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

Date: **30 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 Annex**

***Corrigendum\** to the “Public Redacted Version of ‘Defence Appeal Brief – Part II’,  
31 January 2020, ICC-01/04-02/06-2465”, 27 March 2020, ICC-01/04-02/06-2465-Red**

**Source: Defence Team of Mr. Bosco Ntaganda**

**\* See corrections in the enclosed Annex**

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

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<sup>1</sup> The Defence acknowledges the contribution of Mrs. Amanda Martinez and Mrs. Clémence Volle-Marvaldi.

## **APPEAL BRIEF, PART II<sup>2</sup> - INTRODUCTION<sup>3</sup>**

1. Bosco Ntaganda, the former FPLC Deputy Chief of Staff, maintained throughout his trial, and still maintains, that he “was a revolutionary [...] not a criminal”.<sup>4</sup> There were ample reasons to be a revolutionary given the level of insecurity, conflict and ethnic violence that prevailed in eastern Congo when the UPC/FPLC was born. Mr. Ntaganda never denied these conditions, but maintained that his objective against this difficult backdrop was always – including during the two military operations at the core of this case – to create conditions for peace and stability for all people living in Ituri without discrimination through the conduct of legitimate and lawful military operations. Mr. Ntaganda respectfully asserts that a critical review of the Chamber’s findings in this case shows that his conviction to the contrary cannot stand.

2. As the Appeals Chamber will find in the following grounds of appeal, the Chamber based many of its findings on uncorroborated assertions for which corroboration should have been available, and sought. Often, these uncorroborated assertions emanate from accomplice witnesses, that is, witnesses who “may have motives or incentives to incriminate the accused or to lie”,<sup>5</sup> yet this status is neither acknowledged nor addressed by the Chamber.

3. Fundamental errors in the assessment of the evidence were repeated and blatant. Mr. Ntaganda, who was entitled to the presumption of innocence throughout his trial, was improperly required to jump through additional hoops in terms of proof, such as being required to convince the Chamber, in the face of Prosecution evidence contradictory to his own, that he was not lying in order to be acquitted. Prosecution witnesses, such as P-0010, whom the Chamber found to have repeatedly lied on central and incriminating issues, had other portions of their testimony accepted – including uncorroborated assertions – without the exercise of due caution or appropriate reasons being given. The same beneficent approach was not accorded to Defence witnesses. Indeed, the Chamber’s approach to witness credibility overall was incomplete and partial, finding Prosecution witnesses to be credible or fully credible and then using its preliminary conclusions as a basis to either prefer their evidence

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<sup>2</sup> The Appeal Brief as well as Annexes D and C are filed confidentially pursuant to regulation 23bis(1) of the RoC, as they refer to confidential material and evidence on the record. The Defence undertakes to submit a public redacted version in due course.

<sup>3</sup> See Annex A, Table of contents, for ease of reference to the arguments presented herein.

<sup>4</sup> [T-268](#),51:9. See Annex B, List of transcripts in the case.

<sup>5</sup> [ICTR-Bizimungu-AJ](#), paras.63-64.

over that of other witnesses or disregard other contradictory evidence, including that of Mr. Ntaganda.

4. The foregoing is just a sample of the errors which permeate the Judgment and which are addressed across the 15 appeal grounds. In reviewing these errors, the standard of appellate review for errors of law and procedure is well established.<sup>6</sup> However, in relation to errors of fact, Mr. Ntaganda underscores that the “margin of deference to the factual findings of the trial chamber must be approached with extreme caution”<sup>7</sup> and “[u]ltimately, the Appeals Chamber must be satisfied that factual findings presented as being beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale.”<sup>8</sup> Numerous findings as they presently stand occasioned a miscarriage of justice.<sup>9</sup>

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

5. Mr. Ntaganda was not afforded a fair trial. Throughout the proceedings the Chamber committed numerous procedural errors that impacted his rights enshrined in article 67(1). In many instances, errors could have been avoided or rectified by allowing timely appellate review of the underlying issues, which the Chamber systematically rejected. Four of these errors are presented and argued herein<sup>10</sup> focussing on the Chamber’s excessive resort to *ex parte* material; unchecked disclosure violations on the part of the Prosecution; the infringement on the right of Mr. Ntaganda to know the case he has to meet, and his right to equality of arms. Mr. Ntaganda’s right to a fair trial was violated to such an extent that ordering a new trial is the only appropriate remedy in the circumstances.

### **I. The Chamber’s excessive resort to *ex parte* material violated Mr. Ntaganda’s right to a fair trial**

6. The ICC regime provides for *ex parte* submissions in six limited circumstances, as set out in article 72(7)(a) and rules 56, 74, 81, 83 and 88. The *Lubanga* Trial Chamber suggested

<sup>6</sup> E.g., [Bemba-AJ-3636](#), para.36 citing to [Lubanga-AJ-3121](#), paras.18-19, [Ngudjolo-AJ-271](#), para.20.

<sup>7</sup> [Bemba-AJ-3636](#), para.38.

<sup>8</sup> [Bemba-AJ-3636](#), para.45.

<sup>9</sup> [Bemba-AJ-3636](#), para.40.

<sup>10</sup> Due to the number of pages authorized for the submission of its Appeal Brief, the Defence opted not to brief other additional ‘fair trial’ issues including issues set out in its Notice of Appeal (Ground 2: Sub-ground 3, Sub-ground 4).

that these provisions are not exhaustive, and deal “with *ex parte* issues solely in relation to the particular matters that have been covered in those legal texts.”<sup>11</sup>

7. The Appeals Chamber has held more recently, however, that the “Court’s functions are regulated by a comprehensive legal framework in which its powers have been deliberately spelt out by the drafters to a great degree of detail, thus leaving little room to the invocation of ‘inherent powers’ in the proceedings before it.”<sup>12</sup> Therefore, contrary to the approach in *Lubanga*, the Statute and the Rules appear on their face to contemplate the possibility of *ex parte* procedures, and to exhaustively enumerate the circumstances where they are permitted.

8. This approach accords with the Code of Conduct for United States Judges, which prohibits *ex parte* communications except when specifically authorized by law and, even then, only if there is prompt *post facto* notification of the communication to the other party:<sup>13</sup>

a judge should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized *ex parte* communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.

9. South Africa,<sup>14</sup> New Zealand,<sup>15</sup> Singapore,<sup>16</sup> Italy,<sup>17</sup> and Moldova,<sup>18</sup> all reflect the same prohibition. The WTO rules are even more categorical: “[t]here shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.”<sup>19</sup> The ECtHR has held that depriving one party of access to all the submissions of the other violates the principle of equality of arms.<sup>20</sup> *Ex parte* hearings in England and Wales, outside of those circumstances expressly contemplated by Statute, are tightly restricted, and require, *inter alia*, that: there be no practicable *inter partes* alternative; they be necessary in the interests of justice; and they be confined to matters necessary to achieve the relevant purpose.<sup>21</sup>

<sup>11</sup> [Lubanga-Decision-1058](#), para.6.

<sup>12</sup> [Bemba-et-al-SAJ-2276](#), para.79.

<sup>13</sup> [U.S. Judges Code of Conduct](#).

<sup>14</sup> Rule 55 (3) of the Magistrates’ Court Act, [Deosaran, Francis-Subbiah](#), p.62.

<sup>15</sup> [New Zealand – Guidelines](#), section (G)(a).

<sup>16</sup> [Singapore-Practice Directions](#), section 21.

<sup>17</sup> Article 13 of [Italy – Codice Etico](#). See also article 3.11 of the [Bologna-Milan Global Code of Judicial Ethics](#).

<sup>18</sup> [Council of Europe-Moldova Judicial Ethics](#).

<sup>19</sup> [WTO Rules](#), article 18.

<sup>20</sup> [Lanz v. Austria](#), paras.62-63.

<sup>21</sup> [R. v. Ali](#), para.49. See also *R. v. Agar*; *R. v. Preston*; *Edwards and Lewis v. U.K.*

10. Even where *ex parte* submissions have been entertained, ICC Trial Chambers have required *inter partes* disclosure when the subject-matter spills into matters affecting the credibility of witnesses upon whom the Chamber may rely to convict. Hence, in *Lubanga*, the Trial Chamber did not compel the disclosure of the identities of all Prosecution intermediaries, but only those who had had contact with witnesses whose testimony had been “materially called into question.”<sup>22</sup> Importantly, the Chamber categorically excluded the Prosecution’s suggestion that intermediaries should testify about their interactions with witnesses on an *ex parte* basis.<sup>23</sup>

11. Convictions may be overturned upon a showing of prejudice arising from *ex parte* contacts. Where the judge to whom the *ex parte* submissions have been made is the decider of fact, prejudice may be presumed.<sup>24</sup> Although there are circumstances where an *ex parte* communication might be ‘overlooked’, “the burden of proving lack of prejudice is on the [government], and it is a heavy one.”<sup>25</sup>

12. The Chamber received 214 written *ex parte* submissions during trial, of which 91 remained undisclosed at the end of trial.<sup>26</sup> Even those reclassified during trial often remained *ex parte* until many months after they were first presented, as illustrated in Annex C,<sup>27</sup> or after the end of trial.<sup>28</sup> Others have still not been disclosed.<sup>29</sup>

13. Some of these *ex parte* filings included witness statements containing material prejudicial to Mr. Ntaganda, e.g., allegations that witnesses [REDACTED].<sup>30</sup> P-0768 made these allegations against Mr. Ntaganda both **before** his appearance as a witness<sup>31</sup> (unbeknownst to the Defence until after trial), and **after** his appearance as a witness.<sup>32</sup> The Chamber, as discussed in the grounds of appeal that follow, relied heavily on P-0768 for incriminating findings, including in preference to the contradictory testimony of Mr.

<sup>22</sup> [Lubanga-Decision-2434](#), para.139(b).

<sup>23</sup> [Lubanga-Decision-2434](#), para.137.

<sup>24</sup> See e.g. [U.S. v. Reese](#), p.12; [U.S. v. Reese](#), p.12; [State v. Lotter](#), pp.609-610 (“threat to the judge’s impartiality”) (citations omitted); [U.S v. Wolfson](#), para.41.

<sup>25</sup> [U.S. v. Minsky](#), p.874 (citations and internal quotations omitted).

<sup>26</sup> When the Defence requested an accounting of all *ex parte* filings at the end of the case, the Prosecution voluntarily reclassified 35, and the Chamber ordered the disclosure of 16 more. The rest remains *ex parte* ([Decision-2451](#); [Decision-2451-Anx](#)). See Annex C, List of *ex parte* filings.

<sup>27</sup> E.g. [Prosecution-Submission-1313](#). (7 months); See also Annex C, entries #6, #10, #11, #50, #51, #63, #65, #66, #67, #91, #103, #115, #116.

<sup>28</sup> E.g. [Registry-Report-748](#), [Prosecution-Provision-565](#), [Prosecution-Provision-618](#); See Annex C.

<sup>29</sup> See Annex C, entries #124, #125, #126, #131, #134, #138, #139, #181, #164, #169, #170, #175-183, #187, #189-193, #195-196, #198-201, #204-206, #209-210, #212-214.

<sup>30</sup> E.g. **P-0768**: [Prosecution-Request-349-AnxA](#), [Prosecution-Request-349-AnxB](#).

<sup>31</sup> [Prosecution-Provision-565](#).

<sup>32</sup> [Prosecution-Submission-1313-AnxA](#).

Ntaganda. These *ex parte* statements by Prosecution witnesses were relevant not only to their credibility, but also contain allegations against Mr. Ntaganda that are suggestive of a consciousness of guilt or at least of bad character.

14. The Chamber's tolerance for these sub-sonic, and often highly prejudicial, written communications – and its failure to require their prompt disclosure – violated Mr. Ntaganda's right to a fair trial. In adversarial proceedings, fairness depends on an accused knowing what is being said about him to the triers of fact, especially by Prosecution witnesses. Furthermore, even when such *ex parte* submission is justified, the Defence should be informed to the greatest extent possible of the existence of the filing and the legal justification for its *ex parte* status,<sup>33</sup> and have its status changed to *inter partes* as soon as its justification has been exhausted.<sup>34</sup> In most cases, this did not occur. The need to reveal *ex parte* material is also necessary to preserve public confidence in the impartiality of the judges and to avoid raising a reasonable apprehension of bias.<sup>35</sup>

15. P-0055 is a case in point. On 30 October 2015, before making the solemn declaration in court, P-0055 [REDACTED].<sup>36</sup> Unbeknownst to the Defence,<sup>37</sup> the Chamber had been in receipt of highly prejudicial allegations made by P-0055 against Mr. Ntaganda and his family [REDACTED].<sup>38</sup> The Chamber immediately acceded to the request, stating "[REDACTED]."<sup>39</sup> The Chamber conducted an *ex parte* hearing with the witness alone and then in the presence of VWU representatives.<sup>40</sup> To date, only a summary of this [REDACTED].<sup>41</sup> A section of this summary is headed "[REDACTED]". The specifics of [REDACTED] are redacted but do raise [REDACTED] Ntaganda case.<sup>42</sup> In view of the witness' allegations up to October 2015, the reasonable inference is that P-0055 made further prejudicial allegations against Mr. Ntaganda. In holding such an *ex parte* hearing, and then failing to disclose the transcript, the Chamber erred.

<sup>33</sup> [Lubanga-Decision-1058](#), [Katanga-Judgment-476](#), para.64, [Lubanga-Decision-108](#), para.17.

<sup>34</sup> [Lubanga-Decision-1058](#), para.14.

<sup>35</sup> [R. v. Deleary](#), paras.22-23.

<sup>36</sup> [T-41](#), 11:21-13:3.

<sup>37</sup> The Defence became aware that Witness P-0055 [REDACTED], 13 October 2015, referring to [Prosecution-Request-658](#), fn.16.

<sup>38</sup> See [Prosecution-Request-348](#), [Prosecution-Request-349](#). Further allegations were made later on, see [Prosecution-Request-371](#), [Prosecution-Provision-422](#). The content of **some** of these filings was disclosed in March 2017, at the earliest.

<sup>39</sup> [T-41](#), 18:17-18.

<sup>40</sup> [T-43](#), 2:13-15.

<sup>41</sup> [Provision-995-Anx.](#)

<sup>42</sup> [Provision-995-Anx.](#), p.5 ("[REDACTED]")

16. *First*, the hearing was held in the absence of any lawful authority. The Court's legal texts do not permit an *ex parte* hearing of a witness by a Chamber alone in the circumstances raised by P-0055. Further, at no point did the Chamber identify the legal basis on which it acted. The holding of such a hearing contravened the cardinal principle of open, public justice involving maximum participation by all parties. Indeed, a completely *ex parte* hearing between a fact finder and a witness alone, in the absence of any of the parties, is unheard of and is manifestly irregular on its face.

17. *Second*, the foregoing error is compounded by the Chamber's failure to mitigate any prejudice by providing the parties with an unredacted transcript of the hearing. This failure means that the Defence has been deprived of information relevant to P-0055's credibility which could have been used in cross-examination and in legal submissions.

18. *Third*, it appears that in the hearing the Chamber was exposed to [REDACTED] (the full extent of which were not disclosed to the Defence and, therefore, were not the subject of any assessment or proper challenge by the Defence). These allegations, combined with those to which the Chamber was already privy since August 2014, may have created a bias in the judges against Mr. Ntaganda – specifically in respect of whether to accept P-0055's testimony in preference to that of Mr. Ntaganda or more generally – or would leave a reasonable bystander with a perception that the judges may have been biased against him in these ways.

19. As more particularly argued in ground 15, P-0055 is a witness on whom the Chamber relied to make key findings on the Second Operation. In addition to the errors identified in ground 15, the findings which rely on P-0055's evidence are unsafe on the basis that the judges held an *ex parte* hearing without any legal basis and were made party to material prejudicial to Mr. Ntaganda which he was (and remains) unable to address.

20. The resort to *ex parte* material is so extensive that it should result in a full mistrial. Simply put, these practices – which can never be contemporaneously challenged given their nature – should not be normalized. The Appeals Chamber can assert control over this apparently routine practice only by way of a robust *post facto* remedy. In the alternative, an inference should be drawn that the Chamber's assessment of P-0055 and P-0768's credibility was affected by the repeated and apparently extensive *ex parte* communications of these witnesses to the Chamber, actually or potentially implying that Mr. Ntaganda had engaged in misconduct. No matter how professional or disciplined a professional judge may be, the very principle that *ex parte* hearings are inimical to a fair adversarial trial demonstrates that this is not a problem that can be remedied simply by professional adjudication. The appropriate

remedy is to accord no deference to the Chamber's findings relating to, in particular, P-0055 and P-0768.

## **II. The Prosecution's wilful failure to disclose Mr. Ntaganda's non-privileged conversations in its possession irreparably damaged the fairness of the trial**

21. For 13 months **during the presentation of its case**, the Prosecution was in possession of 4,684 of Mr. Ntaganda's non-privileged telephone conversations from the ICC DC, the vast majority of which took place before August 2014 ("Conversations"), without the Defence being informed. The Prosecution's access to these Conversations resulted from its allegations of witness interference, dating from August 2014.<sup>43</sup> These allegations have not given rise to article 70 charges and remain unproven. These allegations did, however, provide a pretext for the Prosecution to gain **unfettered** access to the Conversations comprising information related to the whereabouts of Mr. Ntaganda at relevant times, Defence investigations, the identity of potential Defence witnesses and Defence strategy. The Prosecution's access to, and extended period of non-disclosure of this information, without informing the Accused, or the Chamber, constitutes an abuse of process.

22. The Prosecution's actions, compounded by the Single Judge's error and the Chamber's failure to take measures to safeguard the fairness of the proceedings upon being informed of the Prosecution's access, irremediably damaged the fairness of the trial.

23. In December 2014, following the Prosecution's August 2014 allegations of witness interference, the Chamber ordered the *post-factum* review of the Conversations. The Chamber instructed the Registry to review the Conversations, prepare summaries thereon and submit periodic reports. The Defence had the opportunity to review the Registry reports and to propose redactions before their transmission to the Prosecution under the Chamber's control. The purpose of this review was to ensure that private matters and, more importantly, information solely related to the Defence case or to Defence investigations would not be provided to the Prosecution.<sup>44</sup> On 3 July 2015, the Chamber [REDACTED].<sup>45</sup> [REDACTED].<sup>46</sup> To ensure the fairness of the proceedings in this case, the Chamber should

<sup>43</sup> A comprehensive overview of the procedural history is [Defence-Request-1830](#), paras.22-40, and its related [Defence-Request-1830-AnxA](#), as well as [Decision-1973](#) ("Restriction Litigation"). The Restriction Litigation was initiated with the [Prosecution-Request-349](#).

<sup>44</sup> [Decision-410](#), para.56, [Defence-Observations-533](#), [Defence-Observations-568](#), [Defence-Observations-625](#), [Defence-Observations-759](#), [Defence-Observations-1312](#).

<sup>45</sup> [Order-697](#), para.11.

<sup>46</sup> [Decision-777](#), para.38; [T-22](#),2:23-3:6.

have directed the Prosecution specifically to Pre-Trial Chamber II, which confirmed the charges and was aware of the specifics of the case, so that any authorization granted would have been given in the knowledge thereof.

24. On 13 August 2015, even before the Chamber ruled on the restrictions sought,<sup>47</sup> the Prosecution seized Pre-Trial Chamber I *ex parte* in the context of an article 70 investigation into allegations of obstruction or interference with Prosecution witnesses involving Mr. Ntaganda and others.<sup>48</sup> Notwithstanding the safeguards implemented by the Chamber during the *post-factum* review of the Conversations,<sup>49</sup> the Prosecution requested the Single Judge to grant unrestricted access to all Mr. Ntaganda's Conversations. The Prosecution knew that it would obtain information related to the Defence case and investigations.

25. There can be no doubt that Conversations containing such information, coming directly from the Accused, were disclosable pursuant to rule 77.

26. In its request before Pre-Trial Chamber I, the Prosecution was remarkably candid about its intended use of the material sought. The Prosecution invoked the potential that the requested material "encompasses information which the Prosecution may need to use during trial in pursuit of the establishment of the truth,"<sup>50</sup> and which "it may use during trial to allow Trial Chamber VI to fully assess the credibility of evidence adduced by both the Prosecution and Defence."<sup>51</sup> There was no pretence. The Prosecution used its article 70 investigation to access information to challenge the credibility of Defence evidence at trial.

27. Aware of the safeguards imposed during the *post-factum* review to protect the fairness of the proceedings;<sup>52</sup> informed of the [REDACTED];<sup>53</sup> and knowing that the material sought was disclosable, the Single Judge seized of the matter erred in granting the Prosecution's request. The Single Judge failed to consider or give sufficient weight to the potential irreversible consequences on the trial - which had just begun<sup>54</sup> - of granting the Prosecution access to material disclosable pursuant to rule 77, without informing the Accused, and more importantly, the Chamber, thereby depriving the Chamber of the ability to protect the fairness of the proceedings.

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<sup>47</sup> [Decision-785](#).

<sup>48</sup> [Prosecution-Request-638](#).

<sup>49</sup> [Decision-459](#).

<sup>50</sup> [Prosecution-Request-638](#), para.67.

<sup>51</sup> [Prosecution-Request-638](#), para.6.

<sup>52</sup> [Prosecution-Request-638](#), para.47.

<sup>53</sup> [Prosecution-Request-638](#), para.6.

<sup>54</sup> The first Prosecution witness appeared on 15 September 2015.

28. At a minimum, Mr. Ntaganda had the right to be informed of the Prosecution's unrestricted access to his **past** Conversations, which should have been disclosed without delay. There was no justification for the non-disclosure of the Conversations. The Prosecution has no discretion under rule 77 to withhold disclosure, except in accordance with rule 81(2) and 81(4). Disclosure to Mr. Ntaganda of his past Conversations as implemented by the Chamber before August 2015, would not have prejudiced the Prosecution's article 70 investigation, which could have continued unabated. Considering the severe restrictions imposed on the Accused from March 2015<sup>55</sup> for the specific purpose of protecting witnesses, the non-disclosure of the Conversations was also not required to address witness protection concerns. Significantly, when seeking unlimited access to the Conversations, the Prosecution neither invoked rule 81(2) "[...] disclosure [which] may prejudice further or ongoing investigation [...]" nor rule 81(4) "[...] steps to ensure the confidentiality of information to protect the safety of witnesses [...]".<sup>56</sup>

29. By 9 May 2016 at the latest, the Chamber became aware that "[...] the Prosecution had been granted access to additional non-privileged calls of the accused"<sup>57</sup> as well as to Conversations previously redacted under its control during the *post-factum* review.<sup>58</sup> By then, the Prosecution had already had access to all of Mr. Ntaganda's Conversations for a full seven months without the Accused being informed.<sup>59</sup>

30. In response to the urgent Defence request for disclosure of the 13 fully *ex parte* annexes only available to the Prosecution and VWU and the two confidential redacted annexes attached to the Prosecution 9 May 2016 submissions,<sup>60</sup> the Prosecution proposed withdrawing the annexes rather than disclosing them.<sup>61</sup> The Prosecution's purpose could only have been to conceal the scope of its access to the Conversations with a view to maximising

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<sup>55</sup> [Order-508](#).

<sup>56</sup> [Bemba-Decision-3255](#), paras.82-83.

<sup>57</sup> [T-159](#),2:15-18.

<sup>58</sup> [Prosecution-Submission-1313](#).

<sup>59</sup> [Prosecution-Request-638](#), [Prosecution-Request-737](#), para.2.

<sup>60</sup> [Prosecution-Submission-1313-AnxA](#), [Prosecution-Submission-1313-AnxB](#), [Prosecution-Submission-1313-AnxC](#), [Prosecution-Submission-1313-AnxD](#), [Prosecution-Submission-1313-AnxE](#), [Prosecution-Submission-1313-AnxF](#), [Prosecution-Submission-1313-AnxG](#), [Prosecution-Submission-1313-AnxH](#), [Prosecution-Submission-1313-AnxI](#), [Prosecution-Submission-1313-AnxJ](#), [Prosecution-Submission-1313-AnxK](#), [Prosecution-Submission-1313-AnxL](#), [Prosecution-Submission-1313-AnxM](#), [Prosecution-Submission-1313-AnxN](#), [Prosecution-Submission-1313-AnxO](#).

<sup>61</sup> [Prosecution-Response-1318](#), paras.5,41.

its litigation advantage. Notably, the Prosecution would later request to rely on the same Conversations during cross-examination of the Accused.<sup>62</sup>

31. In its 3 June 2016 confidential redacted Decision on Defence request<sup>63</sup> – reclassified to confidential only on 12 May 2017<sup>64</sup> – the Chamber, knowing that Annexes C to O were obtained from the Accused and having noted that Annexes C to F “may be material to the preparation of the defence”,<sup>65</sup> erred in denying disclosure.<sup>66</sup> Although disclosure of the Annexes would have alerted the Accused that the Prosecution was in possession of additional Conversations, it would neither have revealed the existence nor the details of the Prosecution’s article 70 investigation that could have continued without interference. More importantly the Chamber failed to consider that the Prosecution’s possession of the Annexes was prejudicial to the Accused as it placed the Prosecution in an unduly advantageous position *vis-à-vis* the Defence. This, the Chamber would acknowledge only much later.<sup>67</sup>

32. Although the Chamber expressed its discomfort with the *ex parte* nature of the parallel investigation, once learning of its existence,<sup>68</sup> it failed to mitigate the prejudice by ordering the Prosecution to immediately disclose the Conversations in its possession. The Chamber noted that “[a]rticle 70 investigations cannot be permitted to continue indefinitely in a manner which could impact proceedings” and encouraged the Prosecution “to disclose all resulting information which may be material to the preparation of the Defence as soon as possible.”<sup>69</sup> This was insufficient, and an error.

33. In September 2016, the Chamber again erred when it encouraged the Prosecution to conclude its investigations in an expeditious manner<sup>70</sup> without ordering disclosure of the Conversations. More than halfway through the presentation of the Prosecution’s case, this was too little, too late. The Chamber erred by ascribing priority to the Prosecution’s article 70 investigation over the fairness of the trial, irreparably damaging the integrity of the proceedings.

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<sup>62</sup> For instance, the Prosecution requested to use 3 of those conversations during the testimony of the Accused: [Prosecution-Submission-1313-AnxC](#), [Prosecution-Submission-1313-AnxD](#), [Prosecution-Submission-1313-AnxE](#) referred in [Prosecution-Request-1925-AnxA](#), p.1.

<sup>63</sup> [Decision-1364](#).

<sup>64</sup> [Defence-Request-1315](#).

<sup>65</sup> Email correspondence from the Trial Chamber VI communications to the Parties and participants, 10 November 2017, at 15:16.

<sup>66</sup> [Decision-1364](#), para.22.

<sup>67</sup> [Decision-1883](#), para.42.

<sup>68</sup> [Decision-1364](#), para.22; [Decision-1494](#), para.24.

<sup>69</sup> [Decision-1364](#), para.22.

<sup>70</sup> [Decision-1494](#), para.24.

34. Significantly, it was only on 7 November 2016 – 404 days after they first gained access – that the Prosecution informed the Defence that it was in possession of all Conversations since the beginning of Mr. Ntaganda’s detention.<sup>71</sup> As a result of technical problems, the Defence was remained unable to access the Conversations until 14 November 2016. In fact, the Prosecution continued to disclose summaries, transcriptions and translations of the Conversations from 15 November 2016 until 4 August 2017.<sup>72</sup>

35. The failure to inform the Accused of the Prosecution’s unlimited access to all of his Conversations and their non-disclosure for 13 months, was neither reasonable nor justified and caused irremediable prejudice to the Accused. During this critical 13-month period, the Prosecution actively hid from the Defence its access to the wealth of relevant information – coming directly from the Accused – contained in the Conversations, while preparing and conducting its case. In the meantime, the Defence conducted its investigations and prepared its cross-examinations on the basis of (what it thought was) confidential information, without knowing that the Prosecution was in possession of disclosable material coming from the Accused, comprising information on Defence investigations and strategy.

36. At this point, the only appropriate remedy was to grant the Defence request for an adjournment of the proceedings,<sup>73</sup> to: (i) allow the Defence to review the Conversations in the possession of the Prosecution for 13 months without the Accused being aware; (ii) identify the information related to Defence investigations and strategy obtained by the Prosecution; and (iii) take remedial measures, for instance, by recalling certain Prosecution witnesses. Rejecting the Defence request was an error.<sup>74</sup> The Chamber’s error was compounded by its rejection of the Defence request seeking leave to appeal,<sup>75</sup> although the criteria in article 82(1)(d) had been met.

