FPLC conducted an attack directed against a civilian population between the assault on Bunia in August 2002 and the assault on the same city in May 2003”.⁹³

SIXTH ISSUE – GROUND 6⁹⁴

36. The Prosecution’s response to Ground 6 comprises a legal argument and a factual argument.⁹⁵ A proper reading of the legal argument establishes that the Prosecution’s approach supports Mr. Ntaganda’s contention that territorial control is required before a crime can be committed under article 8(2)(e)(viii) of the Statute.⁹⁶ As regards the factual argument, an analysis of the underlying evidence reveals that there is no evidence of civilians being displaced from the charged locations **after** UPC forces took control.⁹⁷ Rather, the evidence is of civilians fleeing either before or during the conduct of hostilities and, thereafter, being prevented from returning by the perpetration of other coercive acts. None of these findings are sufficient to satisfy the third material element of the war crime of ordering the displacement of civilians.

I. The “nature and degree of the perpetrator's control over victims” is territorial

37. Territorial control over the locations from where victims were displaced is an implied condition of the war crime of displacing civilians. By reference to the first and third elements of this war crime, the Prosecution concedes that some form of control over the victims is required for the *actus reus* of the crime to be committed, albeit that the “nature and degree of the perpetrators’ control over [the] victims” is a question of fact.⁹⁸ The stark fact is that the “nature and degree” of the required control must be territorial. Indeed, the Prosecution fails to

⁹¹ [TJ](#), para.673.

⁹² [Elements of crimes](#), article 7, introduction, para.3; [TJ](#), para.673.

⁹³ [TJ](#), para.690.

⁹⁴ [Defence-Request-2512](#), para.21(2), [Decision-2522](#), paras.15-16.

⁹⁵ [Prosecution Response – Part II](#), paras.109-117.

⁹⁶ The legal argument is set out at [Prosecution Response – Part II](#), paras.110-111.

⁹⁷ The factual argument is out at [Prosecution Response – Part II](#), paras.112-114.

⁹⁸ [Prosecution Response – Part II](#), para.109.

explain what else it could be and resorts to findings based on territorial control to try to satisfy the third element of the crime.⁹⁹

38. That the “nature and degree” of control required is territorial is in accordance with the crime’s origins. While the Prosecution tries to skate over the *chapeau* of article 8(2)(e) which directs that the “other serious violations”, which that sub-article enumerates, be construed “within the established framework of international law”, it cannot be ignored.¹⁰⁰ Even in the absence of any *lacuna*, it must be considered “to ensure an interpretation of article 8 of the Statute that is fully consistent with, in particular, international humanitarian law.”¹⁰¹ An interpretation of article 8(2)(e)(viii) which is “fully consistent with [...] international humanitarian law” recognises that territorial control is a condition of the crime.

39. As previously explained, article 8(2)(e)(viii)’s origins lie, firstly, in article 49 of GCIV and, thus “Geneva Law” (which protects persons not taking part in hostilities) rather than “Hague Law”, which governs the conduct of hostilities.¹⁰² Secondly, they lie in article 17 of APII. APII is a blend of Geneva Law and Hague Law but article 17 was enacted with the express purpose of extending the protection found in article 49 of GCIV to non-international armed conflicts.¹⁰³ Therefore, article 8(2)(e)(viii)’s roots lie firmly in Geneva Law and, thus, situations where persons find themselves in the power of a party to the conflict.

II. UPC/FPLC fighters were not in a position to effect displacement

40. As recognised by the Prosecution, no findings on the degree of control exercised by UPC fighters over civilians were made by the Trial Chamber as required by the third element of the war crime.¹⁰⁴ The Prosecution’s attempt to import findings made under Count 12 (the crime against humanity of forcible transfer) must fail for the following reasons.

41. None of the evidence underlying the factual findings for Count 12 relied on by the Prosecution relates to civilians being displaced while within territory under the control of the UPC.¹⁰⁵ When discussing these findings, it is acknowledged that the Trial Chamber refers to: (i) persons being “displaced during and in the immediate aftermath of the UPC/FPLC’s

⁹⁹ [Prosecution Response – Part II](#), Section V.B.

¹⁰⁰ [Prosecution Response – Part II](#), para.110.

¹⁰¹ [Appeal-Judgment-1962](#), para.53.

¹⁰² [Defence Appeal Brief – Part II](#), paras.130-131.