37. Four months later, having reviewed the disclosed Conversations while the evidence of Prosecution witnesses continued, the Defence submitted a request for a permanent stay of proceedings.<sup>76</sup> In its decision, the Chamber confirmed that the Prosecution’s access to the Conversations was “prejudicial to the accused as it places the Prosecution in an unduly advantageous position *vis-à-vis* the Defence”<sup>77</sup> and urged the Prosecution “to have any further

<sup>71</sup> [Prosecution-Communication-1616](#), para.15.

<sup>72</sup> [Prosecution-Communication-1760](#), [Prosecution-Communication-2013](#).

<sup>73</sup> [Defence-Request-1629](#).

<sup>74</sup> [T-159](#),2:12-7:24.

<sup>75</sup> [Defence-Request-1645](#), [Decision-1677](#).

<sup>76</sup> [Defence-Request-1830](#).

<sup>77</sup> [Decision-1883](#), para.42.

review of the Conversations conducted by members of the Prosecution who are not, or are no longer, part of the trial team of the *Ntaganda* case.”<sup>78</sup> Notably, the Chamber noted that the “extracts identified by the Defence indeed include **information on the whereabouts of the accused and other individuals at the relevant times, names of individuals who could have provided information for the Defence and potential witnesses, and which may therefore be relevant to defence strategy**”.

38. Nonetheless, the Chamber declined to order a permanent stay on the basis that “the Defence has not identified concrete instances of the Prosecution having used the information in a manner resulting in undue prejudice to the accused” and “the Prosecution’s claim that the information obtained in the context of the Article 70 proceedings was ‘used to assess whether the [a]ccused and others were engaged in criminal misconduct, and not to select witnesses or make any other litigation-related assessment’”.<sup>79</sup> Placing the burden on the Defence to demonstrate prejudice beyond that already established was an error. As for the Prosecution’s extraordinary claim, its request to have certain Conversations admitted proves otherwise.<sup>80</sup>

39. More importantly, the Chamber also erred by holding that the prejudice to the Accused could be “remedied, retroactively and prospectively, through alternative, less drastic measures”.<sup>81</sup> Indeed, the Chamber’s order “that the Prosecution shall not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence’s presentation of evidence [...]”<sup>82</sup> while at the same time, establishing a mechanism allowing the Prosecution to use certain Conversations, for the determination of the truth, upon submission of a substantiated request,<sup>83</sup> failed to remedy the prejudice to the Accused. This procedure *inter alia*: (i) did not cure the undue advantage gained by the Prosecution during the presentation of its case; (ii) created further uncertainty regarding which Conversations the Prosecution would ultimately be authorized to use and how; (iii) triggered the need to conduct further interviews with potential witnesses involved in the Conversations despite the late stage and very little time available; (iv) impacted the decision of the Accused whether to testify and consequently the contents of the Defence case both in terms of scheduling and selection of witnesses; and (iii) retroactively and impermissibly condoned the Prosecution’s abuse of the

<sup>78</sup> [Decision-1883](#), para.61; [Defence-Request-1830](#), [Defence-Request-LtR-1904](#).

<sup>79</sup> [Decision-1883](#), para.43.

<sup>80</sup> *E.g.* [Prosecution-Request-1925](#), [Prosecution-Request-1925-AnxA](#), [Prosecution-Submission-1313-AnxC](#); [Prosecution-Submission-1313-AnxD](#); [Prosecution-Submission-1313-AnxE](#).

<sup>81</sup> [Decision-1883](#), para.43.

<sup>82</sup> [Decision-1883](#), para.61.

<sup>83</sup> [Decision-1883](#), para.61.

Court's process. The Chamber's error was compounded by its rejection of the Defence request seeking leave to appeal,<sup>84</sup> although the criteria in article 82(1)(d) had been met.

40. The situation, as it unfolded following the implementation of the Chamber's erroneous decision – as illustrated by the litigation that followed<sup>85</sup> – demonstrates the severe resulting prejudice to the Accused. To provide but one example, the Accused had to decide whether to exercise his right to testify not knowing what Conversations the Prosecution would be authorised to use in cross-examination. In fact, having decided to testify, the Accused was placed in a position and expected by the Chamber<sup>86</sup> to begin his testimony without this crucial information.<sup>87</sup>

41. The Prosecution's abuse of process, by willfully failing to inform the Accused of its access to the Conversations and failing to disclose the Conversations for 13 months, while presenting its case, not only violated its disclosure obligations but also the right of the accused to know the case he has to meet and, more importantly, the principle of equality of arms, thereby rendering the prospects of a fair trial impossible. The sole appropriate remedy in these circumstances is a full acquittal.

### **III. The Chamber's failure to suspend the proceedings prior to the resolution of the 'no case to answer' appeal was an error**

42. On 25 April 2017, Mr. Ntaganda sought a partial judgment of acquittal.<sup>88</sup> His position was that evidence adduced in relation to the Second Operation and alleged attacks on protected objects, failed to meet the Prosecution's *prima facie* burden of proof at the end of the presentation of its case and that he should be acquitted of those charges at half-time. The Defence case was due to begin on 29 May 2017. That morning, Mr. Ntaganda's no case to answer request was rejected.<sup>89</sup> Following written reasons,<sup>90</sup> Mr. Ntaganda sought leave to

<sup>84</sup> [Defence-Request-1888](#), [Decision-1955](#).

<sup>85</sup> [Prosecution-Request-1925](#), [Prosecution-Request-1925-AnxA](#), [Prosecution-Request-1925-AnxB](#), [Prosecution-Request-1930](#), [Prosecution-Request-1930-AnxA](#), [Prosecution-Request-1930-AnxB](#), [Defence-Response-1940](#), [Prosecution-Request-LtR-1942](#), [Prosecution-Reply-1948](#), [Prosecution-Request-2010](#), [Defence-Response-2012](#), [Prosecution-Request-LtR-2014](#), [Defence-Request-LtR-2017](#), [T-232](#),55:6-57:18, [Prosecution-Request-2044](#), [Defence-Response-2048](#), [T-249](#),5:21-7:13, [Prosecution-Request-2171](#), [Defence-Response-2181](#), [Prosecution-Request-LtR-2183](#), [Prosecution-Reply-2190](#), Email from Trial Chamber VI correspondence to the Parties and participants, 8 June 2017, at 14:37.

<sup>86</sup> [T-209](#),21:8-28:2.

<sup>87</sup> [T-209](#),22:1-25,23:1-19.

<sup>88</sup> [Defence-Request-1879](#).

<sup>89</sup> [T-206](#),5:1-4.

<sup>90</sup> [Decision-1931](#).

appeal.<sup>91</sup>

43. Mr. Ntaganda was due to testify on 14 June 2017. That morning, his request for certification was granted on whether: (i) the Chamber had erred in permitting the trial to proceed on charges for which it declined to consider the sufficiency of the evidence; and (ii) declining to entertain the motion was discretionary.<sup>92</sup> Had the Appeals Chamber decided differently from the Chamber on either or both questions, Mr. Ntaganda's acquittal on certain charges would again have been a live issue. The Defence requested an adjournment until the Appeals Chamber's decision.<sup>93</sup> In refusing this request, and 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.<sup>94</sup>

44. The process whereby an accused can challenge the sufficiency of Prosecution evidence mid-way in the proceedings has long formed part of international criminal procedure. Commonplace at the ICTR and ICTY,<sup>95</sup> the *Ruto & Sang* proceedings were terminated on this basis,<sup>96</sup> and the *Gbagbo & Blé Goudé* case currently stands frozen while the Appeals Chamber resolves this question.<sup>97</sup> In none of these cases was an accused required to present his evidence *before* the "no case to answer" challenge had been resolved.<sup>98</sup> To do so would undermine the primary rationale of a 'no case' submission, being that "an accused should **not** be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need for the defence to mount a defence case".<sup>99</sup> This reflects the domestic position, whereby "the judge must rule immediately on the question of whether there is a *prima facie* case", given that "it is improper for the judge to reserve his or her decision and put the accused to his or her election as to whether the accused intends to call evidence".<sup>100</sup>

<sup>91</sup> [Decision-1931](#); [Urgent-Defence-Request-1937](#).

<sup>92</sup> [T-209](#),4:6-10.

<sup>93</sup> [T-209](#),8:16-20,9:2-11:20.

<sup>94</sup> [Statute](#), article 67(1)(a) and (g).

<sup>95</sup> [ICTY Rules](#), [ICTR Rules](#), rule 98bis.

<sup>96</sup> [Ruto-Sang-Decision-2027](#).

<sup>97</sup> [Gbagbo-Prosecution-Notice-of-Appeal-1270](#).

<sup>98</sup> The [ICTY Rules](#) required the determination of the question "[a]t the close of the Prosecutor's case"; [ICTY Rules](#), rule 98bis; See also [ICTR Rules](#), rule 98bis.

<sup>99</sup> [Ruto-Sang-Decision-1334](#), para.12, citing to [ICTY-Milosević-Decision-Motion-Judgment-Acquittal](#), para.11 (emphasis added); [ICTY-Strugar-Decision-Motion-Judgment-Acquittal](#), para.13. See also [Ruto-Sang-Decision-1334](#), para.23.

<sup>100</sup> [R. v. Seamans](#). See also [R. v. Prasad](#), [Zaneti v. Hill](#), p.444; [DPP v. McManus](#), [Criminal Procedure Act, South Africa](#), section 174.

45. In requiring Mr. Ntaganda to start presenting his case while the question of sufficiency of evidence was still pending, the Chamber compelled an accused to meet a case which may not have been established, and of which he was not fully informed. As explained by the Chief Justice of Canada, “[p]erhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a ‘case to meet’, an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.”<sup>101</sup>

46. Presenting a defence case entails a degree of risk. Any evidence so presented may be used against an accused “much in the same way that the evidence called by the Prosecution may be used to undermine their case.”<sup>102</sup> The choice to relinquish the right to silence must be an informed choice, having had access to legal advice, as part of an overall case strategy, and in full recognition of the risk and benefits of its exercise. This cannot be done when the charges could still change. That the Appeals Chamber later denied the request for suspension of the trial did not justify the Chamber’s decision to proceed; it was dismissed on the basis that it could not be attained through the suspension of the Impugned Decision, and not on its merits.<sup>103</sup>

47. The prejudice suffered is identifiable and concrete; the Chamber relied on Mr. Ntaganda’s testimony in relation to the challenged charges, given prior to the Appeals Chamber’s decision, to make adverse factual findings. The only proper remedy is a reversal of these findings, and the convictions that rest thereon.<sup>104</sup>

#### **IV. Violation of Mr. Ntaganda’s right to a fair hearing**

48. Throughout the proceedings, the Chamber erred by systematically prioritising the expeditious conduct of the proceedings at the expense of fairness. While trial management falls within the discretion of the Trial Chamber, article 64(2) obliges the Chamber to ensure that the trial is fair and expeditious and is conducted with full respect of the rights of the

<sup>101</sup> [R. v. P. \(M.B.\)](#), para.36.

<sup>102</sup> [Ruto-Sang-Decision-1334](#), para.11.

<sup>103</sup> [Decision-1968](#), para.9.

<sup>104</sup> [TJ](#), para.329, fns.879-888,882,884-885; para.551, fn.1672; para.554, fns.1684-1685,1688-1689; para.555, fn.1690; para.564, fns.1715,1720; para.565, fns.1723,1725; para.638, fn.2035; para.647, fns.2062,2065; para.648, fns.2066-2067; para.649, fns.2070,2073-2074; para.650, fn.2077; para.651, fns.2080-2081.

accused. In carrying out this obligation, the Chamber “thus has to undertake a judicious balancing of all of these competing interests.”<sup>105</sup> The Appeals Chamber has held that the question of whether an accused’s rights have been violated “depends on how the Trial Chamber weighed these factors in arriving at its conclusions”. This turns on “the specific facts and circumstances of the case”.<sup>106</sup> In this case, 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. In doing so, it abused its discretion warranting the intervention of the Appeals Chamber.<sup>107</sup>

49. In September 2014, newly assigned counsel indicated that, in light of the current state of Prosecution disclosure, he could be ready to begin trial in June 2015, on the basis that the Prosecution confirmed its list of witnesses; fully complied with disclosure obligations in a timely manner; and submitted its pre-trial brief two months in advance of trial.<sup>108</sup> On this basis, the Chamber scheduled the trial to start on 2 June 2015.<sup>109</sup>

50. On 2 April 2015, the Defence submitted a request for postponement of the trial until 2 November 2015.<sup>110</sup> On 22 April 2015 the Chamber rejected the Defence request, despite *inter alia*, the addition of 29 new Prosecution witnesses on 15 January (including so-called insiders); a three-fold increase in Prosecution disclosure in January 2015; the Prosecution failing to meet its disclosure obligations in a timely manner; and investigation difficulties encountered by the Defence. The Chamber postponed the trial for a limited period (until 7 July), mainly to accommodate the Registry’s own logistical difficulties.<sup>111</sup> In these circumstances, the rejection of the Defence request was so unreasonable as to constitute an abuse of its discretion, given that it violated Mr. Ntaganda’s right to adequate time and facilities to prepare his Defence, and failed to take into account relevant considerations. The Chamber’s error is compounded by its rejection of the Defence request for leave to appeal, although the criteria in article 82(1)(d) were met.<sup>112</sup>

<sup>105</sup> [Katanga-Judgment-2259](#), para.33.

<sup>106</sup> *Ibid.*

<sup>107</sup> [Katanga-Judgment-2259](#), paras.33-34. See also [ICTY-Krajišnik-AJ](#), para.81.

<sup>108</sup> [T-13](#),6:13-7:6,15:1-19:19,37:4-38:11,56:1-22.

<sup>109</sup> [Order-382](#).

<sup>110</sup> [Defence-Request-541](#).

<sup>111</sup> [T-19](#),3:4-8:4.

<sup>112</sup> [Decision-604](#).

51. On 23 June 2015 the Chamber suspended a Defence investigator<sup>113</sup> following an *ex parte* Prosecution request,<sup>114</sup> based on allegations [REDACTED],<sup>115</sup> and [REDACTED]. Intense litigation ensued<sup>116</sup> leading to the Chamber's decision permanently [REDACTED].<sup>117</sup> Driven by an undue concern for the existing trial calendar, the Chamber declined to address Defence concerns regarding the impact of the allegations on the integrity of its investigations to date [REDACTED].<sup>118</sup> In doing so, the Chamber erred in failing to take into account relevant factors. The Chamber was required to address this question before the start of trial, as is the practice before other international courts.<sup>119</sup>

52. The Defence was also left without the ability to investigate. The Chamber denied a Defence request<sup>120</sup> to adjourn the trial until *inter alia* either the Defence investigators were absolved or new investigators were in place. Allowing the trial to begin in these circumstances was manifestly unreasonable, and a failure to properly balance competing interests. The Chamber postponed the trial until 2 September 2015 to allow the Defence "to address certain issues".<sup>121</sup> Such a limited extension was of no meaningful use. At a pre-trial press conference on 1 September, the Defence was candid that the insufficient time given by the Chamber had hampered its preparations.<sup>122</sup> The Defence had no choice but to cross-examine Prosecution witnesses without being able to investigate their allegations, or verify

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<sup>113</sup> [Order-667](#).

<sup>114</sup> [Prosecution-Request-658](#).

<sup>115</sup> [P-0190:T-98](#),6:5-13; [Prosecution-Request-658-Anx2](#), paras.10-11; [Prosecution-Request-658-Anx5](#), 11:306-329.

<sup>116</sup> [Prosecution-Request-658](#), [Order-667](#), [Defence-Notice-673](#), [Defence-Request-691](#), [T-21](#), [Prosecution-Request-705](#), [Defence-Request-LtR-711](#), [Defence-Reply-718](#), [Defence-Notice-717](#), [Decision-731](#), [Defence-Request-LtA-734](#), [Prosecution-Response-746](#), [Decision-761](#), [Defence-Request-737](#), [Prosecution-Response-744](#), [Decision-754](#), [Defence-Request-755](#), [Defence-Response-767](#), [Defence-Notice-773](#), [Decision-777](#), [Expert-Report-798](#), [Defence-Notice-799](#), [Defence-Notice-807](#), [Defence-Notice-813](#), [Defence-Notice-987](#), [Defence-Notice-1081](#).

<sup>117</sup> [Decision-777](#).

<sup>118</sup> [Decision-777](#), [Defence-Notice-799](#), [Defence-Notice-807](#), [Defence-Notice-813](#), [Defence-Notice-987](#), [Defence-Notice-1081](#).

<sup>119</sup> [ICTR-Nyiramasuhuko-Decision](#), p.3360 and paras.2-9: The Prosecution filed an urgent motion for an investigation of contempt on 14 June 2001. Defence responses were filed on 20 June 2001, a hearing was held on 25 June 2001, with a decision on 10 July 2001; [ICTY-Simić-Decision](#), paras.3-10: The Prosecution became aware of alleged interference on the part of the accused and his counsel in May 1999. The Prosecution informed the Court in an *ex parte* hearing on 8 June 1999, following which the Court convened an *inter partes* hearing the next day and suspended the proceedings on the merits. The respondents and the Prosecution filed submissions on 21 July 1999 and hearings were held in September and October 1999; [ICTY-Lukić-TJ](#), paras.21,1164: The Chamber twice ordered the Prosecution to investigate allegations of possible contempt on 28 August 2008 and 10 February 2009. The parties were granted permission to submit evidence and the Chamber dismissed the Prosecution motions on 6 October 2008 and 13 March 2009, within a one-month period.

<sup>120</sup> [Defence-Request-677](#).

<sup>121</sup> [T-22](#),3:24-5:20.

<sup>122</sup> [Ntaganda Case: Press Conference](#), 1 September 2015, at 51.02-51.33.

issues raised by their testimony. The Chamber's error is compounded by its rejection of the Defence request for leave to appeal, although the criteria in article 82(1)(d) had been met.<sup>123</sup>

53. The Chamber's response to Prosecution allegations of witness interference further impeded Defence preparedness for trial and the fairness of the proceedings. The allegations, initially submitted in August 2014, gave rise to 44 filings in the period before September 2015.<sup>124</sup> This litigation was time-consuming and voluminous. Legal aid is tailored to allow an accused to prepare to meet the charges in a case. It does not include resources to respond to voluminous ancillary pre-trial litigation. As such, every hour spent litigating these issues necessarily took time and resources away from the Defence trial preparations. More harmful, however, was that the Chamber took the Prosecution allegations at face value. Without hearing from any witnesses involved in the non-privileged telephone conversations, the Chamber found reasonable grounds to believe that the accused intended or was involved in a scheme to interfere with witnesses.<sup>125</sup> This allowed the Chamber to dispose of the issue quickly by imposing permanent restrictions on the Accused, without altering its trial start-date. However, in doing so, the Chamber failed to invest the necessary time to verify the reliability of the allegations and statements submitted by the Prosecution, and properly adjudicate the issue.<sup>126</sup>

54. The unfairness arising from the Chamber's prioritisation of its schedule manifested in three ways. *First*, while the Defence filed submissions, the allegations were not litigated in the proper sense. Mr. Ntaganda was not given an opportunity to challenge these adverse allegations, suggestive of a consciousness of guilt or at least of bad character, raised by Prosecution witnesses who later testified. Allowing the trial to begin in these unfair circumstances, and continue under this ever-present cloud, was an error. *Second*, once the trial began, the Prosecution regurgitated the Chamber's far-reaching and adverse findings endlessly, including in all of its requests for protective measures,<sup>127</sup> without the Chamber

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<sup>123</sup> [Defence-Request-709](#).

<sup>124</sup> See Procedural Background in [Decision-785](#), paras.1-22 and [Decision-786](#).

<sup>125</sup> [Decision-410](#), [Decision-459](#), [Order-508](#), [Decision-785](#).

<sup>126</sup> [Decision-785](#).

<sup>127</sup> [Prosecution-Request-609](#), [Prosecution-Request-782](#), [Prosecution-Request-843](#), [Prosecution-Request-883](#), [Prosecution-Request-899](#), [Prosecution-Request-900](#), [Prosecution-Request-913](#), [Prosecution-Request-973](#), [Prosecution-Request-978](#), [Prosecution-Request-1066](#), [Prosecution-Request-1071](#), [Prosecution-Request-1074](#), [Prosecution-Request-1196](#), [Prosecution-Request-1212](#), [Prosecution-Request-1218](#), [Prosecution-Request-1224](#), [Prosecution-Request-1310](#), [Prosecution-Request-1323](#), [Prosecution-Request-1332](#), [Prosecution-Request-1336](#), [Prosecution-Request-1349](#), [Prosecution-Request-1353](#), [Prosecution-Request-1362](#), [Prosecution-Request-1383](#), [Prosecution-Request-1385](#), [Prosecution-Request-1475](#), [Prosecution-Request-1500](#), [Prosecution-Request-1576](#), [Prosecution-Request-1579](#), [Prosecution-Request-1652](#), [Prosecution-Request-1686](#), [Prosecution-Request-1756](#).

even hinting that this was inappropriate. In reality, the Prosecution was handed a *carte blanche* to repeatedly and continually submit that the accused was of bad character and had tried to interfere with witnesses, which would necessarily have had an impact on even the most professional of Judges. *Third*, the Chamber's failure to properly adjudicate this issue in pre-trial resulted in protracted and voluminous litigation during the trial. More than 66 filings were filed on this question between September 2015 and the end of the evidentiary phase. This impeded the ability of the Defence to challenge the Prosecution's case and to present its own. Prolonged ancillary litigation is, in fact, the perfect means of undermining Defence preparedness, and the protections afforded in article 67(1)(b).

55. The Chamber's prioritisation of the pace of the proceedings at the expense of fairness continued during trial. As the third evidentiary block began, during which six Prosecution witnesses were scheduled to testify,<sup>128</sup> the Defence associate counsel was unable to finish the cross-examination of P-0790 for [REDACTED].<sup>129</sup> The Chamber ordered lead counsel to take over, which was not unexpected.<sup>130</sup> However, when informed that the absence of the associate counsel on [REDACTED] would be long-term, the Chamber rejected a Defence request to modify the schedule of witnesses to allow lead counsel, now responsible for examining all six witnesses, to prepare.<sup>131</sup> In doing so, it failed to judiciously balance the competing interests at play, and gave unwarranted precedence to the progress of the trial at all costs. The Chamber further erred by rejecting a Defence request for reconsideration of its decision despite the new arguments raised therein.<sup>132</sup>

56. Further, as the Chamber was adjudicating these requests, lead counsel himself fell ill,<sup>133</sup> and proceedings were interrupted for two days, as he sought medical attention at the nearby hospital.<sup>134</sup> As a result, the Defence did not cross-examine witness P-0290, given that it was impossible to prepare adequately, and a related potential Defence witness had died. The Defence reserved the right to recall P-0290 for cross-examination at the end of the Prosecution's case.<sup>135</sup> The Chamber refused this request,<sup>136</sup> and then relied on his testimony to

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<sup>128</sup> P-0790, P-0017, P-0290, P-0800, P-0963, P-0055.

<sup>129</sup> T-55,3:4-18.

<sup>130</sup> T-55.

<sup>131</sup> Defence-Request-1102, Decision 1115.

<sup>132</sup> Defence-Request-1122; Decision-1143.

<sup>133</sup> T-64.

<sup>134</sup> T-65,3:19-25.

<sup>135</sup> Oral decision, T-65,2:22-7:3.

<sup>136</sup> Defence-Request-1751, Decision-1791.

draw adverse inferences against the accused.<sup>137</sup> In doing so, the Chamber again exercised its discretion incorrectly, and compounded the unfairness of the proceedings.<sup>138</sup>

57. In keeping its foot firmly on the accelerator, regardless of legitimate Defence pleas for assistance and delay, the Chamber committed the errors identified above. The Defence repeatedly sought appellate review, filing 21 requests for leave to appeal these and other complex and often novel legal issues. In sealing the trial proceedings from outside scrutiny, the Chamber denied all but three requests.<sup>139</sup> As such, the issues identified herein are coming before the Appeals Chamber for the first time, with Mr. Ntaganda submitting that the Chamber wrongly exercised its discretion in making repeated decisions which violated his right to a fair trial; his right to have adequate time and facilities to prepare his defence and the right to full answer and defence. These errors can only be remedied by ordering a new trial.

#### **GROUND 5: NO ATTACK DIRECTED AGAINST A CIVILIAN POPULATION<sup>140</sup>**

58. The Chamber erred in law and in fact in finding that the multiple commission of acts referred to in article 7(1) by the UPC/FPLC “between the assault on Bunia in August 2002 and the assault on the same city in May 2003,”<sup>141</sup> was an “attack [...] directed against a civilian population”.<sup>142</sup> The Chamber failed to find that a civilian population was the primary object 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 UPC/FPLC military operations; and failed to consider relevant evidence going beyond the allegations of the Prosecution. Most importantly, the Chamber erred in finding that orders were issued to attack civilians.

##### **I. Failure to find that a civilian population was the primary object of the attack**

<sup>137</sup> [TJ](#), para.146; para.343, fn.939; para.565, fn.1725.

<sup>138</sup> Notably, following the testimony of Mr. Ntaganda during which he explained that [REDACTED], the Chamber indicated that it intended to recall P-0290, *see* email correspondence from the Trial Chamber VI communications to the Parties and participants, 10 November 2017, at 15:16. No reasons were provided by the Chamber. The Defence opposed P-0290’s recall at this stage of the proceedings on the basis of fairness, *see* [Defence-Request-2120](#), [OTP-Response-2123](#), [T-252](#), 23-30. The Chamber finally decided not to recall P-0290 [Decision-2191](#).

<sup>139</sup> [Decision-1039](#), [Decision-1513](#), [T-209](#), 24:23-25, 26:11-13.

<sup>140</sup> Ground 4 is addressed after Ground 5 to reflect the order in which the elements were addressed in the Judgment.

<sup>141</sup> [TJ](#), para.690.

<sup>142</sup> [TJ](#), para.672.

59. Article 7 requires that the civilian population be the primary, as opposed to the incidental, object of the attack.<sup>143</sup> The Chamber failed to make this necessary determination, finding simply that the UPC/FPLC directed an attack against a civilian population between August 2002 and May 2003.<sup>144</sup> This basic failure invalidates all findings of guilt entered pursuant to Counts 1, 4, 7, 10 and 12.

## **II. The Chamber erred by limiting its analysis of the evidence to six military operations**

60. In establishing that the UPC/FPLC directed an attack against a civilian population between the assault on Bunia in August 2002 and the assault on the same city in May 2003, the Chamber limited its inquiry to the First<sup>145</sup> and the Second<sup>146</sup> Operations as well as more generally to four so-called *assaults*: Songolo, Zumbe and Komanda before the First Operation and Bunia after the Second operation.<sup>147</sup> That was an error. Article 7 is meant to cover a series or overall flow of events<sup>148</sup> and the Chamber erred in finding that “the fact that the UPC/FPLC may have also conducted operations that were solely serving a military purpose and during which civilians were not attacked [...] [does not impact] the Chamber’s related legal findings”.<sup>149</sup> The Chamber’s error is compounded by its own finding “[w]hen crimes against humanity are alleged to have been committed during an armed conflict, as in the present case” the Chamber may “consider whether a military operation, alleged to form part of the alleged attack against a civilian population, complied with the requirements of IHL.”<sup>150</sup> The Chamber was thus required to direct its inquiry to all UPC/FPLC military operations during the relevant period.

## **III. Failure to accord sufficient weight to the legitimate purpose of the six military operations it considered**

61. The Chamber erred by failing to attach sufficient weight to the legitimate aim and purpose of the six military operations it considered. The Chamber’s own findings as well as

<sup>143</sup> [TJ](#), para.668; [Katanga-Trial-Judgment-3436](#), para.1104; [ICTY-Kunarac-AJ](#), para.90; [ICTY-Blaškić-AJ](#), para.106; [SCSL-Fofana-AJ](#), para.299.

<sup>144</sup> [TJ](#), paras.670-672.

<sup>145</sup> [TJ](#), para.664.

<sup>146</sup> [TJ](#), para.664.

<sup>147</sup> [TJ](#), para.665.

<sup>148</sup> [TJ](#), para.662.

<sup>149</sup> [TJ](#), para.665.

<sup>150</sup> [TJ](#), para.668.

the evidence regarding these operations show that civilians were *not* the UPC/FPLC's primary object and even less so a civilian population.

62. *First*, while the Chamber generally considered the context in which the operations in Songolo, Zumbe and Komanda unfolded<sup>151</sup> and adopted certain related findings, it failed to consider that the aim of these operations was to ensure that the APC and Lendu combattants would not be able to stage a counter-attack from these locations, thereby protecting the population of Bunia.<sup>152</sup>

63. In relation to Songolo, the Chamber failed to refer to its own findings that the UPC/FPLC's aim was to dislodge Lompondo and the APC to prevent them from re organizing such a short distance from Bunia.<sup>153</sup> While the Chamber found that civilians were killed during the search for survivors after this operation,<sup>154</sup> the Chamber erred by relying exclusively on the uncorroborated evidence of P-0888 – a witness who was the subject of serious credibility and reliability concerns<sup>155</sup> – over that of D-0017<sup>156</sup> and D-0300.<sup>157</sup> The Chamber also 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, let alone its primary objective, was other than the aforementioned stated military objective. The evidence available in this case does not support such a finding in respect of Songolo.<sup>158</sup>

64. Concerning Zumbe and Komanda, the Chamber failed to refer to its own findings regarding the context in which these military operations unfolded. The aim of the Zumbe operation was to get back cattle stolen by Lendu combatants from Zumbe.<sup>159</sup> The Chamber also failed to consider the evidence of Mr. Ntaganda who explained the importance of Zumbe as a potential staging area to launch a counter-attack on Bunia.<sup>160</sup> The aim of the Komanda operation was to prevent the APC from capturing the town, which changed hands a few times during the relevant period, and using it to stage an assault on Bunia and its population.<sup>161</sup> The

<sup>151</sup> [TJ](#), paras.438,451,455,459-462.

<sup>152</sup> [DCB](#), para.197 referring to **D-0300:T-214**,75:9-11,84:25-85:7 concerning map [DRC-REG-0001-0063](#) (“we did this in order to protect Bunia and [...] to protect the inhabitants of that city and those who lived in the area.”)

<sup>153</sup> [TJ](#), para.451.

<sup>154</sup> [TJ](#), para.454.

<sup>155</sup> [TJ](#), paras.196-199,137 (“the Chamber cannot exclude that P-0190 and P-0888 discussed their respective involvement with the Court, including certain aspects of their testimony, and that those aspects may be affected by their potential interaction.”)

<sup>156</sup> [DCB](#), para.200 referring to **D-0017:T-252**,85:2-7; *See* Ground 7, paras.142-147.

<sup>157</sup> **D-0300:T-215**,27:9-18.

<sup>158</sup> [TJ](#), para.454.

<sup>159</sup> [TJ](#), para.456.

<sup>160</sup> **D-0300: T-215**,4:2-6; [DCB](#), para.204.

<sup>161</sup> [DCB](#), paras.197-198 referring to **D-0300:T-214**,75:9-11,84:25-85:7; [DRC-REG-0001-0063](#).

Chamber erred by relying on the uncorroborated testimony of P-0907 to find that crimes were committed in the aftermath of these operations.<sup>162</sup> The Chamber also erred by entirely rejecting the evidence of D-0017 who participated in both operations and provided a narrative rich in detail, including being personally wounded in Komanda.<sup>163</sup> Notwithstanding these errors, the limited evidence taken at its highest concerning these operations does not support an inference that a civilian population was the UPC/FPLC's objective, let alone its primary objective.

65. *Second*, regarding the First Operation, the Chamber itself noted several factors which underlined the military importance of the locations which were covered by the operation; specifically, that "members of the APC as well as Lendu fighters controlled Mongbwalu and Sayo, with Sayo being the headquarters of the Lendu fighters";<sup>164</sup> that "Mongbwalu [...] had an airstrip, which was of importance to the UPC/FPLC";<sup>165</sup> and that Lendu fighters occupied Kilo where they had a camp.<sup>166</sup> Notably, the Chamber ignored the wealth of evidence regarding the harsh living conditions imposed on the inhabitants of Mongbwalu by Lendu combatants, more particularly the practice of cannibalism, imposition of work obligations and discriminatory measures imposed on women.<sup>167</sup> More importantly, in assessing whether incidents of criminal conduct committed during the First Operation indicated that civilians were the objective, the Chamber failed to give any consideration to the legitimacy of the military operation directed at lawful military objectives. In addition, the Chamber erred in finding that orders were issued to target everyone without distinction,<sup>168</sup> and that crimes were committed during the First Operation.<sup>169</sup> Given these errors, no reasonable trier of fact could have found that a civilian population was the primary object of the First Operation.

66. *Third*, the Chamber's findings regarding the Second Operation again underline that it was directed at military objectives and that the UPC/FPLC's aim was legitimate. The Chamber found that the aim of the UPC/FPLC was to open the main road between Bunia and Mongbwalu<sup>170</sup> and to get rid of Lendu fighters and APC present in the area.<sup>171</sup> Notably, no orders or plans to commit crimes or attack civilians were found to have been discussed or

<sup>162</sup> [TJ](#), para.457.

<sup>163</sup> [DCB](#), para.204 referring to [D-0017:T-253](#),18:3-24,19:3-12;[T-254](#),72:14-20.

<sup>164</sup> [TJ](#), para.471. [P-0963:T-78](#),70:23-25; [P-0800:T-68](#),16:25-17:3.

<sup>165</sup> [TJ](#), para.441.

<sup>166</sup> [TJ](#), para.537.

<sup>167</sup> [DCB](#), paras.240-241.

<sup>168</sup> [TJ](#), para.671 and *see below* paras.75-103.

<sup>169</sup> [TJ](#), paras.467 et seq.,670; *See* Ground 8.

<sup>170</sup> [TJ](#), paras.442,583.

<sup>171</sup> [TJ](#), paras.549,558,568,571,572,584.

issued at two meetings linked to the organisation of the Second Operation.<sup>172</sup> The Chamber failed to reconcile these findings with the article 7 requirement that civilians must be the **primary** object of the attack. The Chamber also ignored that opening the main road followed the opening of the secondary road from Kilo to Nyangaray to Bunia, as well as peace negotiations with Lendu civilians and notables in Ngongo, which led to the opening of another secondary road from Lipri to Bunia for the benefit of the civilian population without discrimination.<sup>173</sup>

67. *Fourth*, in relation to the operation in Bunia in May 2003, the Chamber failed to consider its own findings on the operation's context, *i.e.* that it resulted from the UPDF withdrawal from Bunia, the mass exodus of Bunia inhabitants that followed and more importantly, the Lendu fighters making use of the security vacuum to kill and loot.<sup>174</sup> The Chamber also ignored evidence that the fighting involved UPC/FPLC against Lendu combatants and that the aim of the operation was to put an end to the massive killing, looting and destruction being committed by Lendu fighters in Bunia since the UPC/FPLC had left.<sup>175</sup>

68. In short, the Chamber erred by giving insufficient weight to the legitimate purpose of the above UPC/FPLC military operations. The Chamber also failed to address its own inconsistent findings on the issue and/or failed to issue a reasoned decision setting out why it failed to find that the primary objective of these operations was a civilian population.

#### **IV. Failure to consider relevant evidence going beyond the allegations of the Prosecution**

69. In addition to erroneously limiting its analysis to the above six operations, the Chamber erred by declining to make factual findings going beyond the Prosecution's allegations.<sup>176</sup> In doing so, the Chamber erred by failing to consider relevant evidence regarding other UPC/FPLC operations, which shows that the Lendu civilian population was not their primary object. The Chamber also erred in finding that the Defence had not referred

<sup>172</sup> [TJ](#), paras.550-553.

<sup>173</sup> [DCB](#), paras.89,90 referring *inter alia* to **P-0105**:[T-133](#),58:5-14,59:21-62:8; **P-0005**:[T-189](#),13:25-14:8; [DRC-OTP-0127-0058](#), at 17:00-17:43,23:44-25:48 (Transl.[DRC-OTP-2102-3675](#), p.3689, ll.320-328; p.3696, l.490 to p.3700, l.596); **D-0300**:[T-219](#),12:4-16:19.

<sup>174</sup> [TJ](#), para.654.

<sup>175</sup> [DCB](#), paras.215-218 referring *inter alia* to [DRC-OTP-2067-1989](#), para.1; [DRC-OTP-0126-0073](#); [DRC-OTP-2078-0393](#), para.15; [DRC-OTP-2078-0229](#); [DRC-OTP-2078-0274](#); [DRC-OTP-2078-0328](#); **D-0300**:[T-221](#),37:5-8.

<sup>176</sup> [TJ](#), para.665.

to specific events and military operations,<sup>177</sup> during which no attacks were directed at civilians. The Defence did.<sup>178</sup>

70. Evidence was led but ignored that, before the First Operation: an operation was conducted by UPC/FPLC forces in Loga where the civilian population was being attacked by Lendu fighters;<sup>179</sup> Mr. Ntaganda personally led an operation to re-occupy Komanda in August 2002 during which soldiers who looted were publicly punished and the goods burned;<sup>180</sup> and operations were conducted by UPC/FPLC forces in September and October 2002 in Chai/Marabo and in Kunda, the aim of which was to prevent the APC forces from reaching Bunia.<sup>181</sup> Significantly, there is no evidence of crimes being committed by UPC/FPLC forces during any of these operations, let alone against civilians. Further, the Chamber failed to refer to its own finding that it was unable to conclude that crimes were committed by emerging UPC/FPLC forces during the events in Bunia from 6 to 9 August 2002.<sup>182</sup>

71. Following the First Operation, the UPC/FPLC conducted numerous lawful military operations on three fronts, namely: between Mongbwalu and Mahagi involving mainly 505 Bde;<sup>183</sup> on the Mongbwalu-Kilo-Nyangaray-Bunia axis involving mostly 409 Bde;<sup>184</sup> as well as on the Bunia-Komanda-Beni axis involving mainly 201 Bde in Komanda and 9 Bn in Boga.<sup>185</sup> The Chamber also ignored the prevailing situation in Mongbwalu involving 401 Bde commanded by Emmanuel Ndugutse before he was appointed DComd of the NE Sector in Aru.<sup>186</sup>

72. The Chamber erred by ignoring probative evidence of these lawful UPC/FPLC operations and activities contained in the logbooks – containing transparent and

<sup>177</sup> [TJ](#), para.665 (“The Defence does not refer to specific events”).

<sup>178</sup> [DCB](#), paras.193-218.

<sup>179</sup> [DCB](#), para.193 referring to [D-0017:T-252](#), 71:10-73:20.

<sup>180</sup> [DCB](#), para.198 referring to [D-0300:T-215](#), 7-9; [D-0017:T-252](#), 76:13-14.

<sup>181</sup> [DCB](#), para.204 referring to [D-0300:T-215](#), 74:22-76:2, 79:19 et seq.; [D-0300:T-215](#), 79:22-81:22.

<sup>182</sup> [TJ](#), paras.443-449, in particular fn.1263.

<sup>183</sup> See *inter alia*: [DRC-OTP-0017-0033](#), pp.0064 (second), 0065 (first), 0073 (second), 0074 (second), 0076, 0082-0083, 0086 (third), 0093 (third), 0094, 0107 (second), 0104 (second) (Transl.[DRC-OTP-2102-3854](#), pp.3886,3887,3895,3896,3898,3904-3905,3908,3915,3916,3929,3966).

<sup>184</sup> [DRC-OTP-0017-0033](#), p.0038 (third), 0041 (first), 0045 (second), 0072 (third), 0160 (second) (Transl.[DRC-OTP-2102-3854](#), pp.3860,3863,3867,3894,3982).

<sup>185</sup> [DRC-OTP-0017-0033](#), p.0111 (second), 0121 (second), 0123 (second), 0124 (second), 0136 (first), 0147 (second), 0171 (second), 0172 (first), 0158 (second), 0196 (third), 0189 (second and third), 0193 (second), 0194 (second), 0195(second) (Transl.[DRC-OTP-2102-3854](#), p.3933,3943,3945,3946,3958,3969,3993,3994,3980,4011,4015,4016,4017,4018).

<sup>186</sup> [DRC-OTP-0017-0033](#), p.0038 (third), 0039 (second), 0053 (second), 0054 (second), 0057 (first), 0058 (first), 0063 (first), 0067 (third), 0069 (third), 0097 (first and second), 0098 (first and second), 0101 (second and third), 0113 (first), 0133 (second), 0140 (first) (Transl.[DRC-OTP-2102-3854](#), pp.3860,3861,3875,3876,3879,3880,3885,3889,3891, 3919,3920,3923,3935,3955,3962).

contemporaneous operational information available only to senior commanders – which provide an accurate overview of UPC/FPLC daily operations and activities. The logbooks also contain contemporaneous evidence of multiple measures taken within the UPC/FPLC to prevent or repress the commission of crimes.<sup>187</sup> For example, no less than four messages depict a situation when, following the killing of a Lendu civilian by a UPC/FPLC member in Mongbwalu, the punishment of death by firing squad, in public, was implemented by Manu, Comd of 401 Bde.<sup>188</sup>

73. In relation to the period following the Second Operation, evidence was led (but ignored) that around 6 March 2003 onwards, there was a two-week period of heavy fighting first between the UPC/FPLC and UPDF forces / APC / and Lendu fighters,<sup>189</sup> resulting in the UPC/FPLC being chased from Bunia to Mamedi and Goma.<sup>190</sup> While the Chamber made some findings in relation to these events, including in respect of crimes committed by Lendu combatants,<sup>191</sup> it failed to consider that no crimes were committed by the UPC/FPLC during this period, let alone against civilians. Moreover, the reason the UPC/FPLC attacked UPDF positions at the time was precisely to limit potential casualties in Bunia.<sup>192</sup>

74. Based on these events, no reasonable trier of fact could have reached the conclusion that a civilian population was the primary object of UPC/FPLC military operations during the period from August 2002 to May 2003. By declining to make factual findings on these lawful UPC/FPLC operations and/or explaining why such operations conducted during the same period did not impact its findings, the Chamber erred, warranting the reversal of the findings regarding the contextual elements of article 7.

## **V. No orders to attack civilians were issued**

75. To find that the UPC/FPLC's course of conduct between August 2002 and May 2003 was directed against a civilian population, the Chamber also relied on seven orders/instructions.<sup>193</sup> Three of these concern the expression *kupiga na kuchaji*.<sup>194</sup> Therefore,

<sup>187</sup> [DCB](#), para.209 referring to [DRC-OTP-0017-0033](#).

<sup>188</sup> [DRC-OTP-0017-0033](#), pp.0097 (second), 0098 (both), 0099 (first), (Transl.[DRC-OTP-2102-3854](#), pp.3919,3920,3921); **D-0300:T-222**,61:2-65:12. See also [DCB](#), paras.175,290,291,685.

<sup>189</sup> [DCB](#), paras.214-216.

<sup>190</sup> [DCB](#), para.216; [TJ](#), paras.651-653.

<sup>191</sup> [TJ](#), para.654.

<sup>192</sup> [TJ](#), paras.647-652; [DCB](#), para.215 referring to **D-0300:T-221**,28-1,37:5-8; [DRC-OTP-2067-1989](#), para.1; [DRC-OTP-2067-1994](#), para.1.

<sup>193</sup> [TJ](#), para.671. The seven orders are found at [TJ](#), paras.484,488,493,508,558,560 and 561.

<sup>194</sup> [TJ](#), paras.484,488,561.

a necessary starting point is a proper understanding of this phrase and the errors made by the Chamber in relation to its interpretation.

**A. *Kupiga na kuchaji* was not an instruction to attack all Lendu**

76. Given the centrality of the phrase '*kupiga na kuchaji*' not only to the establishment of the contextual elements of article 7,<sup>195</sup> but also to many other findings including Mr. Ntaganda's convictions for war crimes,<sup>196</sup> it might be presumed that its meaning was unequivocal - a phrase understood contemporaneously by all relevant players in the same way. However, this was not the case. The range of understandings across witnesses demonstrates that the phrase's meaning was not static. As P-0017 said: "all I can give you is [...] my interpretation. And each individual must have interpreted that according to their understanding."<sup>197</sup> As such, determining beyond a reasonable doubt what the phrase meant in 2002-2003 to all UPC/FPLC members holding different positions was an extremely difficult, if not impossible task.

77. The Chamber found, however, that it could do it. By relying on two witnesses who, in the Chamber's view, testified that *kupiga na kuchaji* was an instruction to get rid of all Lendu, the Chamber held that this is what the phrase meant to all UPC/FPLC soldiers at the time. This was an error. No reasonable Trial Chamber, having considered the entirety of the evidence, could have concluded that no other meaning was reasonable and possible.

78. First, 11 witnesses were asked what was meant by *kupiga na kuchaji*. All 11 testified that the phrase's two parts '*kupiga*' and '*na kuchaji*' referred respectively to the general ideas of "attack the enemy" and "take property".<sup>198</sup> Divergences arose as to whether taking property

<sup>195</sup> [TJ](#), paras.671,688.

<sup>196</sup> It is also relied on to: infer the existence of a common plan; find that the UPC/FPLC military leaders planned a military campaign including series of assaults involving the commission of crimes against the Lendu; find that Mr. Ntaganda devised the military tactic which allowed the UPC/FPLC to take over of Mongbwalu and the related First and Second Operations; find the UPC/FPLC troops intentionally attacked civilians as a war crime; find that the UPC/FPLC troops committed forcible transfer of a population as a crime against humanity; find that Mr. Ntaganda ordered the displacement of the civilian population as a war crime; find that the killing of the Abbé amounted to persecution as a crime against humanity ([TJ](#), paras.749,801,841,922,1057,1085-1086,1094,1099). It is also central to the finding that Mr. Ntaganda possessed the *mens rea* for each of the crimes charged ([TJ](#), paras.1181,1186).

<sup>197</sup> P-0017:T-58,55:12-13.

<sup>198</sup> D-0300:T-213,9:5-23: Q. Mr Ntaganda, do you know the expression "kupiga na kuchaji"? A. Yes. That's why I said to you that when the enemy flees, the second act is that the commanders are going to ask the troops, "Charge", tell the troops to charge; that is to say that the enemy has fled. And all the troops are going to shout, "Charge, charge" as they run behind the enemy. That's something that's done when you attack the enemy. Charge, what does that mean? That means that you take all the equipment that the enemy had when fleeing. That's what we call charge or chaji. Q. What do you mean by taking the equipment that the enemy had? A. Well, it means getting all the weapons that the enemy had because you had beaten the enemy. If you stay where you

meant seizing the military equipment of the enemy following their defeat,<sup>199</sup> or more generally referred to pillaging or looting property,<sup>200</sup> including of civilians.<sup>201</sup>

79. Mr. Ntaganda testified that *kupiga na kuchaji* meant to charge at the fleeing enemy after having beaten them, and to take their equipment.<sup>202</sup> P-0055, a senior military officer who was trained by and [REDACTED],<sup>203</sup> confirmed it was a “military expression” “**used in the army**” which meant “attack the enemy and then pillage by taking away his weapon and all his whatever he has, uniform, military attire, bayonets and whatever they possess, in fact meaning that the enemy should be disarmed.”<sup>204</sup> D-0038 confirmed this understanding.<sup>205</sup> For other

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are, you're going to keep them and you're going to reinforce your stocks; P-0010:T-47,14:16-21: A. "Kupiga na kuchaji" means the following: When you go into battle, you have to fight and loot, you have to attack and loot. And as you're attacking you loot as well. That's what it means, kupiga na kuchaji; P-0055:T-72,10:6-13: [...] this expression is used in the army, it means attack the army and after or as soon as you attack the enemy, you should dispossess the enemy of his weapon and his property. So it's a military expression. I don't know how to explain it, but it means attack and then -- attack the enemy and then pillage by taking away his weapon and all his whatever he has, uniform, military attire, bayonets and whatever they possess, in fact meaning that the enemy should be disarmed. It's a military expression; P-0016:DRC-OTP-2054-1625, pp.1650-1651: That phrase means to attack, strike the enemy, and plunder; P-0017:T-58,54:25: A. Kupiga is to defeat the enemy. Kuchaji is to loot or pillage; T-61,30:11-23: Q. I put it to you that the word "kupiga" means to strike or to attack; is that correct? A. Yes. Q. And would you agree that "na kuchaji" can mean to charge; is that correct? A. Yes, indeed... When I heard that expression and the way it was used, it alluded to pillaging.... but when I was in the UPC they used that expression to mean strike and pillage; P-0888:T-105,77:10-12: A. In Swahili they would say "piga na kuchaji". Q. And this -- A. "Piga" meant to fight and then to, "kuchaji" meant to loot.; P-0901:T-29,19:6-7: Q. What does this term mean? A. Kupiga means attack and the other word means loot; T-29,20:8-12: Q. What type of items would be captured by kupiga na kuchaji to your knowledge? A. In military jargon, kupiga na kuchaji means strike and plunder out on the battlefield, and you could even rifle through the corpses, the enemy corpses, to see what their possessions were. Here we are talking about ascertaining what is in the homes of the civilian population and looting; P-0963:T-78,70:16-17: Q. What did that mean, kupiga na kuchaji? A. It means fight and regain the place or the town and then pillage and loot; P-0768:T-33,64:23-65:10: A. Yes. It means when you're involved in an operation and you manage to drive out the enemy, all of the property that belonged to the enemy automatically belongs to you. That's how they used the term, but they also used it to attack civilians and loot the property that belonged to civilians; P-0907:T-90,8:7-11: During the first attack we were repelled and so we should do kupiga na kuchaji, that means each one can help himself, can serve himself. So many civilians came along with us because they knew that we would take advantage of this attack and loot; D-0038:T-249,18:22-20:9: When it comes to the expression kupiga na kuchaji, it is a strictly military term in Kiswahili. Kupiga na kuchaji means that when you attack an enemy camp you can take their weapons and their military equipment that you find at the camp with a view to weakening the enemy. That is the purpose. And so this is the expression we used, kupiga na kuchaji, you go to the enemy's camp and take away the enemy's weapons, all the enemy's weapons in order to weaken the enemy.

<sup>199</sup> D-0300:T-213,9:5-23; P-0055:T-72,10:6-13; D-0038:T-249,18:22-20:9.

<sup>200</sup> P-0010:T-47,14:16-21; P-0017:T-58,54:25; T-61,30:11-23; P-0888:T-105,77:10-12; P-0907:T-90,8:7-11; P-0963:T-78,70:16-17.

<sup>201</sup> P-0901:T-29,19:6-7; P-0768:T-33,64:23-65:10.

<sup>202</sup> D-0300:T-213,9:5-23.

<sup>203</sup> P-0055:T-70,26:6-19,34:8-15.

<sup>204</sup> P-0055:T-72,10:6-13.

<sup>205</sup> D-0038:T-249,18:22-20:9.

witnesses, *kupiga na kuchaji* extended to taking civilian property,<sup>206</sup> or meant variably to “loot” or “pillage” or “plunder”.<sup>207</sup>

80. Despite this general uniformity in linking the phrase to military combat and seizing property after defeating the enemy, two “key insider” witnesses were viewed as going further. According to the Chamber, P-0907 and P-0963 “explained that this order was understood to mean **also get rid of everyone** and everything, referring to all the Lendu”.<sup>208</sup> Relying on their testimony, the Chamber found that *kupiga na kuchaji* “was understood by the soldiers to mean **attacking all the Lendu, including civilians**.”<sup>209</sup> That was an error.

81. Given that most witnesses did not understand the expression in this way, the Chamber’s conclusion is remarkable. More remarkable, is that P-0907 and P-0963 **did not testify** that this phrase was understood by UPC/FPLC members to mean attacking all the Lendu. In the cited testimony, neither witness discussed the meaning of the phrase, let alone what it meant, **to other soldiers**. Moreover, when P-0907 and P-0963 provided the evidence referred to by the Chamber, both witnesses were being questioned more generally about instructions they received *vis-à-vis* the civilian population in relation to Mongbwalu. The Chamber erred by stretching their testimony to encompass the meaning of *kupiga na kuchaji* by stating that P-0907 and P-0963 were asked about instructions to attack civilians “in the context of a discussion on the use of the expression”.<sup>210</sup>

82. Nothing in their testimony supports a finding that *kupiga na kuchaji* was understood **by all soldiers** as an instruction to ‘attack all the Lendu’. The phrase *kupiga na kuchaji* is associated by both witnesses as being an instruction to pillage, **after which** the questioner then asks about instructions relating to civilians. If there was any doubt, recourse can be had to P-0963’s answer to a specific question as to the meaning of *kupiga na kuchaji*, to which he

<sup>206</sup> P-0901:T-29,19:6-7; P-0768:T-33,64:23-65:10.

<sup>207</sup> P-0010:T-47,14:16-21; P-0017:T-58,54:25;T-61,30:11-23; P-0888:T-105,77:10-12; P-0907:T-90,8:7-11; P-0963:T-78,70:16-17.

<sup>208</sup> TJ, para.415 (emphasis added). In fn.1188, the Chamber also cites “See also P-0768:T-33,64-65 (explaining that the expression ‘*kuchaji*’ was ‘also used to attack civilians’)”. The Chamber, notably, did not include P-0768 as one of the “key insiders, considered by the Chamber as fully credible and reliable” upon whom their finding relies. This may be because P-0768’s cited testimony is equivocal, and he firstly asserts that the phrase “*means when you’re involved in an operation and you manage to drive out the enemy, all of the property that belonged to the enemy automatically belongs to you*”. Nor does his testimony address how the phrase was understood among UPC/FPLC troops generally. Moreover, for the reasons set out in Ground 8, which are repeated and relied upon here, P-0768’s fabrication of his involvement in the First Operation undermines his credibility and makes him incapable of reliance by a reasonable Trial Chamber.

<sup>209</sup> TJ, para.415 (emphasis added).

<sup>210</sup> P-0963:T-78,72:25-73:9; P-0907:T-90,8:4-18.

replied: “[i]t means fight and regain the place or the town and then pillage and loot.”<sup>211</sup> The Chamber was wrong to circumvent this unambiguous testimony and, instead, try to link a later response about civilians to an earlier answer about *kupiga na kuchaji* in an attempt to expand its meaning.

83. *Second*, this finding is undermined by a more fundamental error. In his testimony about the “instructions” regarding civilians, P-0963 claimed they were issued by Mr. Ntaganda during a **meeting** held en route to Mongbwalu.<sup>212</sup> Two witnesses testified about a meeting during which “instructions” were given on their way to Mongwalu, P-0017 said it was in Lalu, in the absence of Mr. Ntaganda,<sup>213</sup> while P-0963 stated the instructions were issued in Mabanga by Mr. Ntaganda himself.<sup>214</sup> At trial, the Defence submitted that their testimonies were so divergent (including on central questions such as location, content and attendees), that they could not be viewed as corroborative and, more importantly, that P-0963 lied about having travelled from Mabanga to Mongbwalu to take part in the first operation.<sup>215</sup>

84. Against all odds, the Chamber merged the divergent testimonies of P-0963 and P-0017, incredibly finding that they attended the same meeting “in **or near** Mabanga,”<sup>216</sup> despite Lalu and Mabanga being many kilometres apart.<sup>217</sup> Critically, however, it found, on the basis of P-0017 and P-0963’s evidence, that it could “make no finding” regarding P-0963’s allegation that Mr. Ntaganda was there.<sup>218</sup> Considering the consistent testimony of P-0963 on this issue in direct and cross-examination,<sup>219</sup> the Chamber erred by holding that this critical inconsistency did not impact his overall reliability.<sup>220</sup>

85. The Chamber also performed an incomplete analysis of the similarities between the meetings attended by P-0017 and P-0963. The Chamber noted that P-0963 mentioned a person with the same name as P-0017 as having been present in the group that travelled to Mabanga.<sup>221</sup> The Chamber ignored, however, the testimony of P-0017 who did not identify P-

<sup>211</sup> **P-0963:T-78**,70:16-17 (Q. What did that mean, *kupiga na kuchaji*? A. It means fight and regain the place or the town and then pillage and loot.)

<sup>212</sup> **P-0963:T-78**,72:25-73:9,75:4-7.

<sup>213</sup> **P-0017:T-58**,51:1-11,53:21-54:11.

<sup>214</sup> **P-0963:T-78**,70:7-11.

<sup>215</sup> **DCB**, paras.347,348,593,624.

<sup>216</sup> **TJ**, para.488 (emphasis added).

<sup>217</sup> **DRC-REG-0001-0066; D-0300:T-217**,23:5-24:3.

<sup>218</sup> **TJ**, fn.1401.

<sup>219</sup> **P-0963:T-81**,89:17-21.

<sup>220</sup> **TJ**, fn.1401.

<sup>221</sup> **TJ**, fn.1401.