¹⁰³ [Commentary APII](#), paras.4849-4850.

¹⁰⁴ [Prosecution Response – Part II](#), para.112. The third element is that: “[t]he perpetrator was in a position to effect such displacement by giving such order” (see, [Elements of Crimes](#), article 8(2)(e)(viii), p.27).

¹⁰⁵ [Prosecution Response – Part II](#), para.113.

second assault” on Mongbwalu;¹⁰⁶ (ii) persons present in Lipri, Tsili, Kobu, and Bambu being displaced during and in the immediate aftermath of the UPC/FPLC assaults on those villages between the beginning of the Second Operation and on or about 25 February 2003;¹⁰⁷ (iii) *ratissage* operations being conducted “after taking over Mongbwalu”;¹⁰⁸ and (iv) “the UPC/FPLC’s conduct during and in the immediate aftermath of the UPC/FPLC assaults on Lipri, Tsili, Kobu, and Bambu had the effect of forcibly displacing part of the persons present”.¹⁰⁹ However, the evidence underlying these findings relates to civilians fleeing prior to the UPC taking control of a village or as the assault unfolded. In the absence of evidence to support the Chamber’s findings, they cannot be relied on.

42. In so far as the Prosecution seeks to rely on the creation of a coercive environment to prove the “requisite degree of control”, this is misplaced.¹¹⁰ There is no evidence to show that any rape or pillage perpetrated once a location had fallen under the control of the UPC had the effect of displacing civilians. Further, “taking advantage of a coercive environment” is expressly recognised in the Elements of Crimes for article 7(1)(d) as falling within the term “forcibly” as it is used in the first element of that crime. Therefore, this element is particular to the crime against humanity of deportation or forcible transfer but not the war crime of ordering the displacement of civilians. Accordingly, the findings about a coercive environment are irrelevant to the proof of any crime committed under article 8(2)(e)(viii).

43. In conclusion, the Prosecution’s arguments fail to show that Mr. Ntaganda’s challenge to his conviction under Count 13 is without merit.

SEVENTH ISSUE – GROUND 7¹¹¹

44. According to the Trial Chamber, each of the counts for which Mr. Ntaganda was convicted was supported by multiple crimes of the same nature, based on different events and acts. This does not circumvent the requirement of corroboration when the evidence presented by the Prosecution to prove a crime is untested.¹¹² The Prosecution must prove each of the material elements of each crime underlying the counts charged beyond a reasonable doubt. In other words, the evidence of one murder cannot serve as corroboration for a second unrelated

¹⁰⁶ [TJ](#), para.1053.

¹⁰⁷ [TJ](#), para.1055.

¹⁰⁸ [TJ](#), para.1058.

¹⁰⁹ [TJ](#), para.1067.

¹¹⁰ [Prosecution Response – Part II](#), para.114. *Also* para.113.

¹¹¹ [Defence-Request-2512](#), para.21(3), [Decision-2522](#), paras.17-18.

¹¹² [Prosecution Response – Part II](#), para.132.

murder for which the evidence is untested and uncorroborated. This would artificially bestow reliability on otherwise low-probative value evidence, and weaken the evidential fabric of the factual findings.¹¹³ Untested evidence “may lead to a conviction only if there is other evidence which corroborates the statement”.¹¹⁴

45. The Prosecution’s position that the Trial Chamber was entitled to rely on P-0022 and P-0027’s statements because they “do not even relate to [Mr. Ntaganda’s] own acts and conduct”¹¹⁵ is erroneously narrow. “Acts and conduct” cover “any ‘critical elements’ of the Prosecution case, that is, to any facts which is indispensable for a conviction”.¹¹⁶ The evidence relied upon by the Trial Chamber from P-0022 and P-0027’s statements was not background evidence or otherwise in the record,¹¹⁷ but was pivotal evidence directly related to material elements of the crimes. This evidence requires corroboration.¹¹⁸ In arguing otherwise, the Prosecution seems to conflate the distinction between the admissibility of a statement and the weight to be afforded to it pursuant to rule 68(2)(c).¹¹⁹

46. The Prosecution then claims that P-0022 and P-0027’s evidence was “consistent with other witnesses [*sic*] accounts that described the UPC’s actions in the First and Second Operations” and that “[t]ogether, they established the pattern of the UPC’s criminal conduct.”¹²⁰ The Prosecution’s reliance on the *Dorđević* Appeals Judgment¹²¹ must be contextualized and distinguished. In that case, one witness testified about his observations after the destruction of the Landovica/Landovicë mosque, and a statement about the same mosque’s destruction was admitted pursuant to rule 92 *quater*. The Appeals Chamber found that while the witness who testified did not directly corroborate the evidence admitted under rule 92 *quater*, it was nonetheless sufficiently corroborated by the pattern of attacks by Serbian forces. This differs from the present case, where no other witnesses testified about the

¹¹³ [ICTY-Popović-Dissenting-Judge-Kwon](#), paras.43-44.