0963 as one of the persons he travelled with from Bunia to Mongbwalu;<sup>222</sup> identified all members of the Salumu Bde [REDACTED] he was with in Lalu, including [REDACTED] the section commander and others who were already there before he arrived, and did not include P-0963 as being one of them;<sup>223</sup> and recalled seeing P-0963 for the first time in the context of the Second Operation when the latter arrived along with reinforcements.<sup>224</sup>

86. The Chamber also failed to explain and/or give reasons as to why the following contradictions in P-0963's testimony did not impair his reliability on this issue:<sup>225</sup> (i) P-0963 claimed [REDACTED] section did not have a commander<sup>226</sup> and did not recall [REDACTED];<sup>227</sup> (ii) P-0963 had no knowledge of the exchange of ammunition between Salumu's brigade and Seyi's forces that P-0017 described in detail as having taken place in Lalu;<sup>228</sup> (iii) P-0963 testified that the [REDACTED] section travelled from Mabanga to Mongbwalu by vehicle,<sup>229</sup> with *inter alia* [REDACTED],<sup>230</sup> whereas P-0017<sup>231</sup> described the [REDACTED] section moving from Lalu to Mongbwaly by foot – as other witnesses did<sup>232</sup> - and not having [REDACTED];<sup>233</sup> and (iv) P-0963 claimed making only one stop in Mabanga on his way to Mongbwalu<sup>234</sup> contrary to P-0017 who testified spending one night in Mabanga before moving to Lalu and then to Mongbwalu.<sup>235</sup>

87. Significantly, the Chamber also failed to address the most important contradiction between the testimony of P-0963 and that of P-0017 concerning the instructions received, *i.e.* according to P-0017's version of what was said at the meeting, nobody suggested that civilians were to be attacked.<sup>236</sup> Presumably this is why P-0963's testimony needed to be kept alive. No reasonable Trial Chamber, having considered the totality of the evidence, could have found beyond reasonable doubt that P-0017 and P-0963 received instructions at the same meeting and that P-0963 was present when Salumu issued instructions prior to the fighting in

<sup>222</sup> P-0017:T-60,83:5-10,84:15-85:13;T-61,5:6-12.

<sup>223</sup> P-0017:T-61,23:5-25.

<sup>224</sup> P-0017:T-59,63:12-64:9.

<sup>225</sup> DCB, paras.347-346.

<sup>226</sup> P-0963:T-82,18:9-15,19:3-5.

<sup>227</sup> P-0963:T-78,68:3-19; P-0017:T-61,23:5-25.

<sup>228</sup> P-0963:T-82,24:10-14; DRC-D18-0001-5748, p.5748 (Transl.DRC-D18-0001-5778, p.5778); P-0017:T-61,24:20-22.

<sup>229</sup> P-0963:T-78,69:16-17;T-82,4:16-6:13.

<sup>230</sup> P-0963:T-78,82:11-17.

<sup>231</sup> P-0017:T-61,32:25-33:1.

<sup>232</sup> P-0901:T-31,62:15-63:3; D-0300:T-217,24:12-26:5,32:19-33:4; DRC-REG-0001-0066; D-0017:T-253,39:15-19.

<sup>233</sup> P-0017:T-58,59:1-60:7.

<sup>234</sup> P-0963:T-81,82:6-10;T-82,4:16-5:24.

<sup>235</sup> P-0017:T-61,21:21-22:8.

<sup>236</sup> P-0017:T-58,55:15-17;T-61,32:9-13;T-63,61:7-22.

Mongbwalu. Accordingly, the cited evidence of P-0907 and P-0963 cannot support the overarching finding that in the UPC/FPLC generally *kupiga na kuchaji* meant get rid of all the Lendu.<sup>237</sup>

88. *Third*, the Chamber was wrong to choose one “definition” of *kupiga na kuchaji* when faced with a wealth of conflicting evidence, in the absence of any or sufficient reasoning. The Chamber made reference to different understandings of the phrase and then, with no explanation, chose the apparent ‘definition’ purportedly given by P-0907 and P-0963, thereby discarding the evidence of **nine other witnesses**. This was an error. The Chamber was required to assess whether, considering the weight of the evidence linking *kupiga na kuchaji* to seizing property (whether military or civilian), the expanded ‘definition’ that it actually meant ‘attack all the Lendu’ could still be relied upon beyond reasonable doubt. No reasonable Chamber, having considered the totality of the evidence, could have found that it did.

89. The Chamber appears to justify its preference for P-0907 and P-0963’s evidence by heralding them as ‘two **key** insiders’ who were ‘considered by the Chamber as **fully** credible and reliable’, and therefore apparently more worthy of reliance than other unidentified ‘non-key’ insiders. It is unclear what the Chamber meant by ‘fully credible’. Regardless, the finding that P-0907 and P-0963 are “**fully** credible and reliable” such as to trump the evidence of nine other witnesses, is difficult to reconcile with other findings in the judgment. For example, P-0017 and P-0901, also “credible” witnesses,<sup>238</sup> testified that *kupiga na kuchaji* meant to attack and seize property, and not “get rid of all the Lendus”.<sup>239</sup> P-0055, another “credible” witness,<sup>240</sup> testified that the phrase was limited to taking the military equipment of the enemy following their military defeat.<sup>241</sup> How the testimony of these other “credible” witnesses does not raise any doubt as to P-0907 and P-0963’s ‘definition’ is not explained. The Chamber failed to provide any or sufficient reasons.

90. In short, the Chamber’s errors in discarding the weight of the relevant evidence, failing to give reasons for doing so, and misrepresenting the evidential record, warrant the reversal of its finding that *kupiga na kuchaji* was an order to attack all Lendu, including civilians, and to loot their property and that this was understood as such by all soldiers. These

<sup>237</sup> [TJ](#), para.415.

<sup>238</sup> [TJ](#), paras.117,215.

<sup>239</sup> [P-0017:T-58](#),54:25;[T-61](#),30:11-23; [P-0901:T-29](#),19:6-7.

<sup>240</sup> [TJ](#), para.126.

<sup>241</sup> [P-0055:T-72](#),10:6-13.

errors infect the Chamber's reliance on the phrase for the purpose of finding that there was an attack directed against a civilian population.<sup>242</sup>

## **B. The Chamber's errors related to the seven orders/instructions considered**

91. At the outset, it is important to note that the Chamber's reliance on seven orders/instructions is infected by its erroneous assessment of the evidence. Specifically, its failure to consider: (i) its own finding that "Lendu fighters did not have a common military uniform [and] included women and children",<sup>243</sup> and the resulting difficulty in identifying Lendu combatants, which was known to UPC/FPLC members;<sup>244</sup> and (ii) the evidence provided by both P-0017<sup>245</sup> and P-0963<sup>246</sup> concerning the firing procedure during the fighting in Mongbwalu, which demonstrates that orders were issued to target military objectives and enemy forces, which is inconsistent with attacking civilians.

92. Against this context, the Chamber also erred in its appreciation of each order, as follows.

93. (1) P-0010 Order. The first order considered by the Chamber arises the night before leaving Bunia for Mongbwalu, when Ntaganda "spoke to some of the UPC/FPLC troops, telling them that they were going to Mongbwalu to fight against the Lendu and ordering them to attack using the term '*kupiga na kuchaji*'."<sup>247</sup> The sole source of this finding is P-0010. As argued above, this phrase cannot reasonably be considered an order to target civilians. In addition, and for the reasons set out in Ground 14, this order was not given and P0010's uncorroborated evidence should not have been relied on to find that it was.

94. (2) Pre-Mongbwalu instructions issued to P-0017/P-0963.<sup>248</sup> The errors in the Chamber's assessment of the evidence related to this second order demonstrated above<sup>249</sup> make it clear that no reliance can be placed on it for the purposes of establishing that there was an attack directed against a civilian population. Moreover, P-0017 and P-0963's evidence concerning the [REDACTED] firing procedure during the fighting in Mongbwalu demonstrates the opposite.<sup>250</sup>

<sup>242</sup> [TJ](#), paras.671-672.

<sup>243</sup> [TJ](#), paras.472-473 (footnotes omitted).

<sup>244</sup> [TJ](#), paras.885,886.

<sup>245</sup> [P-0017:T-58](#),62:21-63:9;[T-61](#),51:6-13,54:3-9;[T-63](#),16:17-19.

<sup>246</sup> [P-0963:T-79](#),13:2-14;[T-78](#),81:23-83:20.

<sup>247</sup> [TJ](#), paras.484,1181.

<sup>248</sup> [TJ](#), para.488.

<sup>249</sup> See above paras.83-87.

<sup>250</sup> See Ground 8, paras.206-207. See also [TJ](#), paras.885-886.

95. (3) P-0768's Camp Goli allegation. The third order relied upon by the Chamber to establish that there was an attack directed against a civilian population comes from P-0768.<sup>251</sup> For the reasons set out in Ground 14, this finding is infected by material errors and, thus, should not have been used to prove the contextual elements of article 7.<sup>252</sup>

96. (4) Order to fire a grenade launcher in Sayo. In holding that there was an attack directed against the civilian population, the Chamber referred to its finding that "orders were given to direct fire at civilians."<sup>253</sup> This finding relates to P-0017's uncorroborated evidence that, as the operation in Sayo was nearing its end, Mr. Ntaganda ordered [REDACTED] to fire a grenade launcher at a slope where people were walking in single file.<sup>254</sup> The Chamber's errors in relation to this finding are set out in Ground 8 and are repeated and relied upon here. Additionally, the Chamber failed to consider the exceptionality of this order. If there had been an attack directed against the civilian population at the time, it can be presumed that many such orders to fire on civilians would have been issued. However, this was not the case, even on the basis of the Chamber's own findings. The Chamber also erred by failing to consider P-0017's evidence related to the [REDACTED] firing procedure and the orders issued before this order was given. All these errors mean that this evidence should not have been relied on to establish the contextual elements of article 7.

97. (5) Kisémbó's briefing to troops in Mongbwalu. The fifth order erroneously relied on by the Chamber concerns the briefing given by Kisémbó to troops in Mongbwalu.<sup>255</sup> P-0963 testified that on or about 17 February 2003, Kisémbó said: "You're going to fight and destroy the headquarters in Kiza \*and to bring back a weapon – [...] the grenade launcher that Kiza has, and open the road because we can't drive towards, Kabakaba or Bunia, it is far away. We need to go that way. Drive out all the Lendu. Drive the Lendu out of that place, push them out of there."<sup>256</sup>

98. The Chamber erred in relying on P-0963's understanding of this order, in support of the proposition that civilians were to be targeted. *First*, the Chamber omitted to consider the reliability of P-0963's evidence on this issue, which is directly related to his lie about the instructions he claimed were given by Mr. Ntaganda in Mabanga.<sup>257</sup> *Second*, on its face, the

<sup>251</sup> [TJ](#), paras.493,671,1057.

<sup>252</sup> See Ground 14, paras.340-347.

<sup>253</sup> [TJ](#), para.671, citing to [TJ](#), para.508.

<sup>254</sup> [TJ](#), para.508.

<sup>255</sup> [TJ](#), paras.560,671,1066.

<sup>256</sup> [P-0963:T-79](#),46:18-23.

<sup>257</sup> See above, para.86.

order reveals a military operation directed at lawful military objectives. *Third*, no reasonable Chamber would conclude simply on the basis of the omission of the word ‘combatant’ in Kisémbó’s instructions that Lendu civilians not taking part in the hostilities were to be targeted.<sup>258</sup> This is particularly the case considering the Chamber’s finding that “Lendu fighters did not have a common military uniform [and] included women and children.”<sup>259</sup> Another reasonable and plausible interpretation is that Kisémbó was referring to the Lendu taking part in the hostilities.<sup>260</sup>

99. (6) Salumu’s order to destroy a triangle / pocket of resistance. The Chamber also erroneously relied on P-0017’s subjective interpretation of otherwise legitimate military orders given by Salumu during a further briefing in Kilo in the context of the Second Operation.<sup>261</sup> P-0017 testified that: “Salumu informed us that we were going to have an operation in Kobu and at the same time in Lipri and Bambu in order to destroy that triangle which was a pocket of resistance to the UPC.”<sup>262</sup> He clarified that the word ‘destroy’ meant “destroying the enemy force which occupied these three places.”<sup>263</sup> On its face, this order reveals a legitimate military operation directed at lawful military objectives. Nonetheless, P-0017 went on to state that: “**for [him]**, all the Lendu, whether man or woman. When they were part of the ethnic group called Lendu it was considered as an enemy of the UPC, including children.”<sup>264</sup> In relying on this testimony, the Chamber committed three errors.

100. *First*, the Chamber erred by failing to assess P-0017’s understanding of this order in the light of his testimony concerning the instructions issued by Salumu in Lalu before the First Operation<sup>265</sup> and failing to assess P-0017’s understanding of this order in light of his evidence on the [REDACTED] firing procedure and the orders issued to him during the fighting in Mongbwalu. The Chamber also erred, when assessing P-0017’s understanding of the order, by failing to consider his knowledge that Lendu combatants included women and children and that they did not wear uniforms.<sup>266</sup>

<sup>258</sup> See Ground 13, para.294.

<sup>259</sup> [TJ](#), paras.472-473 (footnotes omitted).

<sup>260</sup> **P-0963:T-79**,13:2-14; **P-0017:T-61**,51:7-13,54:3-9;**T-63**,16:20-22; **D-0017:T-252**,59:12-16; **P-0963:T-79**,13:2-14; **P-0017:T-61**,51:8-13,54:3-9;**T-63**,16:20-22; **D-0017:T-252**,59:12-16; **P-0758:T-161**,11:14-22.

<sup>261</sup> [TJ](#), paras.558,671,1065.

<sup>262</sup> **P-0017:T-59**,46:10-12.

<sup>263</sup> **P-0017:T-59**,61:20-22.

<sup>264</sup> **P-0017:T-59**,62:24-25 (emphasis added).

<sup>265</sup> See Ground 5, para.87.

<sup>266</sup> [DCB](#), paras.320,597 and 624 referring to *inter alia* **P-0017:T-61**,51:8-13,54:3-9;**T-63**,16:20-22.

101. *Second*, the Chamber erred by failing to consider P-0017's status as an accomplice witness.<sup>267</sup> *Third*, it was only when pushed to provide more detail on who was viewed as the enemy that P-0017 provided his own subjective interpretation.<sup>268</sup> Nothing in the witness' subsequent testimony establishes that any express order was given by Mulenda during the Kilo briefing to attack Lendu civilians or otherwise displace the civilian population.<sup>269</sup> The Chamber's reliance on this witness' subjective interpretation was an error.

102. (7) Salumu's order in Kilo on 18 February 2003. The uncorroborated testimony of P-0963 was relied on by the Chamber to find that a *kupiga na kuchaji* order was issued on a third occasion on or about 18 February 2003 when Salumu gave a briefing to the troops in Kilo during which "[he] explained to us what the objective was. And also munitions were distributed. He talked about the position of each company, each unit, each platoon on the front. Q. Did Salumu say what, if anything, you were to do when you encountered the civilian population? A. It was the same operation piga na kuchaji. And we were fighting the Lendu. The orders were clear: Shoot at everyone."<sup>270</sup> *First*, the Chamber failed to consider the reliability of P-0963's evidence on this issue, which is directly related to his lie about the instructions he claimed were given by Mr. Ntaganda in Mabanga.<sup>271</sup> *Second*, as addressed above, the Chamber erred in relying on P-0963's subjective understanding of the expression *kupiga na kuchaji*.<sup>272</sup> *Third*, the Chamber failed to consider P-0963's evidence about the [REDACTED] firing procedure and the orders purportedly issued to him during the fighting in Mongbwalu.<sup>273</sup> *Fourth*, the Chamber failed to consider P-0963's knowledge that Lendu combatants included women and children and that they did not wear uniforms.<sup>274</sup> Lastly, the Chamber erred by failing to consider P-0963's status as an accomplice.<sup>275</sup>

## V. Conclusion

<sup>267</sup> See Ground 8, paras.159,202 referring to [ICTR-Bizimungu-AJ](#), paras.63-64 (emphasis added); [Bemba-et-al-AJ-2275](#), paras.1531,1534: "The condition of a witness as an "accomplice" is a circumstance that needs to be carefully considered when assessing the reliability of his or her evidence". See also [ICTR-Nchamihigo-AJ](#), paras.312-313: "the Trial Chamber erred by failing to apply special caution in the assessment of Witness BRK's testimony that his status as an accomplice witness required"; [ICTR-Muvunyi-AJ](#), paras.131-132; [ICTR-Simba-AJ](#), paras.141-143. [ICTY-Lukić-AJ](#), para.128; [ICTY-Popović-AJ](#), para.134. See also [ICTY-Krajišnik-AJ](#), para.146; [ICTY-Haradinaj-AJ](#), para.145.

<sup>268</sup> **P-0017:T-59**,62:24-25 ("For me, all the Lendu [...] was considered as an enemy of the UPC, including children") (emphasis added).

<sup>269</sup> **P-0017:T-63**,41:47-48.

<sup>270</sup> **P-0963:T-79**,47:2-8.

<sup>271</sup> See above, para.86.

<sup>272</sup> See above, paras.81-82.

<sup>273</sup> **P-0963:T-79**,13:2-14;**T-78**,81:23-83:20.

<sup>274</sup> **P-0963:T-82**,20:23-21:13.

<sup>275</sup> See Ground 8, paras.159,202.

103. In light of the multiple errors set out above, it was not open to the Chamber to have found beyond reasonable doubt that the UPC/FPLC directed an attack at a civilian population as required under article 7(2). All findings of guilt entered pursuant to Counts 1, 4, 7, 10 and 12 should, therefore, be reversed.

#### **GROUND 4: NO ORGANISATIONAL POLICY**

104. For the contextual elements of article 7 to be established, it must be proved beyond a reasonable doubt that the article 7(1) acts were committed pursuant to or in furtherance of a State or organizational policy. To this day, the Appeals Chamber has not had the opportunity to pronounce on this requirement.

105. To establish the existence of a policy, it is not sufficient to show that acts pursuant to article 7(1) were part of a course of conduct. The demonstration of a link between crimes committed and a policy is also required.<sup>276</sup> In essence, it needs to be established that the organization meant to commit an attack against a civilian population<sup>277</sup> and more importantly that the organization actively promoted or encouraged this attack.<sup>278</sup> In the absence of direct evidence, the existence of a policy to attack a civilian population can be inferred. Such inference, however, must be the only reasonable conclusion that can be drawn on the basis of the totality of the evidence.

106. In finding that there was “a policy of the UPC/FPLC to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians”,<sup>279</sup> the Chamber committed the following seven errors.

107. *First*, the Chamber erred by concluding that the UPC/FPLC was an ‘organization’ pursuant to article 7 before the UPC/FPLC was officially constituted.<sup>280</sup> The UPC/FPLC did not fulfil the characteristics of an article 7 organization until 9 August 2002 at the earliest, when it began exercising control over a territory.<sup>281</sup>

108. *Second*, the Chamber erred by inferring that the UPC/FPLC were engaged in a course of conduct from August 2002 to May 2003, which “took place pursuant to a policy of the UPC/FPLC to attack and chase away the Lendu civilians as well as those who were perceived

<sup>276</sup> [TJ](#), para.673.

<sup>277</sup> [Katanga-Trial-Judgment-3436](#), para.1113.

<sup>278</sup> [Elements of Crimes](#), article 7.

<sup>279</sup> [TJ](#), para.689.

<sup>280</sup> [TJ](#), paras.676,681.

<sup>281</sup> Triffterer, p.247; [Kenya-Decision-19](#), para.93; [Ruto-Kosgey-Sang-Confirmation-Decision-373](#), para.185; [TJ](#), para.449.

as non-Iturians”. Not only did the Chamber ignore other reasonable inferences, no reasonable trier of fact, having considered the totality of the evidence, could have drawn such an inference. The Chamber further erred by inferring that this policy “was actively promoted”.<sup>282</sup>

109. Having analysed a series of documents going back to April 2002, as well as evidence related to a meeting of political leaders of the emerging UPC/FPLC in Kampala, the Chamber recognized that some of the documents produced by the UPC/FPLC indeed “promoted peace, or denounced the crimes committed against the local population of Ituri”<sup>283</sup> and that it was the UPC/FPLC’s stated ambition / aim to defend the population as a whole.<sup>284</sup>

110. Notably, none of the documents referred to by the Chamber<sup>285</sup> evidences any intent to target civilians of any ethnicity. At most, these documents display the resolve of UPC/FPLC political leaders, if necessary, to use force to chase the enemy, *i.e.* the RCD-K/ML. Moreover, even though Lendu combatants are mentioned in some of these documents - in particular in the context of being supported by the APC/RCD-K/ML in committing crimes against civilians – no reference is made to Lendu civilians.

111. *Third*, as for the evidence of P-0014 - considered by the Chamber as the primary source to establish the UPC/FPLC objectives at that time<sup>286</sup> - the Chamber erred by relying on his un-corroborated testimony concerning a meeting in June 2002 that stands out and goes way beyond the content of contemporaneous documents in evidence.<sup>287</sup> The Chamber did not even deem necessary to consider the position held by P-0014 at the time,<sup>288</sup> that his testimony consisted mainly of hearsay information,<sup>289</sup> or the numerous inconsistencies and/or contradictions in his testimony argued further in Ground 13.<sup>290</sup>

112. *Fourth*, the Chamber erred by inferring the existence of a UPC/FPLC policy to also attack and chase away those perceived as non-Iturians. The record is replete with examples of

<sup>282</sup> [TJ](#), para.689.

<sup>283</sup> [TJ](#), para.686.

<sup>284</sup> [TJ](#), para.687.

<sup>285</sup> [TJ](#), paras.682-686 referring to [DRC-OTP-0127-0110](#), [DRC-OTP-0147-0204](#), [DRC-OTP-0113-0055](#), [DRC-OTP-0151-0111](#), [DRC-OTP-0091-0016](#), [DRC-OTP-0092-0466](#), [DRC-OTP-0089-0075](#), [DRC-OTP-0089-0093](#), [DRC-OTP-0194-0328](#), [DRC-OTP-0066-0031](#), [DRC-OTP-0066-0039](#), [DRC-OTP-0066-0048](#), [DRC-OTP-0066-0047](#), [DRC-OTP-0113-0117](#), [DRC-OTP-0109-0136](#), [DRC-OTP-0037-0264-R02](#), [DRC-OTP-0164-0447](#), [DRC-OTP-0092-0436](#), [DRC-OTP-0197-0238](#), [DRC-OTP-0214-0065](#), [DRC-OTP-0214-0091](#), [DRC-OTP-0033-0038-R02](#), [DRC-OTP-0033-0044-R02](#), [DRC-OTP-0033-0058-R02](#), [DRC-OTP-0214-0116](#), p.0118, [DRC-OTP-0037-0536](#).

<sup>286</sup> [TJ](#), para.293.

<sup>287</sup> [DRC-OTP-0066-0031](#), [DRC-OTP-0066-0039](#), [DRC-OTP-0066-0048](#), [DRC-OTP-0066-0047](#).

<sup>288</sup> P-0014 was [REDACTED], but never occupied this position. **P-0014**:[DRC-OTP-2054-0429](#), p.0440, ll.9-11, p.0442, ll.8-17; [DRC-OTP-2054-0612](#), p.0681, ll.3-9;[T-136](#),63:20-66:8.

<sup>289</sup> See **P-0014**:[T-137](#);[T-138](#). In particular, P-0014 [REDACTED]. **P-0014**:[T-137](#),16:20-17:1.

<sup>290</sup> See Ground 13, para.285. See also [DCB](#), paras.1461-1466.

non-Iturians who were either members of the UPC/FPLC or who were welcomed to remain in Ituri.<sup>291</sup> More particularly, the Chamber failed to consider the evidence of P-0005, [REDACTED], who testified that the issue of non-Iturians, referred to as Kivu Holding, was political and did not involve attacking or chasing away non-Iturians.<sup>292</sup> He also testified that he was not aware of a UPC/FPLC policy regarding those perceived as being non-Iturians.<sup>293</sup> Having considered the totality of the evidence no reasonable Chamber could find the existence of a UPC/FPLC policy to attack or chase away non-Iturians.

113. *Fifth*, the Chamber erred by finding that “the internal communications and documents as well as military actions undertaken by the UPC/FPLC show that in parallel its goal was to actively chase away RCD-K/ML and those who were perceived as non-Iturians.”<sup>294</sup>

114. Indeed, taking into consideration: (i) the Chamber’s manifestly unreasonable interpretation of the expression *kupiga na kuchaji*;<sup>295</sup> (ii) the aim and context of the six UPC/FPLC operations which the Chamber examined but failed to appropriately consider;<sup>296</sup> (iii) the aim and purpose of the UPC/FPLC military operations which the Chamber entirely omitted to consider;<sup>297</sup> and (iv) the Chamber’s erroneous assessment of the seven orders,<sup>298</sup> all of which are discussed in Ground 5 above, no reasonable trier of fact could have found that the planning and unfolding of UPC/FPLC military actions directly contradicted the stated aim / ambition of the UPC/FPLC to defend the population as a whole.

115. Moreover, the Chamber erred by failing to provide reasons or explain how, from the purported UPC/FPLC “parallel goal to chase away the **RCD-K/ML**”<sup>299</sup> i.e. the **enemy**, it could conclude “beyond reasonable doubt that the course of conduct took place pursuant to a policy of the UPC/FPLC to attack and chase away the **Lendu civilians**.”<sup>300</sup> Notably, the Chamber did not even identify ‘chasing away the Lendu combatants’ as one of the UPC/FPLC objectives.

116. *Sixth*, the Chamber committed a more fundamental error by failing to consider highly relevant evidence and Defence arguments related to the existence of the UPC/FPLC policy at

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<sup>291</sup> See below, paras.116-120.

<sup>292</sup> P-0005:T-185,28:10-23.

<sup>293</sup> P-0005:T-185,28:6-9.

<sup>294</sup> TJ, para.686.

<sup>295</sup> See Ground 5, paras.76-90.

<sup>296</sup> See Ground 5, paras.60-68.

<sup>297</sup> See Ground 5, paras.69-74.

<sup>298</sup> See Ground 5, paras.91-102.

<sup>299</sup> TJ, para.686 (emphasis added).

<sup>300</sup> TJ, para.689 (emphasis added).

the time. The Chamber did not consider, *inter alia*: the creation of the CTPR composed of representatives of all ethnic groups including Lendu civilians;<sup>301</sup> pacification missions conducted by the CTPR<sup>302</sup> as well as the reports it produced on its activities;<sup>303</sup> the Arua peace negotiations, convened by Uganda, in the presence of Lendu representatives and attended by a multi-ethnic UPC/FPLC delegation [REDACTED];<sup>304</sup> Lubanga's order transmitted through Mr. Ntaganda not to shoot down the plane that transported the Lendu representatives to this meeting;<sup>305</sup> Lubanga's speech in Bunia at the *pères blancs* congregation, clearly illustrating the UPC/FPLC's policy towards Lendu civilians and reconciliation;<sup>306</sup> the Ngongo negotiations attended by a multi-ethnic UPC delegation (sent by Lubanga) and Lendu notables to achieve peace, which resulted in the secondary road between Bunia and Lipri being reopened for the benefit and all civilians regardless of ethnicity;<sup>307</sup> the implementation of the UPC/FPLC's plan to provide weapons to Lendu combatants for the purpose of joining forces with the aim of chasing the UPDF from Ituri;<sup>308</sup> and the UPC/FPLC's continued willingness to cooperate with the CPI and the Sun City negotiations.<sup>309</sup>

117. Most importantly, the Chamber ignored the UPC/FPLC's greatest achievement, the conclusion of an Ituri-wide peace agreement promoted by the UPC/FPLC, which was signed

<sup>301</sup> [DCB](#), paras.81,82,88 referring to [DRC-OTP-0092-0436](#); [DRC-OTP-0089-0075](#); [DRC-D18-0001-0433](#), at 00:21:13-00:55:00; at 00:58:10-01:03:22 (Transl.[DRC-D18-0001-6643](#)); **D-0300:T-218**,86:13-87:9;**T-219**,3:15-19,8:9-14.

<sup>302</sup> [DCB](#), paras.84-85 referring to [DRC-OTP-0093-0260](#) and [DRC-OTP-0014-0152](#).

<sup>303</sup> [DCB](#), paras.86,87 referring to [DRC-OTP-0093-0004](#).

<sup>304</sup> [DCB](#), paras.95-97 referring to [DRC-OTP-0164-0455](#). **P-0005:T-186**,27:15-32:2;**T-188**,25:9-18,38:18-39:23; **T-189**,4:25-5:5,39-40,45:12-19; [DRC-OTP-0037-0295](#), p.0296; **P-0365:T-147**,77:24-25. **D-0300:T-218**,56:3-6.

<sup>305</sup> [DCB](#), para.211. [DRC-OTP-0017-0033](#), pp.0070 (first) 0202 (second) (Transl.[DRC-OTP-2102-3854](#), pp.3892,4024).

<sup>306</sup> [DCB](#), para.78 referring to [DRC-D18-0001-2488](#); [DRC-D18-0001-2489](#) (Transl.[DRC-D18-0001-6710](#)).

<sup>307</sup> [DCB](#), paras.89-94 referring to **D-0300:T-219**,12:4-18,16:9-19; [DRC-OTP-0127-0058](#), at 17:00-17:43 (Transl.[DRC-OTP-2102-3675](#), pp.3689, ll.320-328) (“j’éprouve de la joie à trouver Lilo, un Lendu ... au sein de l’UPC. Alors que les gens disent que l’UPC est un parti de Hema”); **P-0105:T-133**,58:5-14,59:21-62:8; **P-0005:T-189**,13:25-14:8 (“[...] to enable the reconciliation committee to do its work, it was right that we sent a team of ministers into the field to reassure the Lendu that the UPC had nothing against them, so that they would become members of the UPC, that they would accept the UPC”); [DRC-OTP-0017-0033](#), p.0137 (third) ([DRC-OTP-2102-3854](#), p.3959)(“CE CMD IYANGO (-) CMD FAUSTIN MAYEBO QUI SONT EN TRAIN DE PERTURBER LES HABITANTS ET DE FAIRE ECHOUER LE TRAVAIL DE PACIFICATION (-) ARRETEZ-LES ET ENVOYEZ-LES MOI, HQ DU SECTEUR (-) G2 S’OCCUPERA DE LEUR AFFAIRE (-) (-)”).

<sup>308</sup> [DCB](#), paras.112-114.

<sup>309</sup> [DCB](#), paras.100,119,121-124,134,149 referring to **P-0365:T-147**,64:4-65:17,76:7-78:17,86:3-9; **P-0245:T-142**,73:3-14; [DRC-OTP-0029-0280](#); [DRC-OTP-0107-0223](#), p.0316; [DRC-OTP-0014-0170](#), p.0171; **D-0300:T-219**,64:19-65:3.

by the leaders of all ethnic groups in Ituri with the sole exception of part of one of the Lendu delegations, on 7 February 2003.<sup>310</sup>

118. The Chamber also failed to consider the relationship between the UPC/FPLC's policy and its multi-ethnic composition, political and military, which included Lendu civilians.<sup>311</sup> Denis Akobi and Shatchu Lilo - both Lendu civilians - held the positions of National Secretary of Transport and National Secretary of "*fonction publique, travail et prévoyances sociales*".<sup>312</sup> [REDACTED] - [REDACTED]<sup>313</sup> and Lubanga's right hand man, chaired the meetings of National secretaries<sup>314</sup> and replaced Lubanga as President *ad interim* in his absence;<sup>315</sup> Tinanzabo - a Bira - led the creation of the CTPR,<sup>316</sup> was part of a UPC delegation also including a Logo and a Lendu in Ngongo,<sup>317</sup> signed the CPI on behalf of the UPC<sup>318</sup> and represented the UPC at a conference in Dar es Salam.<sup>319</sup> The two Brigade commanders who led troops in the First Operation,<sup>320</sup> the FPLC Deputy Chief of staff,<sup>321</sup> the Rwampara commander,<sup>322</sup> and the G2<sup>323</sup> *inter alia* were also not Hema.

119. The Chamber further failed to consider significant UPC/FPLC undertakings revealing the true UPC/FPLC policy to defend the population as a whole, including *inter alia*: the exchange of troops between newly trained recruits in Mandro and former APC soldiers now members of the NE Sector in Aru,<sup>324</sup> thereby mixing troops from different ethnic background, ensuring that Jérôme's forces would fight pursuant to the UPC/FPLC ideology and obtaining experienced commanders for the Bde in Mandro, including Salumu who became its commander;<sup>325</sup> sending highly educated UPC/FPLC members to attend heavy weapons and IHL training in Rwanda to ensure that heavy weapons would be used properly, targeting only

<sup>310</sup> [DCB](#), para.102 referring to [DRC-OTP-0193-0243](#), p.0244; [DRC-D18-0001-0427](#), at 35:37-36:40 (Transl.[DRC-D18-0001-6667](#), pp.6675, ll.213-219); [DRC-D18-0001-0425](#), at 14:02-14:39 (Transc.[DRC-D18-0001-5540](#), pp.5543, l.56 to 5544, l.61); [D-0300:T-219](#), 67:5-68:12.

<sup>311</sup> [TJ](#), fn.777, where the Chamber dismissed the Defence's argument on the basis that it is not linked to any evidence other than the documents indicating the appointment of non-Hema members of the Executive.

<sup>312</sup> [DRC-OTP-0113-0055](#); [DRC-OTP-0037-0294](#).

<sup>313</sup> [REDACTED].

<sup>314</sup> [REDACTED].

<sup>315</sup> [P-0005:T-184](#), 24:12-20.

<sup>316</sup> [DCB](#), para.88.

<sup>317</sup> [DCB](#), para.89.

<sup>318</sup> [DCB](#), para.121.

<sup>319</sup> [DCB](#), para.131.

<sup>320</sup> [DCB](#), para.778 and 782.

<sup>321</sup> [D-0300:T-209](#), 37:13-14.

<sup>322</sup> [D-0080:DRC-D18-0001-6163](#).

<sup>323</sup> [P-0055:T-70](#), 25:1-10.

<sup>324</sup> [TJ](#), para.325.

<sup>325</sup> [DCB](#), paras.167-171.

lawful military objectives;<sup>326</sup> obtaining *tâche tâche* uniforms for all UPC/FPLC members, thereby fulfilling obligations pursuant to IHL by ensuring that its members could be recognizable from a distance and clearly distinguished from civilians as well as from APC and Lendus combatants;<sup>327</sup> and promulgating a new *mise en place* in February 2003, thereby implementing a more effective chain of command and further organizing the UPC/FPLC into a structured and disciplined armed force in line with Mr. Ntaganda's ideology.<sup>328</sup>

120. Having considered the totality of the evidence, no reasonable trier of fact could have inferred beyond reasonable doubt the existence of a UPC/FPLC policy to target civilians. The Chamber clearly ignored other reasonable inferences available including, in particular, that the UPC/FPLC policy was indeed to “restore good governance; promote reconciliation; establish peace; and protect all civilians without discrimination”.<sup>329</sup>

121. *Seventh*, the Chamber erred by inferring that the purported UPC/FPLC policy “was actively promoted”.<sup>330</sup> Setting aside the Chamber's unreasonable interpretation of *kupiga na kuchaji* and the orders it erroneously relied upon (addressed in Ground 5),<sup>331</sup> there is no evidence showing how the implied UPC/FPLC policy to attack Lendu civilians was communicated to its members.<sup>332</sup>

122. On the contrary, the true UPC/FPLC policy to protect civilians without discrimination and to prohibit the commission of any crimes was clearly communicated to the troops by UPC/FPLC leaders and commanders. Two highly significant instances available to the Chamber were ignored and/or not considered by the Chamber.

123. *First*, the Chamber erred by failing to consider Chief Kahwa's address to the troops assembled in Mandro before the First Operation on the basis that it “does not consider the statements in this speech to reflect the reality of the disciplinary system within the UPC/FPLC as regards looting and rape of civilians associated with the enemy, during UPC/FPLC operations.”<sup>333</sup> None of the nine witnesses who were shown the video of Chief Kahwa's address in Mandro (“Mandro video”) testified that it was propaganda.<sup>334</sup> That crimes were committed during the First Operation does not preclude the existence of a UPC/FPLC policy

<sup>326</sup> [DCB](#), paras.165-166. See also **P-0769:T-122**,34.

<sup>327</sup> [DCB](#), paras.163-164.

<sup>328</sup> **D-0300:T-220**,12:25-13:11,14:24-15:9. [DCB](#), paras.210,260,1036,1038.

<sup>329</sup> [TJ](#), para.686.

<sup>330</sup> [Elements of crimes](#), article 7, Introduction, para.3.

<sup>331</sup> See *supra* paras.75-102.

<sup>332</sup> See *inter alia* [Gbagbo-Decision-432](#), para.44(3).

<sup>333</sup> [TJ](#), fn.790.

<sup>334</sup> **P-0963, P-0907, P-0888, P-0769, P-0365, P-0898, P-0911, D-0300** and **P-0002**.

to protect the civilian population as a whole. Moreover, the Chamber omitted to consider the many punishments meted out to UPC/FPLC members who committed violations following Kahwa's speech.

124. The Chamber also erred in failing to find that Chief Kahwa's speech depicted in the Mandro video was addressed to the troops who subsequently took part in the First Operation.<sup>335</sup> The Chamber failed to consider its own finding that the video was recorded when Kahwa was still a member of the UPC/FPLC,<sup>336</sup> namely before 2 December 2002;<sup>337</sup> that Américain who participated in the First Operation<sup>338</sup> and stayed in Kilo until at least 2 December 2002,<sup>339</sup> was identified in the video by P-0907;<sup>340</sup> and that other UPC/FPLC members who participated in the First Operation were present during Kahwa's address to the troops.<sup>341</sup> Notably, Mr. Ntaganda, who assisted Chief Kahwa with his speech,<sup>342</sup> testified without being challenged on this point that the troops depicted in the Mandro video were those subsequently sent to Mongbwalu, under the command of Salumu.<sup>343</sup> The Chamber erred in rejecting Mr. Ntaganda's evidence on this issue and by failing to provide reasons or to explain why the troops appearing in the video are not those who took part in the First Operation.

125. *Second*, the Chamber ignored Lubanga's address to UPC/FPLC members, recruits, and others in Rwampara depicted in a video recorded on 12 February 2003, shortly before the Second Operation. On this occasion, the UPC/FPLC President himself, accompanied by Tinanzabo and Mr. Ntaganda<sup>344</sup> delivered a powerful and clear message revealing the UPC/FPLC policy, stating *inter alia*: "[w]e are making that effort... For you to finish the training, for you to get a weapon, for you to go and protect the citizens and to go and ensure the security of the citizens [...] since we formed this party, the UPC, is to bring back that unity ...among the Congolese [...] Our army does not have one tribal enemy, no...the Bira

<sup>335</sup> [TJ](#), fn.789 ("on the basis of the evidence on the record, the Chamber is unable to make a finding on the exact timing of this speech").

<sup>336</sup> [TJ](#), fn.789.

<sup>337</sup> [TJ](#), para.306, fn.792.

<sup>338</sup> [P-0017:T-58](#),51:7-11.

<sup>339</sup> The Chamber referred to P-0907's testimony that Américain went to Kilo after the Mongbwalu takeover, [TJ](#), fn.1613 and that he was there until at least 5 December 2002, [TJ](#), paras.548 et seq.

<sup>340</sup> [P-0907:T-92](#),9:20-24.

<sup>341</sup> P-0898 and P-0907 [REDACTED] ([P-0017:T-58](#),32:13-17,59:15-60:7). [P-0898:T-155](#),23:1-24:3 and [P-0907:T-92](#),9:20-24.

<sup>342</sup> [DCB](#), para.173; [DRC-OTP-0082-0016](#), at 11:30-18:15,19:46-21:27,22:42-23:34,25:17-26:47 (Transl.[DRC-OTP-0164-0710](#), ll.190-264,288-310,329-346,374-397).

<sup>343</sup> [D-0300:T-216](#),7:14-24.

<sup>344</sup> [TJ](#), para.369; [DRC-D18-0001-0463](#) (Transl.[DRC-OTP-2101-2791](#) and [DRC-D18-0001-6692](#)).

tribe is not the enemy of our army, nor the Lendu tribe, nor the Hema tribe. Our enemy is any person ... who refuses to allow peace to return to us here.”<sup>345</sup> The Chamber erred in ignoring this evidence and/or by failing to explain or provide reasons as to why President Lubanga’s address was not relevant to the determination of the existence of an organisational policy.

126. Furthermore, the Chamber also failed to consider that the UPC/FPLC policy to *inter alia*, protect the civilian population as a whole, was also communicated to the troops via punishments meted out against UPC/FPLC members who committed violations. While the Chamber found that a disciplinary system was in place, it found that “these examples of punishment do not affect its finding that some offenses were not considered punishable within the UPC/FPLC”.<sup>346</sup> That was an error. *First*, the Chamber ignored that UPC/FPLC members received IHL training.<sup>347</sup> *Second*, the Chamber failed to consider the impact of the two instances when the punishment of death by firing squad, in public, was imposed by the highest UPC/FPLC authorities, when a UPC/FPLC member looted from the house of a Nande civilian in Bunia<sup>348</sup> and when a UPC/FPLC member killed a Lendu civilian in Mongbwalu.<sup>349</sup> In both cases, this ultimate punishment was imposed to send a strong message and to deter the commission of crimes.<sup>350</sup> *Third*, the Chamber rejected numerous examples of disciplinary measures imposed<sup>351</sup> based on the purported “isolated character of these incidents”, thereby reversing the burden of proof, implying that the Defence should have provided evidence of punishment for all crimes committed.

127. Having considered all evidence on the record, no reasonable trier of fact could infer that a policy to target civilians was actively promoted by UPC/FPLC political and military leaders. The Chamber clearly ignored other reasonable inferences available on the evidence including in particular, that the UPC/FPLC actively promoted and communicated its policy to protect the civilian population as a whole without discrimination.

128. The numerous errors committed by the Chamber warrant the reversal of its finding/inference regarding the existence of a UPC/FPLC policy to attack civilians that was

<sup>345</sup> [DRC-OTP-2101-2791](#), ll.222-247.

<sup>346</sup> [TJ](#), fn.893.

<sup>347</sup> [DCB](#), para.175 referring to [P-0055:T-71](#),79:8-21; [P-0963:T-81](#),74:14-18; [P-0911:T-157](#),16:22-17:6.

<sup>348</sup> [D-0300:T-215](#),42:9-43:10; [T-227](#),47:7-13,83:7-25; [T-242](#),84:17-86:11; [D-0017:T-252](#),65:10-25.

<sup>349</sup> [DRC-OTP-0017-0033](#), pp.0097 (second), 0098 (both), 0099 (first) (Transl.[DRC-OTP-2102-3854](#), pp.3919, 3920,3921); [D-0300:T-222](#),61:2-65:12. See also [DCB](#), paras.175,290,291,685.

<sup>350</sup> [DRC-OTP-0017-0033](#), p.0098 (first) (Transl. [DRC-OTP-2102-3854](#), p.3920) (« TOUTES CES INFRACTIONS AVOIR AMENE AUTORITE MIL. A DECIDE SUR PEINE LA PLUS FORTE AFIN DE SERVIR D’EXEMPLE »). [D-0300:T-215](#),42:9-43:10; [T-227](#),47:7-13,83:7-25; [D-0017:T-252](#),65:10-25.

<sup>351</sup> [DCB](#), paras.175,1560.

actively promoted. Consequently, all findings of guilt pursuant to Counts 1, 4, 7, 10 and 12 must be quashed and verdicts of acquittal entered.

## **GROUND 6: ERROR IN FINDING THAT ORDERING DISPLACEMENT AS A WAR CRIME WAS COMMITTED**

129. The Chamber made the following series of errors in convicting Mr. Ntaganda of the war crime of ordering the displacement of the civilian population.<sup>352</sup> These errors mean that his conviction under count 13 must be reversed.<sup>353</sup>

### **I. Territorial control is a condition of ordering displacement as a war crime**

130. Reliance on orders issued during the conduct of hostilities but *prior to* the relevant territory falling under the control of the UPC/FPLC to found the conviction under count 13 constitutes a legal error.<sup>354</sup> A war crime under article 8(2)(e)(viii) of the Statute “may only be committed [...] when a party to a non-international conflict controls a portion of territory and displaces protected persons living there.”<sup>355</sup> This stems from the article’s origins in article 49 (Deportations, Transfers, Evacuations) of GCIV and article 17 of APII.<sup>356</sup>

131. Under article 49 of GCIV: “Individual or mass forcible transfers, as well as deportations of protected persons *from occupied territory* to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.”<sup>357</sup> Article 17 of APII was intended to fill the gap in protection in non-international armed conflicts where forced population movements also arose.<sup>358</sup> The ICRC Commentary on APII establishes that article 17 similarly requires territorial control, noting that article 17(2)’s text is “suited to all the possible cases which might arise in a situation covered by Protocol II, and to take into account, in particular, *situations where the insurgent party is in control of an extensive part of the territory*. In this case the insurgents, too, should respect the obligation laid down here, and *not compel civilians to leave the area under their authority*.”<sup>359</sup>

132. Further, the language used in article 8(2)(e)(viii), and in its originating provisions, underlines that there must be territorial control before the crime can be committed. Article

<sup>352</sup> [TJ](#), paras.1080-1101.

<sup>353</sup> [TJ](#), para.1199.

<sup>354</sup> [TJ](#), paras.1085-1086,1098-1099.

<sup>355</sup> [Acquaviva](#), p.20.

<sup>356</sup> [Acquaviva](#), p.20, fn.64. Also Dörmann, pp.473-474.

<sup>357</sup> [Geneva Convention IV](#), article 49 (emphasis added).

<sup>358</sup> [Commentary APII](#), paras.4849-4850.

<sup>359</sup> [Commentary APII](#), para.4859 (emphasis added, footnote omitted).

8(2)(e)(viii) and article 17 of APII both use the term ‘ordering’. An order to displace can only be given if the person issuing it is in a position to give effect to the order, *i.e.*, the civilians are within that person’s power and control. Converting this term to mean ordering acts that might result in population movement, *i.e.*, indiscriminate shelling, would be an error because it would turn this standalone crime into another completely different crime. Additionally, the limited circumstances in which article 8(2)(e)(viii) (along with article 49, GCIV, and article 17, APII) permits a military force to displace a population (all of which are protective in purpose) indicate that the relevant force must have responsibility for and control over that population.<sup>360</sup> If the population was not within the force’s territorial control, the force would not have the ability to carry out the permitted displacement in accordance with the measures expected under international law.<sup>361</sup>

133. In short, the Chamber’s legal error in applying article 8(2)(e)(viii) to orders issued in advance of territorial control being achieved invalidates the conviction for count 13.

## **II. Errors in finding that the first material element of article 8(2)(e)(viii) was fulfilled**

134. In addition, or in the alternative, the Chamber made a further series of errors in relation to its assessment of the evidence which invalidate the conviction under count 13. By reference to six orders,<sup>362</sup> the Chamber found “that the first material element of the war crime of ordering the displacement of the civilian population is fulfilled.”<sup>363</sup> For all the reasons set out in Grounds 5, 8, 13 and 14 in relation to the errors made by the Chamber in its assessment of the six orders, this finding must be vacated. Given that the establishment of the first material element of article 8(2)(e)(viii) was dependent on these orders, Mr. Ntaganda’s conviction for ordering the displacement of the civilian population should be reversed.

135. In conclusion, the foregoing legal and/or factual errors, cumulatively or individually, mean that Mr. Ntaganda’s conviction under count 13 for ordering the displacement of the civilian population contrary to article 8(2)(e)(viii) of the Statute should be reversed.

<sup>360</sup> The circumstances are the security of the civilians involved or imperative military reasons. See [Statute](#), article 8(2)(e)(viii); [GCIV](#), article 49; [APII](#), article 17(1).

<sup>361</sup> [GCIV](#), article 49 (“The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated”); [APII](#), article 17(1) (“[...] Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.”)

<sup>362</sup> [TJ](#), paras.1085-1086;1089-1091. See also Grounds 5, 8, 13 and 14 which address these orders.

<sup>363</sup> [TJ](#), para.1094.

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

### I. The Chamber erred in its assessment of Mr. Ntaganda's testimony

136. The Chamber found that Mr. Ntaganda's testimony, which lasted over 30 court days, was "detailed and comprehensive, and touched on all matters relevant for this case",<sup>364</sup> and was "internally consistent" noting "only limited number of discrepancies on discrete issues."<sup>365</sup> Nevertheless, the Chamber found his evidence not to be credible, or preferred the contradictory evidence of Prosecution witnesses on nearly all significant disputed issues in the case.<sup>366</sup> In doing so, the Chamber committed the following errors.

137. *First*, in its preliminary credibility assessments, the Chamber held: "[i]n instances where the evidence provided by Mr. Ntaganda is contradicted by other evidence, the Chamber also considered, on a case-by-case basis and where appropriate, the possibility that Mr. Ntaganda had an incentive to provide exculpatory evidence."<sup>367</sup> Thus, from the outset, the Chamber assessed Mr. Ntaganda's testimony differently from that of Prosecution witnesses, adding an additional criterion to the assessment of his credibility. This impermissibly shifted the burden of proof. A trier of fact is not permitted to start from the position that the accused might lie in order to be acquitted.<sup>368</sup> Unless patently implausible or untrustworthy, Mr. Ntaganda's testimony that contradicted Prosecution evidence testimony should have been considered as raising reasonable doubt, just like any other evidence.<sup>369</sup>

138. This error was amplified by the Chamber's approach of first concluding that the Prosecution evidence on a disputed issue was credible, (or that it had come from a witness which the Chamber had pre-ordained as 'credible') and dismissing Mr. Ntaganda's contradictory evidence on that basis alone.<sup>370</sup> These textbook burden shifts were frequent and blatant. In respect to whether the UPC/FPLC planted landmines in Mongbwalu, for example,

<sup>364</sup> [TJ](#), para.258.

<sup>365</sup> [TJ](#), para.258.

<sup>366</sup> [OTP-Sentencing-Brief-2425](#), para.100.

<sup>367</sup> [TJ](#), para.262.

<sup>368</sup> [R. v. B.](#), pp.798-99.

<sup>369</sup> [Katanga-Minority-Opinion-3436-AnxI](#), paras.168-169. See also [SCSL-Taylor-TJ](#), para.181; [ICTY-Vasiljević-TJ](#), para.13; [SCSL-AFRC-TJ](#), para.117; [SCSL-RUF-TJ](#), para.477.

<sup>370</sup> [TJ](#), fns.942,1430,1494,1507,1589,1596,1598,1672,1679,2035.

the Chamber found “no reason to doubt the truthfulness of P-0768’s account” about mines and “**therefore** excludes Mr Ntaganda’s denial on this specific issue as not credible”.<sup>371</sup>

139. As expanded upon in Grounds 8 and 14, this “either/or” approach to fact-finding is erroneous.<sup>372</sup> It shifts the burden of proof by requiring the accused to present a more credible version of events in order to be acquitted. Rather, the Chamber was required to determine “whether the evidence of the Prosecution witnesses should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the evidence which the Accused and other Defence witnesses gave.”<sup>373</sup> The Chamber’s erroneous standard meant that it systematically dismissed Mr. Ntaganda’s testimony when it contradicted Prosecution evidence,<sup>374</sup> and accepted his testimony when it corroborated Prosecution evidence.<sup>375</sup> Considering the centrality of Mr. Ntaganda’s evidence to the Defence case, this error in its assessment had an incalculable impact on the fairness of the trial.

140. In addition, the Chamber erred by failing to consider that Mr. Ntaganda testified before other Defence witnesses,<sup>376</sup> which should have been considered in his favour in assessing his credibility and the probative value accorded to his evidence.<sup>377</sup>

141. In sum, the Chamber’s assessment of Mr. Ntaganda’s testimony was so unreasonable that it tainted its overall assessment of the totality of the evidence adduced. Given the far-reaching consequences of the Chamber’s errors, the only appropriate remedy is an acquittal or a new trial.

## **II. The Chamber erred in dismissing D-0017’s evidence in its entirety**

142. After Mr. Ntaganda, D-0017 was probably the most significant Defence witness, in terms of his direct knowledge of relevant events. D-0017, who was one of Mr. Ntaganda’s bodyguards, accompanied Mr. Ntaganda during the First Operation. He testified about

<sup>371</sup> [TJ](#), para.171, fn.413.

<sup>372</sup> See, for example, [R. v. S.](#), p.533; *R. v. Calides*, pp.356-360. See also [Gans](#), pp.220-246; [ICTY-Vasiljević-TJ](#), para.13; [SCSL-AFRC-TJ](#), para.117; [SCSL-RUF-TJ](#), para.477.

<sup>373</sup> [ICTY-Vasiljević-TJ](#), para.13; See also [R. v. Dowling](#), para.19; [R. v. Dinardo](#), para.23.

<sup>374</sup> See, e.g. [TJ](#), paras.415,498,515,528,533,638, fns.413,737,790,850,893,894,906,994,1049,1052,1057,1065,1067,1158,1160,1177,1360,1371,1374,1412,1414,1431,1434,1462,1474,1529,1558,1574,1584,1589,1598,1679,1720.

<sup>375</sup> See, e.g. [TJ](#), fns.602,617,801,802,805,807,813,815-817,829,832,834-835,841,848,856,866,868,871,904,913,917,923-925,957,961,971,1002,1003,1006,1007,1011,1012,1013,1015,1017,1018,1021,1025,1026,1038,1044,1046,1058,1062,1068,1083,1095,1120,1152,1178,1243,1244,1252,1253,1256,1258,1261,1276,1277,1296,1298,1320,1334,1353,1368,1375,1380,1386,1395,1408,1409,1410,1457,1458,1461,1570,1582,1583,1715,1712,2062,2065,2066,2067,2070,2073,2074,2078,2080,2081.

<sup>376</sup> Only D-0251 testified before Mr. Ntaganda, providing evidence on limited topics.

<sup>377</sup> [ICTY-Limaj-TJ](#), para.22; [ICTY-Vasiljević-TJ](#), para.13.

military training in Mandro, the structure of the UPC/FPLC, and his involvement in military operations.

143. D-0017's evidence was dismissed in its entirety.<sup>378</sup> The Chamber held that he "generally displayed a tendency to negate knowledge of incriminating facts" and his testimony reflected a "concern not to provide any incriminating evidence as regards the accused".<sup>379</sup> This blanket refusal to consider any of his evidence is undermined by the following errors.

144. First, the bases relied upon to undermine his credibility do not survive scrutiny. It is incorrect that "D-0017 generally denied the commission of crimes by the UPC/FPLC".<sup>380</sup> He was frank in his testimony that UPC/FPLC forces looted in Mongbwalu, stating: "I mean, in such circumstances there was always looting"<sup>381</sup> and "whenever there was an attack, generally there's pillaging".<sup>382</sup> The claim that D-0017's description of conditions in the Mandro Camp was too "positive"<sup>383</sup> ignores the details of his evidence. While he said, for example, the sanitary conditions were "very good", he explained further that "it wasn't really easy to change clothes every day, but we could go to the river" and "we'd actually dug holes on the ground that were used as toilets".<sup>384</sup> His testimony was far more nuanced than represented. Specifically, the Chamber found "implausible" D-0017's evidence that he "categorically stated that he never saw any recruits aged under 18 years in Mandro".<sup>385</sup> In fact, he testified that "[a]s far as I know, I never saw any recruits aged under 18"<sup>386</sup> preceding which he had given frank and detailed explanations of the recruitment process as he experienced it.

145. D-0017's evidence that recruits "were told to protect members of the population and their property regardless of their ethnicity" and were "taught to fire at the enemy only in the direction of where the fire was coming from" was found by the Chamber to "stand in contrast to the consistent evidence provided by a number of credible witnesses"<sup>387</sup> and as such was used to justify the Chamber's rejection of his evidence. The Chamber ignored that D-0017's description mirrors the video of Chief Kahwa's speech to recruits in Mandro in October

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<sup>378</sup> [TJ](#), para.255.

<sup>379</sup> [TJ](#), para.252.

<sup>380</sup> [TJ](#), para.254.

<sup>381</sup> [D-0017:T-253](#),57:4-7.

<sup>382</sup> [D-0017:T-253](#),45:3-6.

<sup>383</sup> [TJ](#), para.254.

<sup>384</sup> [D-0017:T-252](#),64:12-17.

<sup>385</sup> [TJ](#), para.253.

<sup>386</sup> [D-0017:T-252](#),55:11-14 (emphasis added).

<sup>387</sup> [TJ](#), para.254.

2002,<sup>388</sup> and P-0769 and Mr. Ntaganda's evidence on the same.<sup>389</sup> D-0017's evidence that he was taught to shoot at those who were shooting, corroborates the evidence of "credible"<sup>390</sup> witness P-0017 who [REDACTED].<sup>391</sup> Ignoring this corroborative evidence, and then relying on unidentified other "credible witnesses" to disregard D-0017's evidence **in its entirety** is a flawed approach to fact finding. Rather than considering "does D-0017's evidence cast doubt on the Prosecution evidence?", the Chamber found that "given that D-0017's evidence differs from the Prosecution's allegations, we are going to disregard it in full".<sup>392</sup> This logic is erroneous. D-0017's evidence should not have been disregarded on this manifestly flawed basis.