¹¹⁴ [ICTY-Galić-Decision-Interlocutory-Appeal](#), fn.34; See also [ICTY-Popović-TJ](#), paras.62; [ICTY-Popović-AJ](#), para.96; [ICTY-Milutinović-Decision-Rule92quater](#), para.13; [ICTY-Karadžić-Decision-Rule92quater](#), para.8; [ICTY-Hadžić-Decision-Rule92quater](#), para.15; [ICTY-Martić-TJ](#), para.27.

¹¹⁵ [Prosecution Response – Part II](#), para.134.

¹¹⁶ [ICTY-Prlić-Decision-Admission-Evidence](#), para.59 (footnotes omitted).

¹¹⁷ *Contra* [ICTR-Bagosora-Decision-Admission-Statements](#), paras.22-23.

¹¹⁸ [ICTY-Dorđević-AJ](#), para.807, citing [ICTY-Galić-Decision-Interlocutory-Appeal](#), paras.13,18-19; [ICTY-Karadžić-Decision-Admission-KDZ172](#), para.43; [ICTY-Martić-Decision-Evidence-Babić](#), paras.19-20 (“[...] evidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction”).

¹¹⁹ [Prosecution Response – Part II](#), para.134; [ICTY-Šešeljić-Decision-Admission-Rule92quater](#), para.20.

¹²⁰ [Prosecution Response – Part II](#), para.133.

¹²¹ [ICTY-Dorđević-AJ](#), paras.808-809.

specific crimes described by P-0022 and P-0027.¹²² More importantly, the Chamber did not indicate that it had relied on the pattern of criminal conduct of the UPC to corroborate the evidence of P-0022 and P-0027.¹²³ The Prosecution cannot speculate to that effect.

TENTH ISSUE – GROUND 15¹²⁴

47. The Prosecution's attempt to salvage the Trial Chamber's errors in determining that Mr. Ntaganda met all the *mens rea* requirements for the crimes committed during the Second Operation misunderstands the law applicable to indirect co-perpetration pursuant to article 25(3)(a) of the Statute.

48. Whereas the JCE theory is built around the shared intent element, the crucial criterion being the accused's mental disposition towards the collective crime rather than the intensity of his particular contribution to it, the concept of co-perpetration is based on the joint control theory and the focus is placed on essential contribution and the power to frustrate the commission of the collective crime.¹²⁵ The subjective elements, which must be established to engage the criminal responsibility of the indirect co-perpetrator pursuant to article 25(3)(a) are at least twofold: (i) the accused's awareness of the factual circumstances, which allow him to exert control over the crime; and (ii) the accused meeting the mental elements prescribed by article 30 of the Statute.¹²⁶

49. First, regarding the accused's awareness of the factual circumstances, which allow him to exert control over the crime, the Chamber did not, as acknowledged by the Prosecution, find that Mr. Ntaganda was aware of such factual circumstances.¹²⁷ The fact that the Chamber: (i) held that Mr. Ntaganda met the *mens rea* requirements for indirect co-perpetration; and (ii) made factual findings similar to the conclusions from which the Pre-Trial Chamber inferred in its Confirmation Decision that Mr. Ntaganda was aware of such factual circumstances,¹²⁸ is of no assistance. Notably, the Pre-Trial Chamber's findings in support of this inference – that Mr. Ntaganda held a high ranking position in the UPC/FPLC and had a dominant role – without more, were insufficient to draw this inference.

¹²² P-0022:TJ, fns.1637,1647; P-0027:TJ, fn.1875; [Defence Appeal Brief – Part II](#), paras.149-150.

¹²³ [ICTY-Dorđević-Dissenting-Opinion-Tuzmukhamedov](#), para.54.

¹²⁴ [Defence-Request-2512](#), para.21(6), [Decision-2522](#), paras.23-24.