146. At a minimum, D-0017's testimony should have been assessed in the same manner as Prosecution witnesses, namely that "[i]t is possible for a witness to be accurate and truthful, or provide reliable evidence, on some issues, and inaccurate and/or untruthful, or provide unreliable evidence, on others."<sup>393</sup> Even accepting that D-0017's testimony "reflect[ed] a concern not to provide any incriminating evidence with regard to the accused",<sup>394</sup> significant swathes of his testimony were unrelated to crimes, or Mr. Ntaganda's conduct, and yet were corroborative of the Defence evidence. His detailed testimony as to the security situation in Mongbwalu prior to the UPC/FPLC operation;<sup>395</sup> the movement of UPC/FPLC troops from Bunia to Mongbwalu,<sup>396</sup> the composition of the group,<sup>397</sup> the situation on arrival in Mongbwalu,<sup>398</sup> is necessarily unaffected by the Chamber's concern that he was trying not to inculcate Mr. Ntaganda or minimise the commission of crimes. There was no suggestion that he had not been part of these operations, or invented his involvement in the UPC/FPLC. Even if caution was required in assessing the remainder of his evidence, it should still have been assessed.

147. Having duly considered the evidence provided by D-0017, no reasonable trier of fact could have reached the findings the Chamber did in relation to the attack on Songolo in

<sup>388</sup> [DRC-OTP-0082-0016](#) (Transc.[DRC-OTP-0164-0567](#), p.7, l.200 to p.8, l.258), (Transl.[DRC-OTP-0164-0710](#), p.6, l.202 to p.8, l.275).

<sup>389</sup> [P-0796:T-120](#),30:25-31:12; [D-0300:T-215](#),86:12-87:03.

<sup>390</sup> [TJ](#), para.117.

<sup>391</sup> [P-0017:T-63](#),47:16-19.

<sup>392</sup> See e.g. [TJ](#), fn.644.

<sup>393</sup> [TJ](#), para. 80.

<sup>394</sup> [TJ](#), para.252.

<sup>395</sup> [D-0017:T-252](#),45:2-47:6.

<sup>396</sup> [D-0017:T-253](#),32:11-39:22.

<sup>397</sup> [D-0017:T-253](#),32:11-39:22.

<sup>398</sup> [D-0017:T-253](#),39:23-40:10.

August 2002,<sup>399</sup> the attack on Komanda in November 2002<sup>400</sup>, and Mr. Ntaganda's trip to Rwanda in February 2003.<sup>401</sup> As such, on the basis of the Chamber's erroneous dismissal of D-0017's evidence, these findings must be reversed.

### **III. Error in relying on uncorroborated untested evidence to convict the Accused**

148. Untested evidence cannot form the sole basis for a conviction.<sup>402</sup> The Chamber erred by relying solely on the untested and uncorroborated evidence admitted pursuant to rule 68(2)(c), in particular that of witnesses P-0022 and P-0027, to enter convictions against Mr. Ntaganda.

149. The Chamber relied on the prior recorded statements of P-0022 to find that a Ngiti man and a pregnant Lendu woman were killed in Kilo;<sup>403</sup> that UPC/FPLC soldiers attempted to murder<sup>404</sup> and forced detainees to rape P-0022<sup>405</sup> in the aftermath of the assault on Kilo; and to illustrate the manner in which Lendu civilians were persecuted and targeted on ethnic grounds.<sup>406</sup> The Chamber also relied on P-0027's evidence to find that "at least one person" was killed in the surrounding bushes of Buli by UPC/FPLC members.<sup>407</sup> Notably, the Chamber considered this incident as a material element of the war crime of intentionally attacking civilians.<sup>408</sup>

150. In doing so, the Chamber convicted Mr. Ntaganda after impermissibly relying solely on untested evidence, violating Mr. Ntaganda's right to examine, or have examined, the witnesses against him under article 67(1)(e). This resulted in material prejudice invalidating his convictions based on those findings. These convictions should be reversed to the extent that they rely on these findings.<sup>409</sup>

<sup>399</sup> [TJ](#), para.452, fn.1277.

<sup>400</sup> [TJ](#), paras.461-463, fn.1314.

<sup>401</sup> [TJ](#), fn.1672.

<sup>402</sup> [ICTY-Karadžić-TJ](#), paras.449,462-475; [ICTY-Popović-AJ](#), paras.96,1222; [ICTY-Prlić-AJ](#), para.137; [ICTY-Martić-AJ](#), para.192, fn.486.

<sup>403</sup> [TJ](#), para.873, fn.2555 referring to para.546 and fn.1648. *See also* para.894, fn.2603.

<sup>404</sup> [TJ](#), para.874, fn.2564 referring to para.546, fn.1647. *See also* para.878, fn.2570 and para.894, fn.2602.

<sup>405</sup> [TJ](#), para.940, fn.2714 referring to para.545, fns.1643-1644. *See also* para.942, fn.2720.

<sup>406</sup> [TJ](#), para.1017, fns.2905-2908.

<sup>407</sup> [TJ](#), para.605, fn.1875.

<sup>408</sup> [TJ](#), para.915, fn.2658.

<sup>409</sup> Murder and attempted murder as a crime against humanity and as a war crime (Counts 1 and 2): [TJ](#), para.873, fn.2555 referring to para.546 and fn.1648; [TJ](#), para.874, fn.2564 referring to para.546, fn.1647; Rape as a crime against humanity and as a war crime (Counts 4 and 5): [TJ](#), para.940, fn.2714 referring to para.545, fns.1643-1644; Persecution as a crime against humanity (Count 10): [TJ](#), para.1017, fns.2905-2908; Intentionally attacking civilians as a war crime (Count 3): [TJ](#), para.915, fns.2657,2658.

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

151. The Chamber's findings for the central events of the First Operation hinge on the uncorroborated testimony of three accomplice witnesses whose credibility was vigorously contested. The findings concerning killings in Nzebi;<sup>410</sup> the shooting of the *Abbé*;<sup>411</sup> anti-personnel mines in Mongbwalu;<sup>412</sup> the grenade launched in Sayo;<sup>413</sup> Mr. Ntaganda's role in killing prisoners at the *Appartements*;<sup>414</sup> and the allegation that the UPC/FPLC "fired at everyone in Mongbwalu including the 'civilian population'",<sup>415</sup> are based on the uncorroborated testimony of accomplice witnesses P-0017, P-0768 and P-0963. In accepting their testimony as reliable, the Chamber made (and repeated) legal and factual errors in its assessment of the evidence. These errors undermine findings of identified UPC/FPLC crimes during the First Operation.

### **I. Attack on Nzebi**

152. The only evidence of a UPC/FPLC attack on Nzebi comes from P-0768.<sup>416</sup> No other witnesses mentioned this village as being part of the First Operation, or even on its trajectory. Witnesses who purported to give a step-by-step account of the First Operation make no reference to an attack on Nzebi and the Prosecution did not seek to corroborate P-0768's account from any of them. None of the UN reports admitted into evidence, nor reports from Human Rights organisations mention any crimes having been committed there, or a UPC presence.

153. Mr. Ntaganda denied that the UPC attacked Nzebi, testifying that he did not know this place.<sup>417</sup> The Chamber held that it had "carefully assessed P-0768's testimony in relation to the unfolding of an assault in Nzebi against Mr Ntaganda's account, and decides to rely on P-0768's testimony in this respect."<sup>418</sup> Six reasons establish why this finding was an error, and should be reversed.

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<sup>410</sup> [TJ](#), paras.509-510.

<sup>411</sup> [TJ](#), para.533.

<sup>412</sup> [TJ](#), para.524.

<sup>413</sup> [TJ](#), para.508.

<sup>414</sup> [TJ](#), para.528.

<sup>415</sup> [TJ](#), para.494.

<sup>416</sup> [TJ](#), paras.509-510.

<sup>417</sup> [D-0300:T-237](#), 8:23-9:10.

<sup>418</sup> [TJ](#), fns.1505,1507.

154. First, the Chamber adopted the wrong approach to the assessment of evidence by pitting Mr. Ntaganda's testimony against that of P-0768, and then choosing a side. This 'either/or' approach to fact-finding has been recognised as erroneous in both domestic<sup>419</sup> and international criminal cases<sup>420</sup> because it shifts the burden of proof, by requiring the accused to present a more credible version of events in order to be acquitted. However, an accused's decision to testify "does not mean that he accepted any onus to prove his innocence."<sup>421</sup> Rather than choosing between conflicting testimonies, the proper approach is to "[...]determine whether the evidence of the Prosecution witnesses should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the evidence which the Accused and other Defence witnesses gave."<sup>422</sup> The 'either/or' approach also generates the improper inference that any lack of credibility in an accused's testimony bolsters the credibility of incriminating evidence, which is not the case.

155. The Chamber failed to assess whether P-0768's evidence was still capable of reliance despite Mr. Ntaganda's testimony and made no effort to mask its adoption of the 'either/or' approach to the two conflicting testimonies.<sup>423</sup> However, a trial cannot be reduced to "a contest of credibility between witnesses" whereby it is necessary to accept the accused's evidence in order to acquit.<sup>424</sup> By putting Mr. Ntaganda and P-0768 in a credibility contest, and then choosing a winner, the Chamber shifted the burden of proof, and committed an error of law, which materially impacts its findings on Nzebi.

156. This error was compounded by the Chamber's failure to consider relevant evidence which undermines P-0768's account. Notably, P-0768's Nzebi story had civilians being killed by UPC "shelling".<sup>425</sup> However P-0963, a witness found to be "credible"<sup>426</sup> by the Chamber and who was relied upon unreservedly in relation to the First Operation,<sup>427</sup> [REDACTED],<sup>428</sup> with no mention of grenade launchers first being redeployed to an attack in Nzebi, where they

<sup>419</sup> See, for example, *R. v. S*, p.533; *R. v. Calides*, pp.356-360. See also *Gans*, pp.220-246.

<sup>420</sup> *ICTY-Vasiljević-TJ*, para.13; *SCSL-AFRC-TJ*, para.117; *SCSL-RUF-TJ*, para.477.

<sup>421</sup> *ICTY-Vasiljević-TJ*, para.13.

<sup>422</sup> *ICTY-Vasiljević-TJ*, para.13; See also *R. v. Dowling*, para.19: "It is not the case that a tribunal of fact must accept a version put forward or advanced by an accused person before they entertain a reasonable doubt about the guilt of the accused. That version 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. **Nor is it a case of determining which version is preferred.** The onus and burden is on the Crown from beginning to end to prove the guilt of the accused beyond reasonable doubt." (emphasis added). See also *R. v. Dinardo*, para.23.

<sup>423</sup> *TJ*, fns.1505,1507.

<sup>424</sup> *R. v. Van*, para.23; See also *Murray v The Queen*, para.57; *R. v. Stoddart*; *R. v. E* (1995), p.330.

<sup>425</sup> *TJ*, para.509.

<sup>426</sup> *TJ*, para.249.

<sup>427</sup> *TJ*, paras.246-247.

<sup>428</sup> **P-0963:T-79**,23:7-9.

were used to kill civilians. The Chamber's failure to consider this testimony, which casts doubt on P-0768's account, was its *third* error.

157. Further doubt is cast on P-0768's evidence by the absence of any references to Nzebi in the logbook, being the written record of UPC/FPLC communications over the *radiophonie* network between 19 November 2002 and 22 February 2003.<sup>429</sup> During the First Operation, Mr. Ntaganda's logbook shows the presence and movement of troops from Aru<sup>430</sup> (with some soldiers going to Damas),<sup>431</sup> to Pili-Pili,<sup>432</sup> to Pluto,<sup>433</sup> to the centre of Mongbwalu,<sup>434</sup> with no mention of Nzebi. A video taken in Mongbwalu shows Kisémbu at the *Appartements* with Kasangaki, Salumu and Mr. Ntaganda (but not P-0768) being briefed about the liberation of Sayo. Nothing was said about the UPC/FPLC troops then attacking the nearby location of Nzebi.<sup>435</sup> This evidence corroborates Mr. Ntaganda's testimony that they did not.

158. The Chamber dismisses the absence of any reference to Nzebi by noting that "the fact that Nzebi is not referred to in a segment of the video referred to by the Defence and/or in the logbooks **does not demonstrate that an assault on the village did not occur**."<sup>436</sup> This shifts the burden of proof. There was no obligation on Mr. Ntaganda to **demonstrate** that the assault on Nzebi did not occur. Rather, the Chamber should have considered whether the absence of any references to Nzebi in the contemporaneous material raised doubt as to P-0768's account, particularly given that it corroborated Mr. Ntaganda's testimony. This shift in the burden of proof and the failure to give sufficient reasons comprises the *fourth* error.

159. *Fifth*, nowhere does the Chamber acknowledge the impact of P-0768's status as an accomplice. While a Chamber may rely on accomplice evidence, even when uncorroborated, it "must exercise appropriate caution in assessing such evidence and carefully consider the totality of the circumstances in which it was tendered", including that the witness "**may** have motives or incentives to incriminate the accused or to lie",<sup>437</sup> and "must explain the reasons

<sup>429</sup> [DRC-D18-0001-5748](#).

<sup>430</sup> [DRC-D18-0001-5748](#), p.5752 (Transl.[DRC-D18-0001-5778](#), p.5782).

<sup>431</sup> [DRC-D18-0001-5748](#), p.5748 (Transl.[DRC-D18-0001-5778](#), p.5778); [DRC-D18-0001-5748](#), p.5750 (Transl.[DRC-D18-0001-5778](#), p.5780).

<sup>432</sup> [DRC-D18-0001-5748](#), p.5754 (Transl.[DRC-D18-0001-5778](#), p.5784).

<sup>433</sup> [DRC-D18-0001-5748](#), p.5754 (Transl.[DRC-D18-0001-5778](#), p.5784).

<sup>434</sup> [DRC-D18-0001-5748](#), p.5766 (Transl.[DRC-D18-0001-5778](#), p.5796).

<sup>435</sup> [DRC-OTP-2058-0251](#), at 45:56-49:54.

<sup>436</sup> [TJ](#), fn.1505 (emphasis added).

<sup>437</sup> [ICTR-Bizimungu-AJ](#), paras.63-64 (emphasis added); [Bemba-et-al-AJ-2275](#), paras.1531,1534: "The condition of a witness as an "accomplice" is a circumstance that needs to be carefully considered when assessing the reliability of his or her evidence". See also [ICTR-Nchamihigo-AJ](#), paras.312-313: "the Trial Chamber erred by failing to apply special caution in the assessment of Witness BRK's testimony that his status as an accomplice witness required."; [ICTR-Muvunyi-AJ](#), paras.131-132; [ICTR-Simba-AJ](#), paras.141-143.

for accepting the evidence of an accomplice”.<sup>438</sup> The complete absence of any caution, or any explanation for relying on P-0768’s evidence (including when uncorroborated)<sup>439</sup> is an error, as is the failure to provide reasons for accepting his testimony despite his status.

160. These errors are heightened by the fact that the Chamber indeed heard evidence that P-0768 “may have motives or incentives to incriminate the accused or to lie”, specifically that he held a grudge against Mr. Ntaganda. The Chamber incorrectly asserted that the factual allegations were based “on the testimony of Mr Ntaganda alone.”<sup>440</sup> However, P-0768’s bias against Mr. Ntaganda finds partial corroboration in a screening note that **twice** records that P-0768 initiated contact with the Prosecution, and “[REDACTED]”.<sup>441</sup> P-0768’s later denial that he “[REDACTED]” puts him at odds with the Prosecution’s own investigators.<sup>442</sup> The Chamber held that a witness volunteering to give evidence does not “of itself” reveal bias. It does, however, align with Mr. Ntaganda’s position that P-0768 hated him,<sup>443</sup> which the Chamber should have properly taken into account. Similarly, the fact that the grudge was fuelled by Mr. Ntaganda having informed the Rwandan intelligence service of P-0768’s presence in Rwanda as a deserter, which led to his imprisonment for a year,<sup>444</sup> also aligns with P-0768’s testimony that he was imprisoned in Rwanda during this period.<sup>445</sup>

161. Moreover, Mr. Ntaganda’s testimony that he had “chastened and sidelined” P-0768 for arriving **after** the battle of Mongbwalu<sup>446</sup> finds corroboration in the logbook, where upon seeing P-0768’s absence from the operational messages<sup>447</sup> Mr. Ntaganda contacted Jérôme in Aru early on 21 November 2002 to ask where P-0768 was,<sup>448</sup> following which he received a response that “[REDACTED].”<sup>449</sup> Messages showing [REDACTED] (call sign “Echo Mike”)

<sup>438</sup> [ICTY-Lukić-AJ](#), para.128; [ICTY-Popović-AJ](#), para.134. See also [ICTY-Krajišnik-AJ](#), para.146; [ICTY-Haradinaj-AJ](#), para.145.

<sup>439</sup> [TJ](#), para.510.

<sup>440</sup> [TJ](#), para.163.

<sup>441</sup> [TJ](#), para.164. [DRC-OTP-2055-0254](#), p.0255: [REDACTED]; p.0256: “[REDACTED].”

<sup>442</sup> [P-0768:T-36](#),41:3-24.

<sup>443</sup> [DCB](#), para.252. [DRC-OTP-0017-0033](#), p.0178 (first) (Transl.[DRC-OTP-2102-3854](#), p.4000); [D-0300:T-216](#),22:23; [T-217](#),57:18;[T-222](#),70:14-16;[T-223](#),30:1-4,30:13-31:4.

<sup>444</sup> [D-0300:T-223](#),30:13-31:4.

<sup>445</sup> [P-0768:T-35](#),17:4-18:1.

<sup>446</sup> [D-0300:T-216](#),22:22-24; [T-217](#),57:9-22.

<sup>447</sup> [DRC-D18-0001-5748](#), pp.5748,5754 and 5756 (Transl.[DRC-D18-0001-5778](#), pp.5778,5784 and 5786).

<sup>448</sup> Mr. Ntaganda’s testimony on this point was detailed and internally consistent throughout examination in chief ([T-216](#),85:14-19,88:12-89:2), cross-examination ([T-235](#),22:19-25), and re-examination ([T-241](#),43:3-10,45:15-21).

<sup>449</sup> [DRC-D18-0001-5748](#), p.5756, (Transl.[DRC-D18-0001-5778](#), p.5786). The original handwritten message notes “[REDACTED]” rather than “[REDACTED]” in the translation, reinforcing [REDACTED].

leading the 401<sup>st</sup> Bde only appear in December 2002,<sup>450</sup> reinforcing Mr. Ntaganda's testimony of P-0768's absence and subsequent sidelining. Moreover, the Mongbwalu video records Abner, who drove the truck that arrived in Mongbwalu **after** the liberation of Sayo, explaining that he had been given fuel by P-0768 prior to leaving Aru;<sup>451</sup> further corroborating P-0768's presence in Aru rather than in Mongbwalu as the operation was underway. This evidence was raised at trial,<sup>452</sup> but ignored. In finding that the factual allegations supporting a grudge came "only from Mr. Ntaganda", the Chamber failed to consider this relevant corroborative evidence, and committed its sixth error.

162. Which, of course, brings us to the heart of the matter; P-0768 only arrived in Mongbwalu after the assault was over. Corroborated evidence shows that it was Commander Seyi [REDACTED] who commanded the unit coming from Aru.<sup>453</sup> P-0768 falsely inserted himself into this story, and incriminated Mr. Ntaganda through allegations that find no corroboration in the evidential record.

163. In finding that [REDACTED],<sup>454</sup> the Chamber committed two errors. *First*, it circumvented the evidence that [REDACTED] by reasoning that "even if" [REDACTED].<sup>455</sup> This reasoning ignores that P-0768 repeatedly insisted [REDACTED] for the Mongbwalu operation,<sup>456</sup> [REDACTED] Seyi.<sup>457</sup> If, in fact, he was only "present with them", this has catastrophic implications for his credibility. The Chamber cannot have it both ways. Either [REDACTED], or he was lying about his involvement in the battle of Mongbwalu.

164. *Second*, in finding that P-0768 [REDACTED] and was present at the Mongbwalu battle,<sup>458</sup> the Chamber failed to consider directly relevant evidence. The Chamber's analysis considers only the contradictory evidence of Mr. Ntaganda.<sup>459</sup> It ignores the logbook messages showing that [REDACTED],<sup>460</sup> while P-0768 travelled later from Aru.<sup>461</sup> It also

<sup>450</sup> See [DRC-OTP-0017-0033](#), p.0053 (second) (Transl.[DRC-OTP-2102-3854](#), p.3875), being EM's first message on 14 December 2002. **D-0300:T-235**,42:14-16,38:14-20.

<sup>451</sup> [DRC-OTP-2058-0251](#), [DRC-OTP-2102-3708](#), p.3747, ll.1384-1385 (Transl.[DRC-OTP-2102-3766](#), p.3809, ll.1494-1495).

<sup>452</sup> [DCB](#), para.280, [DRC-D18-0001-5748](#), p.5756 (first) (Transl.[DRC-D18-0001-5778](#), p.5786); **P-0290:T-66**,6:19-22,7:24-8:1; [DRC-D18-0001-5748](#), p.5754 (date) (Transl.[DRC-D18-0001-5778](#), p.5784); [DRC-OTP-2102-3766](#), p.3809, ll.1494-1495.

<sup>453</sup> [DRC-D18-0001-5748](#), pp.5748,5754 and 5756 (Transl.[DRC-D18-0001-5778](#), pp.5778,5784 and 5786); **D-0300:T-216**,64:1-5; **P-0017:T-59**,13:19-20;[T-61](#),97:8-13.

<sup>454</sup> [TJ](#), para.[REDACTED].

<sup>455</sup> [TJ](#), fn.[REDACTED] (emphasis added).

<sup>456</sup> **P-0768:T-33**,20:7-8,31:20-32:7,43:24-25.

<sup>457</sup> **P-0768:T-33**,21:16-19.

<sup>458</sup> [TJ](#), paras.487,491-99.

<sup>459</sup> [TJ](#), fn.1396.

<sup>460</sup> [REDACTED].

ignores P-0017's evidence [REDACTED] had been taken.<sup>462</sup> The exclusion of both the logbook messages, and P-0017's evidence from any analysis of this central point was a failure to consider significant evidence with direct relevance to the issues at hand,<sup>463</sup> namely P-0768's credibility in relation to the First Operation and whether his uncorroborated testimony could be safely relied upon to make adverse findings. It would not have been ignored by a reasonable Chamber.

165. The Chamber was aided in its erroneous circumvention of the logbook by its finding that it was "not necessary for the purpose of the Judgment to resolve the question of the correct sequence of messages registered [...]"<sup>464</sup> in the logbook, thereby failing to adjudicate on a live issue in the case that impacted the credibility of Prosecution evidence.<sup>465</sup> Mr. Ntaganda explained that his logbook, compiled by P-0290 in his presence when travelling to and from Mongbwalu, was a record of his movements and actions during the First Operation.<sup>466</sup> Establishing the correct sequence of messages recorded was essential, in particular with respect to pages where no dates are mentioned.<sup>467</sup> The Chamber was provided with the information it needed to decide on the sequencing of messages.<sup>468</sup> Its failure to do so was an error that further undermines its assessment of P-0768's credibility.

166. Given the errors outlined above, the Chamber's findings on Nzebi are manifestly unsafe.<sup>469</sup> The errors committed are grounds for reversal on appeal, given that they have materially affected the Chamber's findings and have occasioned a miscarriage of justice.

## II. Killing of the Abbé

167. The same errors invalidate the finding that Mr. Ntaganda killed the *Abbé*. Again, this finding relies on P-0768's uncorroborated testimony and, given the above errors, it is unsafe. In particular, P-0768 testified that he was **in Nzebi** when Mr. Ntaganda called him to the *Appartements*, that he travelled to the *Appartements* **from Nzebi** by foot, and that when he

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<sup>461</sup> [DRC-D18-0001-5748](#), p.5756, (Transl.[DRC-D18-0001-5778](#), p.5786).

<sup>462</sup> [P-0017:T-59](#),13:13-20;[T-61](#),97:8-13. Notably, P-0017 was found capable of reliance, even when uncorroborated, for adverse findings against Mr. Ntaganda. See, e.g., [TJ](#), paras.508,528.

<sup>463</sup> [Bemba-AJ-3636](#), para.172.

<sup>464</sup> [TJ](#), para.65.

<sup>465</sup> [DCB](#), para.468, [D-0300:T-216](#),60:14-61:15;60:14-67:16;[T-235](#),20:2-8.

<sup>466</sup> See, e.g. [D-0300:T-216](#),57:22-59:23.

<sup>467</sup> See, e.g. [DRC-OTP-2102-3828](#), p.3834, (Transl.[DRC-D18-0001-5778](#), p.5786), which confirm that as the First Operation started, P-0768 was still in Aru.

<sup>468</sup> [TJ](#), paras.62-65; [DCB](#), paras.467-468. [D-0300:T-216](#),60:14-61:15;60:14-67:16;[T-235](#),20:2-8.

<sup>469</sup> [TJ](#), paras.509-510.

got there, he saw Mr. Ntaganda hitting the *Abbé* with a piece of wood.<sup>470</sup> P-0768 testified, and the Chamber accepted, that these events form part of the same story. P-0768 was never in Nzebi. The Chamber's errors in finding that he was, also necessarily cast doubt on the credibility of his testimony concerning the *Abbé*.

168. Other significant problems affect this finding. Again, Mr. Ntaganda denied this allegation under oath. He testified that on 25 November, while still in Mongbwalu, he heard over the Motorola that the *Abbé* and three nuns had been taken to the *Appartements*. Once at the *Appartements*, and having been informed that the *Abbé* had collaborated with the combatants and harmed the population, Mr. Ntaganda authorised his interrogation. He told the *Abbé* that, after interrogation, he would be accompanied back to his parish. Mr. Ntaganda then returned home.<sup>471</sup>

169. In favouring P-0768's testimony that Mr. Ntaganda interrogated the *Abbé* while hitting him with a piece of wood, over Mr. Ntaganda's testimony that he did not, the Chamber erred by again engaging in an "either/or" credibility contest. Rather than considering whether Mr. Ntaganda's story raised doubt in relation to P-0768's account, the Chamber chose a side.<sup>472</sup>

170. In this case, the Chamber picked P-0768's story because of, *inter alia*, "its conclusion in P-0768's credibility assessment".<sup>473</sup> An initial assessment that a witness is "credible"<sup>474</sup> cannot be used to circumvent all evidence casting doubt on his testimony. The acceptance of "the complainant's evidence before even considering that of the accused results in a subtle shift of the onus of proof, because, the appellant's presumption of innocence is displaced by a presumption - indeed, a *finding* - of guilt where a judge essentially decides to convict the accused unless his evidence persuades them to do otherwise."<sup>475</sup> P-0768 won the credibility contest after receiving an unfair head start.

171. Moreover, an initial finding that a witness is 'credible' is not an automatic basis on which to find each of their allegations capable of reliance beyond a reasonable doubt. The Chamber was required to examine the plausibility of the allegations themselves, particularly when considered against the contradictory evidence.<sup>476</sup> This legal error in the assessment of

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<sup>470</sup> [TJ](#), para.532.

<sup>471</sup> [D-0300:T-217](#), 70:24-73:18.

<sup>472</sup> [TJ](#), fn.1589.

<sup>473</sup> [TJ](#), fn.1589.

<sup>474</sup> [TJ](#), para.173.

<sup>475</sup> [R. v. C.L.Y.](#), para.30.

<sup>476</sup> *E.g.*, [Faryna v. Chorny](#), para.11 ("The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried

the evidence invalidates the finding that Mr. Ntaganda interrogated and hit the *Abbé*, which must be reversed.

172. Moreover, in finding that Mr. Ntaganda then shot and killed the *Abbé*, the Chamber again failed to properly consider P-0768's status as an accomplice. This is not optional. A Chamber "**must explain the reasons for accepting the evidence of an accomplice**".<sup>477</sup> The complete absence of any caution, or any explanation<sup>478</sup> for its wholesale reliance on P-0768's evidence<sup>479</sup> is an error, particularly given that he was the only witness to implicate Mr. Ntaganda in the *Abbé's* death.

173. These errors, individually or cumulatively, invalidate the conviction. However, other factors demonstrate the unreliability of this finding. Central to P-0768's story are Mr. Ntaganda's bodyguards. According to him, they were present when Mr. Ntaganda hit the *Abbé* with a piece of wood, and it is they who took the *Abbé* behind the *Appartments* when he was shot and killed.<sup>480</sup> If true, the bodyguards would be expected to tell the same story. They did not. P-0010 confirmed that wherever Mr. Ntaganda went in Mongbwalu "we followed him",<sup>481</sup> yet did not mention that that Mr. Ntaganda killed the *Abbé*. Similarly, P-0888, despite telling an incredible story about the priest's head being driven around Mongbwalu on a spear attached to the front of a car,<sup>482</sup> said "I know that a certain father or priest was killed, but I don't know who killed him."<sup>483</sup> A reasonable Trial Chamber would have considered whether the bodyguards' complete lack of knowledge of an event they apparently participated in, raised doubt as to P-0768's account.