¹²⁵ [Yanev](#), p.696.

¹²⁶ [Katanga-TJ-3436](#), paras.1399,1414,1415.

¹²⁷ [Prosecution Response – Part II](#), para.273.

¹²⁸ [Confirmation-Decision-309](#), para.135.

50. Second, determining whether the co-perpetrator was aware of the factual circumstances allowing him to exert control over the crimes, requires as a preliminary step, a determination that the accused indeed exerted control over the crime. This in turn requires the trier of fact to assess whether the co-perpetrator made, within the framework of a common plan, an essential contribution with the resulting power to frustrate the commission of the crime.¹²⁹ This assessment requires an analysis of the evidence related to the actions of the co-perpetrator in relation to the crimes committed by the members of the ‘organisation’, through which the crimes were committed.

51. The actions of the co-perpetrator in relation to the crimes committed by the ‘organisation’, which need to be assessed for this purpose, depend on the nature of the common plan and the element of criminality found therein. In this case, leaving aside the alleged defects in the common plan the Chamber found to have existed,¹³⁰ it is significant that the common plan comprises the context (a military campaign against the RCD-K/ML), a plan (to drive out all Lendu from the localities targeted during the course of the military campaign) as well as no less than 10 generic crimes meant to be committed and five crimes foreseen with virtual certainty, in the entire territory of Ituri, during a period of 17 months.

52. To be sure, the nature and content of the common plan in this case simply cannot be compared to the common plans found to have existed in *Lubanga* (one continuing crime foreseen with virtual certainty),¹³¹ *Katanga* (one military attack to ‘wipe out’ the village of Bogoro, matching the aim of the plan)¹³² and *Bemba et al.* (one corruption crime directed at 14 witnesses, matching the aim of the plan).¹³³

53. The evidence related to the actions of Mr. Ntaganda that needs to be addressed in this case thus cannot be limited to: (i) one of the generic crimes that was committed, one or more times; (ii) generic crimes committed over a certain period of time; or (iii) crimes committed in only one of the military operations. Indeed, it was not possible to find – and the Trial Chamber did not – that Mr. Ntaganda was aware of the factual circumstances, which allowed him to exert control over the crimes such that he had the power to frustrate their commission,

¹²⁹ [Lubanga-AJ-3121](#), para.469.

¹³⁰ [Defence Appeal Brief – Part II](#), paras.278-316; [TJ](#), paras.808-811.

¹³¹ [Lubanga-TJ-2842](#), para.1134.

¹³² [Katanga-TJ-3436](#), para.1127.

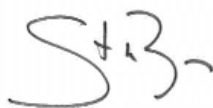
¹³³ [Bemba-et-al-TJ-1989](#), paras.103-104,802-803.

without assessing the evidence of his actions, within the framework of the common plan, related to the specific crimes charged.

54. Yet, this is exactly what the Trial Chamber did when assessing the acts and conduct of Mr. Ntaganda almost exclusively in relation to the First Operation and the crimes committed therein. That was an error. Although the Chamber found that “these two operations were part of the same military campaign and constituted a logical succession of events”,¹³⁴ which took place as part of the same course of conduct, even if separate in place and time; the nature of the (ill-conceived) common plan and the charges laid, rest on the existence of two distinct operations. More importantly, the evidence concerning the First and Second Operations reveals that: (i) Mr. Ntaganda’s involvement and the role assigned to him within the framework of the common plan, were different; (ii) Mr. Ntaganda’s interactions with the co-perpetrators and the planning of the operations, were different; and (iii) Mr. Ntaganda’s actions in relation to the ‘organisation’, through which the crimes were committed, were different. Consequently, the Trial Chamber was bound to analyse Mr. Ntaganda’s responsibility in respect of both operations separately. A normative assessment of the role and activities of Mr. Ntaganda, in the specific circumstances of the case, taking into account the division of tasks, makes it clear that Mr. Ntaganda, by virtue of his contribution, did not exercise control over the crimes committed in the second operation, let alone have awareness of the factual circumstances allowing him to exert such control.

55. Mr. Ntaganda did not meet all the *mens rea* requirements for indirect co-perpetration in respect of the crimes committed during the Second Operation.

RESPECTFULLY SUBMITTED THIS 22nd DAY OF JUNE 2020



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¹³⁴ [TJ](#), para.664.