174. Instead, the Chamber cites to three other Prosecution witnesses who had heard that the *Abbé* had been killed by UPC/FPLC forces during this period and finds that they "partly corroborate" P-0768's account.<sup>484</sup> Their evidence does the opposite. Each of these witnesses knew the *Abbé* had been killed during the First Operation, yet **none** of them had ever heard

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conviction of the truth [...] In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.")

<sup>477</sup> [ICTY-Popović-AJ](#), para.134 (emphasis added); See also [ICTY-Lukić-AJ](#), para.128. [ICTR-Bizimunqu-AJ](#), paras.63-64; [Bemba-et-al-AJ-2275](#), paras.1531,1534: "The condition of a witness as an "accomplice" is a circumstance that needs to be carefully considered when assessing the reliability of his or her evidence". See also [ICTR-Nchamihigo-AJ](#), paras.312-313; [ICTR-Muvunyi-AJ](#), paras.131-132; [ICTR-Simba-AJ](#), paras.141-143.

<sup>478</sup> [ICTY-Lukić-AJ](#), para.128.

<sup>479</sup> [TJ](#), para.533.

<sup>480</sup> [TJ](#), paras.532-533.

<sup>481</sup> [P-0010:T-47](#),13:5.

<sup>482</sup> [P-0888:T-107](#),19:14-20:10.

<sup>483</sup> [P-0888:T-105](#),76:11-12.

<sup>484</sup> [TJ](#), fn.1593.

that Mr. Ntaganda killed him. Had a commander of Mr. Ntaganda's notoriety,<sup>485</sup> [REDACTED]<sup>486</sup> while surrounded by at least his escorts,<sup>487</sup> it would be a widely known fact, particularly given the apparent infamy of the *Abbé's* death itself.<sup>488</sup> The fact that these three witnesses had never heard, at any time between November 2002 and their ICC testimony, that the *Abbé* had been shot by Mr. Ntaganda does not "partly corroborate" P-0768's account, it completely undermines it.

175. As does the fact that P-0898 [REDACTED], but made no mention of Mr. Ntaganda killing him.<sup>489</sup> P-0901 [REDACTED] *Abbé's* death, but again knew only that [REDACTED].<sup>490</sup> P-0041 had been informed in November 2002 [REDACTED].<sup>491</sup> He gave the Prosecution a report [REDACTED].<sup>492</sup> P-0886 also testified about being at the *Appartements* during the events, but knew nothing about Mr. Ntaganda killing the *Abbé*.<sup>493</sup> P-0800 was present at a mass for the exhumation of the *Abbé's* remains in 2013, where Father Justin Zana Mwisi who had lived with the *Abbé* discussed the circumstances of his death.<sup>494</sup> No mention was made of Mr. Ntaganda being involved.<sup>495</sup>

176. The evidence demonstrates that the *Abbé's* death is infamous in the region; a story known to all, and a central part of the narrative of these events.<sup>496</sup> However, Mr. Ntaganda has only ever been linked to this event by P-0768. It is simply not plausible that, had Mr. Ntaganda committed this crime, it would never have been spoken about before P-0768 told ICC prosecutors over a decade later.

177. Regardless, the legal errors in the Chamber's assessment of evidence, including the burden shift to the Accused and the failure to take into account relevant evidence and considerations, have materially affected the Chamber's finding, and have occasioned a miscarriage of justice. The conviction should be reversed on appeal.

### **III. Anti-personnel mines at the entry and exit points of Mongbwalu**

<sup>485</sup> P-0907:T-91,38:18-20; P-0245:T-142,46:16-20; P-0017:T-63,5:20-6:1; P-0901:T-31,8:19-25;T-32,34:23-35:1.

<sup>486</sup> P-0768:T-35,67:2.

<sup>487</sup> TJ, para.533.

<sup>488</sup> TJ, fn.1593.

<sup>489</sup> P-0898:T-154,56:7-57:2.

<sup>490</sup> P-0901:T-32,55:15-19.

<sup>491</sup> DRC-OTP-0147-0002, pp.0015-0016.

<sup>492</sup> DRC-OTP-0127-0118.

<sup>493</sup> P-0886:T-39,65:15-66:6,75:20-76 :3.

<sup>494</sup> P-0800:T-69,80:19-82:6.

<sup>495</sup> P-0800:T-69,83:19-25.

<sup>496</sup> See, e.g., P-0901:T-28,56:23-57:1.

178. The Chamber also relies on P-0768 alone to find that Mr. Ntaganda ordered that anti-personnel mines be planted at entry and exit points of Mongbwalu.<sup>497</sup> Like P-0768's other uncorroborated allegations, this finding suffers from similar errors, which require its reversal.

179. First, the Chamber's assessment of the evidence concerning mines is a textbook shift of the burden of proof. Before considering the Defence evidence, the Chamber concludes that it has "no reason to doubt the truthfulness of P-0768's account" about mines and "**therefore excludes** Mr. Ntaganda's denial on this specific issue as not credible".<sup>498</sup> The Chamber only turns to the Defence evidence in the factual findings, and dismisses it by recalling "its finding on the witness's credibility assessment, as well as its finding that Mr Ntaganda is not credible on this point in para. 75 [*sic*] above."<sup>499</sup> This approach to fact-finding is at odds with the presumption of innocence, with the Chamber placing the burden on Mr. Ntaganda to disprove P-0768's account, rather than considering whether the Defence evidence raises doubt in relation to the allegation. A basic error of this magnitude warrants a reversal of the finding.

180. In shifting the burden, the Chamber also errs by reaching a finding without considering the Defence evidence, which amounted to more than a "denial" from the Accused,<sup>500</sup> but also explains why he could never have given the alleged order. Mr. Ntaganda was open that the UPC/FPLC had received a "box" anti-personnel mines from Goma, but was told that "it was forbidden to use" them.<sup>501</sup> He also explained why setting up mines (in this case anti-tank mines) at the entry and exit points in Mongbwalu following the operation would never have been done because "we had attacked the enemy and the enemy fled. So why would we be using those types of mines, because that would be laying traps for ourselves?"<sup>502</sup> A reasonable Chamber would have considered the totality of this evidence in assessing whether P-0768's allegation could be established beyond a reasonable doubt. In failing to do so,<sup>503</sup> the Chamber erred.

181. Other errors invalidate the finding. Again, not only is there no consideration of P-0768's accomplice status, but the Chamber also states: "the **mere fact** that this specific aspect of P-0768's evidence is no [*sic*] corroborated by any other witness does not render his

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<sup>497</sup> [TJ](#), para.524.

<sup>498</sup> [TJ](#), para.171, fn.413 (emphasis added).

<sup>499</sup> [TJ](#), fn.1558.

<sup>500</sup> [TJ](#), para.171, fn.413.

<sup>501</sup> [D-0300:T-218](#),40:13-14.

<sup>502</sup> [D-0300:T-218](#),41:2-4.

<sup>503</sup> [TJ](#), para.171.

testimony unreliable”.<sup>504</sup> Given its context, the lack of corroboration necessarily affects the credibility of the allegation. If P-0768 is to be believed, “[REDACTED],<sup>505</sup> and [REDACTED].<sup>506</sup> As such, P-0768 alleges nearly two decades of death and injury in Mongbwalu caused by mines, meaning all residents would be aware of their existence. All UPC soldiers were also informed about the mines given that, according to P-0768, they had to avoid the areas where the mines had been planted.<sup>507</sup> In these circumstances, that not one civilian or soldier corroborated P-0768’s testimony is not just a “mere fact”,<sup>508</sup> it raises significant doubt on the veracity of the claim.

182. The Chamber also cites to P-0769, P-0963 and P-0907 who said variably that they had been trained in how to use mines in Rwanda, and that the UPC/FPLC had anti-tank and anti-personnel mines in its possession.<sup>509</sup> Which begs the question why did none of these witnesses went on to say, “which the UPC/FPLC used in Mongbwalu to kill and injure many civilians”? Also, why did the Prosecution not seek confirmation of P-0768’s testimony from them?

183. One likely reason is that this allegation emerged very late in the day. Absent from his statements, P-0768 only told the Prosecution about this allegation a few weeks before his testimony.<sup>510</sup> In finding that this had no impact on its credibility,<sup>511</sup> the Chamber erred. P-0768 claimed to have [REDACTED] many people injured by landmines to the hospital. He testified that [REDACTED].”<sup>512</sup> It is implausible that wounded civilians would somehow call P-0768, being a commander in the very group which planted the mines, to help them with their [REDACTED] having been injured by them. Even if true, [REDACTED] mine victims to and from the hospital would have been horrific; not easily forgotten, and necessarily a central experience of the events. Regardless, P-0768 did not inform the Prosecution until just prior to testifying.

184. The Chamber found that P-0768 had “satisfactorily explained the absence of this allegation” from his statement, because when he first met Prosecution “he was not prepared to

<sup>504</sup> [TJ](#), fn.413 (emphasis added).

<sup>505</sup> [P-0768:T-35](#),73:17-20,71:19-21:[REDACTED].

<sup>506</sup> [P-0768:T-33](#),67:2-3.

<sup>507</sup> [P-0768:T-35](#),75:8-10.

<sup>508</sup> [TJ](#), fn.413.

<sup>509</sup> [TJ](#), fn.1558.

<sup>510</sup> [P-0768:T-36](#),5:22-24.

<sup>511</sup> [TJ](#), fn.410.

<sup>512</sup> [P-0768:T-33](#),59:17-18.

testify and that, therefore, certain events ‘may have escaped him’.”<sup>513</sup> Putting aside the non-sequitur between not being prepared to testify and remembering key events, this is not even true. The Prosecution’s note of its first meeting with the witness records that “[REDACTED].”<sup>514</sup> P-0768’s willingness to testify was clear from the start, and testify he did. The Chamber was wrong to accept his explanation without considering this contradictory evidence. The lateness of this type of allegation necessarily impacts its credibility. Like P-0768’s other uncorroborated claims, the numerous errors committed by the Chamber materially affect the subsequent finding, occasioning a miscarriage of justice, and warranting its reversal.

#### **IV. UPC soldiers fired “at everyone in Mongbwalu” including the “civilian population”**

185. The Chamber heard from over 20 witnesses about the unfolding of the First Operation. Only P-0963 said that UPC soldiers fired on the civilian population, which the Chamber accepted.<sup>515</sup> This is an extraordinary finding, and the errors which invalidate it warrant its reversal on appeal.

186. The Chamber was able to accept P-0963’s testimony that the UPC targeted the “civilian population”,<sup>516</sup> because it found that “many persons were present in the town as the assault unfolded”.<sup>517</sup> As such, there was a “civilian population” present for the UPC to fire on. This finding is contradicted by Prosecution and Defence witnesses, in evidence not considered by the Chamber.

187. There were very few subjects in this case about which witnesses were in near-unanimity. The fact that the civilian population fled Mongbwalu to avoid the UPC/FPLC assault was one of them. The Defence submitted that: “the civilian population upon hearing the first gunshots, leaving before the fighting reached Mongbwalu”.<sup>518</sup> The Chamber rejected this on the basis that the witnesses cited by the Defence did not consistently specify the “exact moment” they left, or the precise “moment in time” civilians fled.<sup>519</sup> As such, given that the Chamber couldn’t say precisely when the civilians fled, they found “many persons” remained as the operation unfolded. This was an error.

<sup>513</sup> [TJ](#), fn.410.

<sup>514</sup> [DRC-OTP-2055-0254](#), p.0256 (emphasis added).

<sup>515</sup> [TJ](#), para.494.

<sup>516</sup> [TJ](#), para.494.

<sup>517</sup> [TJ](#), para.498.

<sup>518</sup> [DCB](#), para.598. [P-0859:T-51](#),20:17-21,23:20-23; [P-0887:T-93](#),14:22-15:1; [P-0892:T-83](#),27:19-25; [P-0800:T-69](#),32:16-21; [P-0850:T-112](#),73:18-24,73:20-74:3.

<sup>519</sup> [TJ](#), fn.1448.

188. Witnesses described fleeing from the sound of gunfire.<sup>520</sup> They were fleeing for their lives, with their children and families. This reaction is an immediate one; a decision taken in minutes or seconds. That some of them were unable to specify with precision the “exact moment” they fled, does not support a finding that they remained for the unfolding of the assault. P-0859’s evidence, for example, was disregarded on the basis that he “did not specify the exact moment when he and others fled the second assault on Mongbwalu in relation to the moment when the UPC/FPLC entered Mongbwalu”.<sup>521</sup> What he said was this:<sup>522</sup>

[...] if we are here and you hear gunshots, you definitely would think that the attack is coming nearer, and then you flee. Now, when there is gunfire and there are gunshots, one becomes aware that the fighting is coming nearer and one flees.

189. Therefore, finding that “many people were present as the attack unfolded” because witnesses could not specify the exact moment they fled, was unreasonable.

190. Second, in reaching this finding, the Chamber ignored relevant evidence from others who fled (or from those who encountered them), which corroborated the evidence cited by the Defence.<sup>523</sup> In accepting that “many people” remained, the Chamber failed to consider: **P-0039** saying “[REDACTED]”,<sup>524</sup> **P-0805** who saw people fleeing from Mongbwalu and asked them “Why are you running away” to which they replied that “the UPC had just gone into Mongbwalu”,<sup>525</sup> **P-0868** describing the arrival of the Mongbwalu population in his village because they had been “compelled to flee”,<sup>526</sup> **P-0887** saying “we also heard gunfire coming from the direction of the airport, and that is when we fled”,<sup>527</sup> **P-0893**’s evidence of a “stream of people” coming from Mongbwalu to Bambu because of the clashes;<sup>528</sup> and **P-0792**’s evidence of seeing people fleeing from Mongbwalu to hide in the bush.<sup>529</sup> The Chamber was required to consider this corroborated evidence, and assess whether it raised doubt as to its

<sup>520</sup> **P-0850:T-112**,73:13-74:3; **P-0887:T-93**,14:19-15:1; **P-0892:T-83**,27:19-28:4; **P-0912:T-148**,50:19-51:9; **P-0022:DRC-OTP-0104-0026-R02**, p.0030; **P-0859:T-52**,17:18-18:9.

<sup>521</sup> **TJ**, fn.1448.

<sup>522</sup> **P-0859:T-52**,18:3-6.

<sup>523</sup> **DCB**, para.598, citing to **P-0859:T-51**,20:17-21,23:20-23; **P-0887:T-93**,14:22-15:1; **P-0892:T-83**,27:19-25; **P-0800:T-69**,32:16-21; **P-0850:T-112**,73:18-24,73:20-74:3.

<sup>524</sup> **P-0039:DRC-OTP-0104-0015-R03**, p.0019.

<sup>525</sup> **P-0805:T-25Bis**,3:6-21.

<sup>526</sup> **P-0868:T-178**,9:3-6.

<sup>527</sup> **P-0887:T-93**,14:19-15:1.

<sup>528</sup> **P-0863:T-180**,11:21-12:1.

<sup>529</sup> **P-0792:T-150**,45:23-47:3.

finding that “many people” remained in Mongbwalu as the attack unfolded.<sup>530</sup> Its failure to do so was an error which invalidates its finding.

191. Regardless, had the Chamber wanted to know when the population fled *vis-à-vis* the advancing UPC/FPLC force, it had evidence from the soldiers themselves. Firstly, from Mr. Ntaganda.<sup>531</sup> The Chamber held its conclusion that “many people” remained in Mongbwalu was “unaffected by Mr. Ntaganda’s testimony” that when the UPC arrived, the population had already left.<sup>532</sup> However, **P-0768** said that when the UPC got to Mongbwalu “there were very few people in the city”;<sup>533</sup> and **P-0010**, (using the term “Lendu” as shorthand for “Lendu combatants”) testified that in Mongbwalu: “there were no civilians. You see, when there is an attack, the civilians flee. So all who were in the city were the Lendu. And if the civilians were to find out that war was to break out soon, they would usually flee.”<sup>534</sup> Neither of these witnesses features in the Chamber’s analysis. This was an error. The Chamber was wrong to discard Mr. Ntaganda’s testimony as not credible,<sup>535</sup> without acknowledging that the other UPC witnesses said the same thing.

192. The picture of a Mongbwalu deserted by civilians found further corroboration in the testimony of another “credible” witness **P-0017**, who confirmed that “[w]hen we engaged in fighting I did not in fact see any civilians at that time”<sup>536</sup> adding that “[REDACTED].”<sup>537</sup> Unlike P-0010 and P-0768, the Chamber **did** consider this evidence, but held that “it was possible” that civilians were there and P-0017 just didn’t see them.<sup>538</sup> Of course, the correct question was not whether this was possible, but whether P-0017’s evidence that he did not see any civilians raised doubt as to the soundness of the Chamber’s finding that “many” remained. Of course, it does.

193. There was a reason why only one witness testified that the UPC/FPLC fired on the civilian population during the assault on Mongbwalu. The civilians who testified said “we all fled”, and the UPC/FPLC witnesses said “we arrived to no-one”. Relying on P-0963’s uncorroborated allegation was an error, not only because it goes against the weight of the

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<sup>530</sup> [TJ](#), para.498.

<sup>531</sup> **D-0300:T-217**,36:16-23.

<sup>532</sup> [TJ](#), para.498.

<sup>533</sup> **P-0768:T-34**,15:6-11.

<sup>534</sup> **P-0010:T-50**,62:15-22.

<sup>535</sup> [TJ](#), fn.1447.

<sup>536</sup> **P-0017:T-61**,51:8-13.

<sup>537</sup> **P-0017:T-61**,54:3-5; **P-0017:T-63**,16:20-22.

<sup>538</sup> [TJ](#), fn.1448.

evidence, but because the legal errors committed in reaching it materially affect the finding and have occasioned a miscarriage of justice.

**V. The shooting of the grenade at the departing column**

194. The Chamber found that, as the operation in Sayo was nearing its end, Mr. Ntaganda ordered [REDACTED] to fire a grenade launcher at the slope where people in civilian clothes were walking in single file. The grenade was fired but caused no injuries.<sup>539</sup> This story is uncorroborated. Despite occurring on a “hot and clear day” with “good visibility”, P-0017 was the only Prosecution witness who saw the incident. Nor did the Prosecution seek corroboration from other witnesses who were there.<sup>540</sup>

195. Mr. Ntaganda gave a detailed account of how Sayo was taken,<sup>541</sup> including his presence in the centre of Sayo as the attack was ending and the absence of heavy weapons.<sup>542</sup> In accepting P-0017’s testimony over Mr. Ntaganda’s, the Chamber committed five errors that invalidate the finding.

196. *First*, the Chamber’s burden shift to Mr. Ntaganda is blatant. In finding that this event indeed occurred, the Chamber “recalls its credibility assessment on this specific aspect of his [P-0017] testimony”.<sup>543</sup> This assessment appears at the start of the Judgment, and reads:

The Defence also challenges the witness’s account of his alleged participation in the Sayo operation. On this point, the Chamber considers that the witness’s evidence about having received an order to shoot at civilians is detailed, consistent throughout his testimony, and plausible.<sup>544</sup>

197. The problem is that this “assessment” was made without considering the Defence’s contradictory evidence. It is then used as a justification to disregard this contradictory evidence. This is backwards. The Chamber was required to consider whether the Defence evidence casts doubt on P-0017’s account [REDACTED], and whether P-0017’s evidence was still capable of supporting a finding beyond a reasonable doubt.

198. *Second*, in dismissing Mr. Ntaganda’s evidence that he did not see any heavy weapons in Sayo, the Chamber again erred by pitting the two witnesses against each other, finding that

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<sup>539</sup> [TJ](#), para.508.

<sup>540</sup> [P-0963:T-79](#),11:10-15:9; [T-82](#),37:1-39:7; [P-0886:T-37](#),9:3-11:7; [P-0800:T-68](#),31:7-33:11.

<sup>541</sup> [D-0300:T-217](#),45:8-55:14.

<sup>542</sup> [D-0300:T-217](#),53:14-24.

<sup>543</sup> [TJ](#), fn.1488.

<sup>544</sup> [TJ](#), para.112.

[having] 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.<sup>545</sup>

This reasoning is unsound. Unlike P-0017, Mr. Ntaganda was unable to give a "sufficiently clear and detailed" and "internally consistent" account of an event that did not happen. It is not possible to say "there were no heavy weapons in central Sayo" in a more detailed manner. More generally, however, and as argued above, the Chamber's 'either/or' approach to fact-finding is wrong<sup>546</sup> and the resultant finding should be quashed.

199. The third error concerns the central problem at the heart of P-0017's allegation. During cross-examination, P-0017 marked on a map [REDACTED], and the location of the column. The distance between them was 200 metres.<sup>547</sup> As such, P-0017's account was that [REDACTED] shot a grenade launcher at a group of people that was "very numerous" from a few hundred metres away and none were injured, let alone killed. Mr. Ntaganda submitted that this defies belief. Firing a grenade launcher at a group of people from this distance, would have resulted in carnage.<sup>548</sup>

200. In addressing this submission, the Chamber held that "it is **plausible** for the shooter to have **missed the target**, even under the aforementioned circumstances, or not to have shot at the people themselves, but **only in their direction**, thereby still leaving them unharmed."<sup>549</sup> This was an error. The question is not whether P-0017's story was **plausible**, but whether it could be relied upon to support a finding beyond a reasonable doubt that this incident happened, particularly in light of the evidence from the Accused that it did not.

201. More critically, the Chamber's theory as to how a grenade could be launched at a group with no resultant injuries has no basis in the evidence. The Chamber neither heard, nor solicited evidence of the impact of a grenade launcher being shot "in the direction" of a group of people from this limited distance. Its theory is based on speculation, very similar to that which led to the quashing of convictions in *Gotovina*.<sup>550</sup> Moreover, it is contradicted by the evidence of P-0017 himself, who never testified that [REDACTED] missed the target, but

<sup>545</sup> [TJ](#), fn.1494.

<sup>546</sup> [ICTY-Vasiljević-TJ](#), para.13; [SCSL-AFRC-TJ](#), para.117; [SCSL-RUF-TJ](#), para.477; [R. v. Van](#), para.23; [Murray v The Queen](#), para.57; *R. v. Stoddart*, 217; [R. v. Dowling](#), para.19; *E (1995)*, para.330.

<sup>547</sup> [REDACTED].

<sup>548</sup> [REDACTED]; [P-0017:T-58](#), 72:20-24.

<sup>549</sup> [TJ](#), para.1498 (emphasis added).

<sup>550</sup> [ICTY-Gotovina-AJ](#), paras.58-61.

rather that [REDACTED] fired “[REDACTED].”<sup>551</sup> Nor does the Chamber’s theory address why [REDACTED], having missed the target in full view of the commander who allegedly gave [REDACTED] the order, did not shoot again? This is not a credible story, as demonstrated by the legal and factual gymnastics required by the Chamber to accept it.

202. Next, the Chamber erred in failing to consider P-0017’s status as an accomplice, and in giving no indication that it exercised caution in assessing his testimony.<sup>552</sup> The Chamber was required to explain the reasons for accepting P-0017’s evidence despite his status,<sup>553</sup> and its failure to do so is its fourth error. This error is compounded by the fact that P-0017’s allegation was uncorroborated, which is not acknowledged, let alone cited as a basis for a cautious approach to his evidence.

203. In fact, the need for caution was heightened by P-0017’s retraction of a key aspect of his story in Sayo. On the stand, P-0017 testified that after Mr. Ntaganda ordered [REDACTED] to fire on the column of people, they then progressed to the church where people were hiding. According to P-0017, Mr. Ntaganda said “go fuck your mother” to the people in the church, before one of Mr. Ntaganda’s bodyguards then shot and killed a man.<sup>554</sup> In cross-examination, P-0017 was shown his 2006 statement, in which he had said that, [REDACTED].<sup>555</sup> Many other discrepancies between the two accounts were raised.<sup>556</sup> The Chamber held that under cross-examination P-0017 “appeared to no longer stand by the information provided in 2016 [*sic*]”, and, therefore, did not rely “on this specific aspect of P-0017’s evidence”.<sup>557</sup>

204. Elements of testimony cannot simply be discarded like playing cards. False, incorrect or even just unreliable testimony is a necessary and intrinsic part of evaluating the credibility of a witness. Not relying on this ‘specific aspect’ of his testimony was not enough. A reasonable Chamber would have explained why the retraction of such a grave allegation had no impact on his testimony that Mr. Ntaganda ordered him to shoot on a column of people apparently minutes earlier. The failure to do so was particularly acute in the context of these proceedings, where there were no limits to the Prosecution’s pre-trial preparation of its

<sup>551</sup> **P-0017:T-58**, 71:2-3.

<sup>552</sup> **ICTR-Bizimungu-AJ**, paras.63-64; **ICTY-Popović-AJ**, para.134; **ICTY-Lukić-AJ**, para.128; **Bemba-et-al-AJ-2275**, paras.1531,1534; **ICTR-Nchamihigo-AJ**, paras.312-313; **ICTR-Muvunyi-AJ**, paras.131-132; **ICTR-Simba-AJ**, paras.141-143.

<sup>553</sup> **ICTY-Popović-AJ**, para.134; **ICTY-Lukić-AJ**, para.128.

<sup>554</sup> **P-0017:T-58**, 71:8-77:15.

<sup>555</sup> **P-0017:T-61**, 108:24-109:11.

<sup>556</sup> **TJ**, fn.286, citing **DCB**, paras.322-323.

<sup>557</sup> **TJ**, para.115.

witnesses. Indeed, in many cases the process lasted weeks, and witnesses could read their prior statements and all related material in full, before discussing these with the Prosecution immediately before testifying.<sup>558</sup>

205. The Chamber failed to engage in any way with these significant question marks over P-0017's credibility; his accomplice status; the lack of corroboration of this significant event; and his apparent willingness to lie about Mr. Ntaganda's orders to shoot and kill civilians. At the very least, a reasonable Trial Chamber was required to explain why, despite these significant obstacles, P-0017 was still capable of reliance. Its failure to do so was an error.

206. Moreover, for many reasons, P-0017's account is implausible. Mr. Ntaganda, P-0017 and P-0963 (both "credible" witnesses)<sup>559</sup> explained to the Chamber how [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED] would never be at the frontline.<sup>560</sup> Their employment was a [REDACTED].<sup>561</sup> [REDACTED].<sup>562</sup>

207. The idea that Mr. Ntaganda would order [REDACTED] to just "point and shoot" a heavy weapon at a column of people 200 metres away is incompatible with all other evidence heard about the use of heavy weapons in the case. This may be why P-0017 did not include this allegation in his 2013 statement to the Prosecution.<sup>563</sup> Nor can it be reconciled with [REDACTED] that he was (properly) [REDACTED] from Commander Salumu's G3, Kasangaki in Sayo.<sup>564</sup> Neither the Prosecution nor the Chamber addressed why, if Mr. Ntaganda wanted a heavy weapon to be fired, he would not have simply followed the chain of command and given the order to Kasangaki. Instead, without giving any reasons, the Chamber found that Mr. Ntaganda circumvented the military hierarchy to give an order directly to the heavy weapons [REDACTED]. The Chamber heard no other evidence that the UPC/FPLC, with its structure replicating a "conventional modern army",<sup>565</sup> did not operate in accordance with the chain of command.

208. The implausibility of the allegation aside, the legal errors committed by the Chamber in again shifting the burden of proof to the accused and dismissing Mr. Ntaganda's submissions on the basis of speculative theories with no basis in the evidence, materially

<sup>558</sup> [Decision-652-Anx](#), [Defence-Reply-Brief-2307](#), para.50.

<sup>559</sup> [TJ](#), paras.117,249.

<sup>560</sup> [P-0963:T-78](#),82:5-23; [P-0017:T-61](#),52:12-23; [D-0300:T-223](#),37:23-38:22.

<sup>561</sup> [P-0017:T-60](#),77:17-79:9.

<sup>562</sup> [P-0017:T-60](#),78:11-15.

<sup>563</sup> [P-0017:T-61](#),106:5-22.

<sup>564</sup> [P-0017:T-61](#),68:19-20.

<sup>565</sup> [TJ](#), para.784.

affect the Chamber's the finding. In order to address the subsequent miscarriage of justice, the finding should be reversed.

## **VI. Killing prisoners at the *Appartements***

209. Again, P-0017 is the sole witness to implicate Mr. Ntaganda in the killing of the two prisoners at the *Appartements*.<sup>566</sup> The Prosecution called numerous witnesses who claimed to have been present in and around the *Appartements* over this period, and none of them, including members of his escort, had heard that Mr. Ntaganda took two prisoners and ordered that they be beaten to death.<sup>567</sup>

210. A Trial Chamber is permitted to rely on uncorroborated evidence, even when the witness in question is an accomplice.<sup>568</sup> There is no prohibition on it doing so, even when the evidence directly implicates the accused in murder. However, in this case, the Chamber relied on the uncorroborated evidence of an accomplice, in the absence of any caution, with no discussion of his status or reasoning as to why his uncorroborated testimony was reliable, to convict Mr. Ntaganda of murder.<sup>569</sup> This was an error of law,<sup>570</sup> and a violation of the requirement to give a full and reasoned statement of findings on the evidence.<sup>571</sup> Particularly given that P-0017's credibility was "vigorously impugned",<sup>572</sup> most notably on the basis that his inability to recognize the *Appartements* or central characters in his story raise reasonable doubt as to him even being present.<sup>573</sup> This error warrants the reversal of this finding on appeal.

211. Other errors invalidate this finding. First, on the basis of other findings in the Judgment, P-0017's evidence as to his date of arrival at the *Appartements* undermines his allegation. The Chamber found that the UPC/FPLC attacked Mongbwalu "on or about 20 November 2002", and that it took "approximately three to four days"<sup>574</sup> for the UPC/FPLC to take the town. On this basis, Mongbwalu fell to the UPC/FPLC on or about 23 or 24

<sup>566</sup> [TJ](#), para.528.

<sup>567</sup> [P-0963:T-79](#),21:19-25:15; [P-0887:T-93](#),33:1-34:11; [P-0898:T-154](#),18:18-20:19; [P-0907:T-90](#),34:11-34:25; [P-0002:T-172](#),29:23-32:12; [P-0055:T-70](#),97:4-98:6; [P-0190:T-97](#),16:1-19.

<sup>568</sup> [Bemba-et-al-AJ-2275](#), para.1531.

<sup>569</sup> [TJ](#), para.873.

<sup>570</sup> [ICTR-Bizimungu-AJ](#), paras.63-64; [ICTY-Popović-AJ](#), para.134; [ICTY-Lukić-AJ](#), para.128; [Bemba-et-al-AJ-2275](#), paras.1531,1524; [ICTR-Nchamihigo-AJ](#), paras.312-313; [ICTR-Muvunyi-AJ](#), paras.131-132; [ICTR-Simba-AJ](#), paras.141-143; [ICTY-Krajišnik-AJ](#), para.146; [ICTY-Haradinaj-AJ](#), para.145.

<sup>571</sup> [Statute](#), article 74(5).

<sup>572</sup> [Katanga-TJ-3436](#), para.111.

<sup>573</sup> [DCB](#), paras.302-308, [Defence-Reply-Brief-2307](#), paras.88-94. [P-0017:T-62](#),50:7-25,51:17-22,52:5-10,57:18-23,69:2-9;[T-63](#),8:6-10; [D-0300:T-226](#),93:21-94:4.

<sup>574</sup> [TJ](#), para.486.

November. The Chamber found that Mr. Ntaganda's date of departure "cannot be established",<sup>575</sup> but that he stayed "at least one week" after Mongbwalu fell.<sup>576</sup> It could not find, for example, that he stayed for two weeks or a month; it found that he stayed "at least one week".

212. The Chamber's failure to determine the date on which Mr. Ntaganda left Mongbwalu was an error. Mr. Ntaganda testified that he left Mongbwalu on 28 November.<sup>577</sup> However, the evidence relied upon by the Chamber to reject this date was not incompatible with it. The Chamber firstly relied on "the informed evidence" of "witnesses who were in Mongbwalu at the time",<sup>578</sup> namely P-0002, P-0768, P-0901 and P-0963. **P-0002** did not give a date for Mr. Ntaganda's departure.<sup>579</sup> **P-0768** testified that Mr. Ntaganda remained in Mongbwalu for "almost a week or up to a week and a half" following the takeover of Mongbwalu; thereby encompassing the date of 28 November.<sup>580</sup> **P-0901** said that Mr. Ntaganda left after organising the FPLC soldiers on site, and said "I think he spent more than a week", although it is not clear if this describes the total time Mr. Ntaganda spent in Mongbwalu or the time following its takeover, and no clarification was sought by the examining attorney.<sup>581</sup> **P-0963** asserted in chief that Mr. Ntaganda remained in Mongbwalu for "three weeks", but places his departure before Kisembo's arrival, who was present on the ground in the days following the operation.<sup>582</sup> Under cross-examination, P-0963 conceded that [REDACTED].<sup>583</sup> As such, none of these testimonies contradict Mr. Ntaganda's more precise account that he left on 28 November. If anything, they reinforce it.

213. It is also significant that the Prosecution put to Mr. Ntaganda that he left "on 29 November 2002, or sometime after".<sup>584</sup> Even with this hedging, the Prosecution could not have put this question in this form to the witness without having a reasonable basis to believe he left on 29 November, a day after Mr. Ntaganda himself remembers leaving.

214. Next, the Chamber had regard to "findings related to Mr. Ntaganda's whereabouts and conduct during the First Operation" citing to; (i) the 'killings in Nzebi', and (ii) P-0017's

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<sup>575</sup> [TJ](#), fn.1412.

<sup>576</sup> [TJ](#), paras.489,1180.

<sup>577</sup> **D-0300:T-218**,4:19-5:10.

<sup>578</sup> [TJ](#), fn.1412.

<sup>579</sup> **P-0002: DRC-OTP-2060-0002**, p.0012.

<sup>580</sup> **P-0768:T-34**,7:9-12.

<sup>581</sup> **P-0901:T-28**,57:19-22.

<sup>582</sup> **DRC-OTP-2058-0251**, at 45:56-49:54.

<sup>583</sup> **P-0963:T-82**,40:11-16.

<sup>584</sup> **D-0300:T-237**,10:25-11:14.

testimony about the *Appartements*. The killings in Nzebi were an invention of P-0768, and any reliance on his testimony is an error for the reasons set out above. Regardless, they were not found to have occurred on a particular date, but rather “sometime” before Mr. Ntaganda’s departure.<sup>585</sup> Again, they do not undermine Mr. Ntaganda’s date of 28 November.

215. As for P-0017’s testimony concerning [REDACTED].<sup>586</sup> This evidence features nowhere in the Chamber’s analysis. This was a failure to consider directly relevant evidence,<sup>587</sup> given that it meant that P-0017 [REDACTED]. But more than that, [REDACTED].<sup>588</sup>

216. As such, to accept P-0017’s testimony was to accept that he and Mr. Ntaganda overlapped in the *Appartements* for a prolonged period; P-0017 described night after night of Mr. Ntaganda’s comings and goings, after P-0017’s arrival on 30 November, to the point that any deviation from his normal behaviour was worthy of note. This was incompatible with (i) Mr. Ntaganda’s testimony that he left Mongbwalu on 28 November;<sup>589</sup> (ii) the “informed evidence” of Prosecution witnesses, none of whom put Mr. Ntaganda’s departure in a time period that was incompatible with 28 November;<sup>590</sup> and (iii) the Prosecution’s own proposition in cross-examination that Mr. Ntaganda left Mongbwalu on 29 November.<sup>591</sup>

217. At the very least, P-0017’s evidence gave rise to the need for an explanation from the Chamber before accepting beyond a reasonable doubt that Mr. Ntaganda was present at the *Appartements* (and killing prisoners) seemingly weeks after all other evidence had him leaving Mongbwalu. Prevaricating as to dates, and then ignoring the key piece of evidence that P-0017 only arrived at the *Appartements* **about a week after** the UPC took Mongbwalu was an error. The finding that Mr. Ntaganda killed prisoners at the *Appartements* should be reversed.

218. Moreover, the finding that people were imprisoned at the *Appartements* is also fundamentally flawed. In finding that prisoners were detained at the *Appartements* during the First Operation,<sup>592</sup> the Chamber gives three reasons for preferring P-0017’s account over Mr. Ntaganda’s, which it dismissed as “not credible”.<sup>593</sup> First, the Chamber states that Mr. Ntaganda “testified that only one person was taken ‘prisoner’ during the First Operation, in

<sup>585</sup> [TJ](#), para.510.

<sup>586</sup> [P-0017:T-62](#), 56:10-18.

<sup>587</sup> [Bemba-AJ-3636](#), para.172.

<sup>588</sup> [P-0017:T-59](#), 22:5-23:1.

<sup>589</sup> [D-0300:T-218](#), 4:19-5:10.

<sup>590</sup> [TJ](#), fn.1412.

<sup>591</sup> [D-0300:T-237](#), 10:25-11:14.

<sup>592</sup> [TJ](#), para.528.

<sup>593</sup> [TJ](#), para.528.

Sayo, and that this person was released”.<sup>594</sup> The Chamber considered that this was “not credible” given Mr. Ntaganda’s own admission that the *Abbé* had also been taken prisoner. However, Mr. Ntaganda’s testimony cited by the Chamber is limited to the operation **in Sayo**.<sup>595</sup>

Q. Now, in relation to prisoners, you've indicated that there was one prisoner **in Sayo** and you let him go. Correct?

A. Yes, I let him go.

Q. But in fact your troops **in Mongbwalu** took many prisoners during the operation, didn't they?

219. The first question makes reference to Mr. Ntaganda’s earlier testimony that on arrival at the church in Sayo he realised that **one** prisoner of war had been taken, whom he then released.<sup>596</sup> The second question’s expansion to “Mongbwalu” reinforces that the first question relates only to Sayo. To claim a ‘contradiction’ between this testimony and Mr. Ntaganda’s earlier testimony about the *Abbé* at the *Appartements* misrepresents his evidence. There was no contradiction. Mr. Ntaganda was talking about two different things.

220. The Chamber considers that this evidence is also contradicted by “Mr Ntaganda’s statement shortly after the takeover of Mongbwalu that many people were captured and that a significant number **of them** were killed.”<sup>597</sup> This, again, misrepresents the record. In the interview in question, Mr. Ntaganda referred to two groups, those who were captured during the fighting, and those who were killed during the fighting.<sup>598</sup> His statement cannot reasonably be read as meaning that a significant number of those captured were killed. If there was any doubt, this was clarified **twice** by his testimony that in this interview he stated “that we killed a lot of people and captured a lot **of others**”<sup>599</sup> and “that we captured a lot of people and that a lot **of others** had died”.<sup>600</sup>

221. *Thirdly*, the Chamber was unconvinced by Mr. Ntaganda’s explanation that this statement was nothing more than a military tactic to intimidate the enemy (although it failed to consider his relevant evidence that the APC was manipulating the media in the same

<sup>594</sup> [TJ](#), fn.1574.

<sup>595</sup> [TJ](#), fn.1574, citing [D-0300:T-235](#), 84-85.

<sup>596</sup> [D-0300:T-217-FRA](#), 54:2-13.

<sup>597</sup> [TJ](#), fn.1574, citing [DRC-OTP-2058-0251](#), at 00:12:04-00:12:40 (Transl.[DRC-OTP-2102-3766](#), p.3774, ll.201-202).

<sup>598</sup> [DRC-OTP-2102-3766](#), p.3774, ll.201-202: “nous avons capturé beaucoup des gens dans leur rangs, et un grand nombre parmi eux ont été tués.”

<sup>599</sup> [D-0300:T-235](#), 86:25 (emphasis added).

<sup>600</sup> [D-0300:T-241](#), 55:25-56:1 (emphasis added).

way),<sup>601</sup> in light of “the competing, consistent evidence from P-0907, P-0903, P-0017, P-0898 and P-0887.”<sup>602</sup>

222. No reasonable Chamber could have considered these testimonies to be consistent. According to these witnesses, the prison was variably [REDACTED];<sup>603</sup> was “underground”;<sup>604</sup> was “in a small room” called Mabushu;<sup>605</sup> or the prisoners were spread between the *Appartements*, Salumu’s camp, camp Galanga, or camp Goli.<sup>606</sup> The prisoners were variably “[REDACTED]”;<sup>607</sup> or were “prisoners of war” who might have been combatants;<sup>608</sup> or were “Lendus”;<sup>609</sup> or Lendu, Nyali and also “Lulu”.<sup>610</sup> P-0017 and P-0898 made no mention of prisoners being questioned, whereas P-0887 said they were brought to the camp to be questioned (although it is unclear by whom);<sup>611</sup> P-0963 said the questioning was done by Pigwa<sup>612</sup> (with no knowledge of Mr. Ntaganda interrogating anyone);<sup>613</sup> whereas P-0907 was alone in testifying that some of them would be tried.<sup>614</sup> This was not “consistent evidence”.<sup>615</sup> Key details differ.

223. Regardless, having found Mr. Ntaganda’s testimony to be “not credible” on the basis of the misrepresentation of the evidence and the invented contradictions discussed above, the Chamber then accepted P-0017’s uncorroborated evidence that Mr. Ntaganda would “sometimes come to the *Appartements* and take persons held there away”, or that he ordered soldiers to “tie up and kill two persons detained there” who were subsequently beaten and killed.<sup>616</sup> In doing so, the Chamber

<sup>601</sup> **D-0300:T-241**,55:15-56:12.

<sup>602</sup> **TJ**, fn.1574. *See also* fn.1577.

<sup>603</sup> **P-0017:T-59**,21:18-19.

<sup>604</sup> **P-0887:T-93**,33:12.

<sup>605</sup> **P-0898:T-154**,20:6-7.

<sup>606</sup> **P-0907:T-90**,34:12-19.

<sup>607</sup> **P-0017:T-59**,24:10-11.

<sup>608</sup> **P-0887:T-93**,33:3-10,34:6;34:10.

<sup>609</sup> **P-0963:T-79**,22:9-15.

<sup>610</sup> **P-0898:T-154**,19:1-3.

<sup>611</sup> **P-0887:T-93**,33:7-9.

<sup>612</sup> **P-0963:T-79**,22:2-3.

<sup>613</sup> **P-0963:T-79**,25:14-15.

<sup>614</sup> **P-0907:T-90**,34:22.

<sup>615</sup> **TJ**, fn.1574.

<sup>616</sup> **TJ**, fn.1577.

recalls its conclusion in P-0017's credibility assessment on P-0017's testimony on his presence at the camp at the same time as Mr Ntaganda, and finds his account of having been a guard at the 'prison' at *Appartements* to be credible and reliable, noting that it is detailed and consistent with evidence of P-0963, P-0887, and P-0898.<sup>617</sup>

224. P-0963, P-0887 and P-0898 said **nothing** about Mr. Ntaganda taking prisoners away or ordering that they be tied up and killed. To claim consistency between their testimonies and that of P-0017 is an error. The fact that P-0963, P-0887 and P-0898 claim to have been in and around the *Appartements* during this period yet know nothing about Mr. Ntaganda's involvement in any taking of prisoners, or interrogating prisoners, or ordering them to be tied up and beaten to death, is not "consistent" with P-0017's testimony. Rather, it raises a reasonable doubt about his account.

225. The above legal errors and the Chamber's misrepresentation of Mr. Ntaganda's evidence materially affect the Chamber's finding, based solely on the testimony of P-0017, that Mr. Ntaganda took and ordered the killing of prisoners at the *Appartements*. The finding should be reversed.

## VII. Conclusion

226. The Prosecution can base a significant part of its case – in this case each of the alleged major events of the First Operation – on the uncorroborated testimony of accomplice witnesses. A Trial Chamber can accept this testimony to establish facts beyond a reasonable doubt. However, these steps can only be taken in the most limited circumstances given that, according to the Appeals Chamber, accomplice status "is a circumstance that needs to be carefully weighed when their testimony is assessed".<sup>618</sup>

227. This is because the uncorroborated evidence of accomplices is objectively weaker than the corroborated evidence of witnesses who have no motivation to incriminate the Accused. Given that there is no acknowledgement of the accomplice status of P-0768, P-0963 or P-0017, let alone any indication that their testimony was 'carefully weighed', this amounts to both a failure by the Chamber to consider relevant circumstances, and a failure to give reasons. Either error is fatal to these findings.

228. Moreover, significant events like the taking of a village, or the shooting of a priest in the open, or the firing of a grenade on a column of people who then all survive, are the kind of

<sup>617</sup> [TJ](#), fn.1577.

<sup>618</sup> [Bemba-et-al-AJ-2275](#), para.1534.

events to which many people can normally attest. The complete lack of corroboration for all of these events, **combined** with the significant credibility questions which hang over P-0017, P-0963 and P-0768, **combined** with the fact that these witnesses are accomplices (and relied upon unreservedly in the absence of any apparent caution); **combined** with other inherently implausible aspects of their accounts, render these findings manifestly unsafe.

229. Of course, these findings are invalidated by a more fundamental error. The Chamber was entitled to find Mr. Ntaganda not credible and to disregard his testimony. But it did not. Apart from specific topics, the Chamber properly recognized that his testimony was coherent, candid and consistent.<sup>619</sup> As such, it cannot be disregarded with nothing more than “we choose the other witness”. In doing so, the Chamber ignored the **impact** that the Accused’s contradictory evidence has on the reliability of a Prosecution witness’ story. The Chamber was required to consider whether, in light of all the contradictory evidence, the Prosecution witness’ testimony could still safely be relied upon to establish the facts beyond a reasonable doubt.

230. Throughout the web of criminal law, “one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt”.<sup>620</sup> If there is a reasonable doubt that the Prosecution has established its case, then the accused must be acquitted. The reasonable doubt raised by Mr. Ntaganda was consistently circumvented by an erroneous approach to the assessment of evidence, which shifted the burden to him to show why his version should be preferred. In doing so, the Chamber repeatedly ignored other directly relevant evidence, or characterised Mr. Ntaganda’s testimony as being ‘uncorroborated’ when it was not. These errors undermine the Chamber’s reasoning, which cannot now be salvaged. For all these reasons, the Appeals Chamber should reverse the First Operation findings discussed above.

## **GROUND 9: THE CHAMBER ERRED IN FINDING THAT ANY OF MR. NTAGANDA’S ESCORTS WAS UNDER 15 YEARS OF AGE**

### **I. Introduction**

231. The Chamber, on the basis of video images, found that three of Mr. Ntaganda’s escorts were under the age of 15.<sup>621</sup> This finding was particularly important to the Chamber’s

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<sup>619</sup> [TJ](#), para.258.

<sup>620</sup> [Woolmington v. D.P.P.](#)

<sup>621</sup> [TJ](#), paras.387-391,1190.

finding of Mr. Ntaganda's *mens rea*, because of the "frequency and proximity" of Mr. Ntaganda's contacts with his own escorts.<sup>622</sup>

232. The determination of age made by the Chamber was manifestly unreasonable and/or reflects an improper standard of proof. The Chamber ignored – in fact, failed to set out at all – the degree of caution necessary for age determination based on video images; relied on an age estimate of a witness whom the Chamber found had lied about her own age; and erroneously relied on age estimates straddling 15 years of age as proof that the three escorts (or other FPLC soldiers) were under 15.<sup>623</sup> These errors are compounded by, or based on, a systematic: failure to state reasons<sup>624</sup> or to properly apply the standard of reasonable doubt;<sup>625</sup> taking account of irrelevant facts, and misappreciating the relevant facts;<sup>626</sup> and failing to provide an adequate explanation for findings in the face of weak and inconclusive evidence.<sup>627</sup> These errors are grounds for reversal on appeal where, as here, they have materially affected the Chamber's findings and have occasioned a miscarriage of justice.

## **II. The impugned findings**

233. The Chamber found that three of Mr. Ntaganda's escorts, based on video depictions and purported corroborating age estimates, were under 15 years of age: (1) "Lamama"; (2) an unidentified person; and (3) "Tipe".<sup>628</sup> The Chamber also relied on testimonial evidence, unaccompanied by any visual depiction (let alone names), for the unspecific conclusion that "Mr Ntaganda's escort comprised *kadogos*, including individuals under 15 years of age."<sup>629</sup>

234. The Chamber relied on these findings to find that Mr. Ntaganda knew that these sub-15 year olds were active members of the UPC/FPLC.<sup>630</sup> This was one of the two pillars for the finding that Mr. Ntaganda "necessarily knew that the UPC/FPLC would recruit, train, and deploy children under 15 years of age".<sup>631</sup>

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<sup>622</sup> [TJ](#), para.1192.

<sup>623</sup> [TJ](#), paras.387-391,1190.

<sup>624</sup> [Bemba-et-al-AJ-2275](#), paras.102-103; [Lubanga-AJ-3121](#), para.313; [ICTR-Ndindiliyimana-AJ](#), para.56; [ICTY-Hadžihanović-AJ](#), para.13; [ICTY-Naletilić-AJ](#), para.603.

<sup>625</sup> [Bemba-AJ-3636](#), para.45.

<sup>626</sup> [Lubanga-AJ-3121](#), para.21.

<sup>627</sup> [Bemba-AJ-3636](#), para.44.

<sup>628</sup> [TJ](#), paras.387-388.

<sup>629</sup> [TJ](#), paras.389-390.

<sup>630</sup> [TJ](#), para.1192.

<sup>631</sup> [TJ](#), paras.1190-1194.

**III. The Chamber’s approach to visual determinations of age was unexplained, misapplied the burden of proof, and did not exclude all other reasonable possibilities**

235. The Chamber found beyond a reasonable doubt that two individuals on the “Rwampara video” (DRC-OTP-0120-0293) – “LAMAMA” and an unidentified person – were under 15 years of age at the time of the video.<sup>632</sup> The Chamber purported to do so based on its own impression of LAMAMA’s “size” and “facial features”, and the unidentified person’s size alone (because facial features were not visible).<sup>633</sup> The Chamber also relied on P-0010’s “credible and reliable”<sup>634</sup> estimates of their ages to reach the finding. A person on a different video, whom P-0898 identified as Mr. Ntaganda’s former escort named “Tipe”, was determined by the Chamber to be under 15 years of age based on “in particular, the facial features” without mention of his size.<sup>635</sup>

236. These findings are legally and factually erroneous.

237. *First*, the Chamber set out no reasons – none – explaining how it approached the hazardous exercise of determining age based on visual images. None of the jurisprudence or law submitted by the Defence<sup>636</sup> was even addressed. No other jurisprudence or law was cited. None of the witness evidence attesting to the substantial margin of error was addressed.<sup>637</sup> No mention was made of the inter-cultural context. The Chamber merely incanted the formula of words from *Lubanga* – “large margin of error” and “manifestly”<sup>638</sup> – to baptize its conclusion. The reasoning is even more opaque than that which the Appeals Chamber noted in *Lubanga* “could have been more extensive”,<sup>639</sup> this Chamber has offered even less for appellate scrutiny, despite fuller briefing of the issue than was available in *Lubanga*. While the need to address any particular issue is fact-specific and contextual,<sup>640</sup> this was a central and determinative issue that needed to be addressed.

<sup>632</sup> [TJ](#), para.387.

<sup>633</sup> [TJ](#), para.387, fns.1099,1100; [DRC-OTP-0120-0293](#), at 00:37:38 (*n.b.* that [TJ](#) says 00:37:25).

<sup>634</sup> [TJ](#), fns.1099,1100.

<sup>635</sup> [TJ](#), para.388.

<sup>636</sup> [DCB](#), paras.1286-1289.

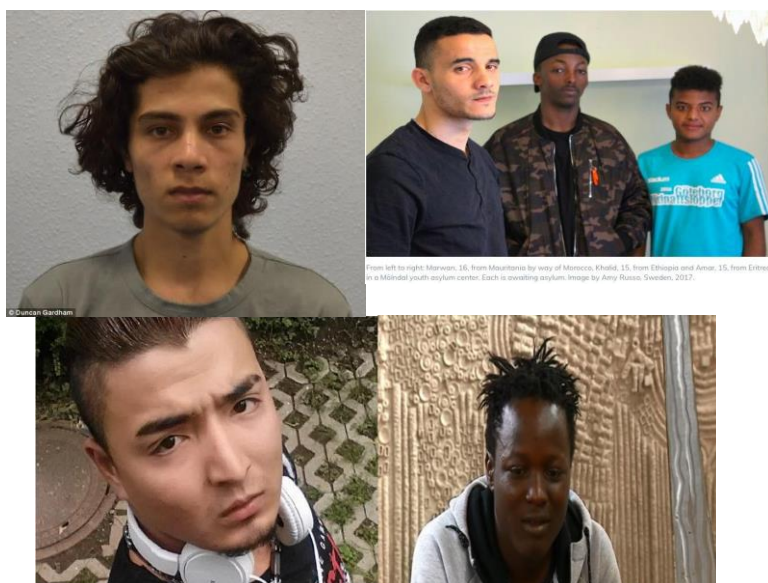
<sup>637</sup> **P-0046:T-103**,24:7-9 (refusing to offer any age assessment based on photographic images alone, asserting that “it would depend on so many factors that I find the exercise useless”); **P-0887:T-94**,95:24 (testifying that she could not “estimate someone’s age from a photograph”); **P-0116:T-196**,39:9-10 [REDACTED] *See also* V. Feltz, p.3; [V. De Sanctis, A.T. Soliman](#), p.6.

<sup>638</sup> [TJ](#), para.387.

<sup>639</sup> [Lubanga-AJ-3121](#), para.222.

<sup>640</sup> [Lubanga-AJ-3121](#), para.20.

238. *Second*, no reasonable Trial Chamber, applying the proper degree of caution, could have concluded that “LAMAMA” and the unidentified person were under 15 based on the video-imagery. Domestic case law suggests that it is possible on the basis of visual images alone to distinguish beyond reasonable doubt between a “pre-pubescent” and an adult – a margin of six to eight years<sup>641</sup> – but not between a 15 and 18-year old.<sup>642</sup> Even medical testing of a subject gives rise to a margin of error of about 2 years.<sup>643</sup> This approach explains why none of the asylum-seekers pictured below,<sup>644</sup> despite an appearance that might suggest the contrary, have been found to be over 18 years of age, even based on the less exigent “balance of probabilities” test:<sup>645</sup>



From left to right: Marwan, 16, from Mauritania by way of Morocco; Khalid, 15, from Ethiopia and Amal, 15, from Eritrea, in a Malmö youth asylum center. Each is awaiting asylum. Image by Amy Russo, Sweden, 2017.

<sup>641</sup> [Katz](#), para.21.

<sup>642</sup> [Loring](#), para.15.

<sup>643</sup> V. Feltz, p.3; [V. De Sanctis, A.T. Soliman](#), p.6.

<sup>644</sup> [Asylum seeker who claimed to be a child refugee jailed for rape and murder](#), Metro.co.uk, 22 March 2018; [Mineurs étrangers non accompagnés, casse tête pour la justice : illustration à Lyon](#), FranceInfo, 10 April 2018; [Sweden Steps Up Deportation](#), Pulitzer Center, 30 June 2017; [Betrayed by the 'shy and polite' boy they took into their home: Iraqi asylum seeker, 18, is found guilty of trying to blow up 93 Parsons Green commuters with bomb built with his foster parents' Tupperware while pair were on holiday](#), Daily Mail, 24 March 2018.

<sup>645</sup> Even with the full spectrum of “physical, developmental, psychological, environmental and cultural factors” available during an interview with the subject, “age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure.” [Separated Children in Europe Programme](#), para.D.5.

239. These photographs may be usefully compared to those of “LAMAMA” on which the Chamber relied to find **beyond a reasonable doubt** that she was under 15, which include the first two images on the left below:<sup>646</sup>



240. No reasonable judge applying the proper caution could have concluded beyond reasonable doubt on the basis of these images that this person, who is a female, was under 15 at the time. While that surmise is possible, or perhaps even likely, it cannot be said that there is no reasonable possibility that this female person has reached her 15<sup>th</sup> birthday.

241. *Third*, the reasonableness of this possibility is reinforced by the estimate of a Congolese, Prosecution witness P-0017, who testified [REDACTED].<sup>647</sup> The Chamber erroneously deemed this estimate irrelevant on the basis that there was “no evidence” that the person on the far right is the same as the person on the left.<sup>648</sup> This misses the point. All that is required is a **reasonable possibility** that the person on the right is the same as the person on the left (which is self-evident), and that that image leaves open the possibility that the person is 15 years of age or older (which is reinforced by the estimate of P-0017 who was deemed a credible witness by the Chamber,<sup>649</sup> and who was demonstrably not biased towards Mr. Ntaganda).<sup>650</sup>

242. *Fourth*, if the videos on their face demonstrate age beyond reasonable doubt, as the Chamber asserted,<sup>651</sup> then extrinsic corroboration of age should have been unnecessary. Yet,

<sup>646</sup> [DRC-OTP-0120-0293](#), at 00:06:58-00:07:03,00:22:49-00:23:22; [DRC-OTP-0103-0008](#), at 32:17.

<sup>647</sup> [TJ](#), fn.1099; [P-0017:T-62](#), 52:24-53:6.

<sup>648</sup> [TJ](#), fn.1099.

<sup>649</sup> [TJ](#), paras.107,117.

<sup>650</sup> See e.g. [TJ](#), para.528.

<sup>651</sup> [TJ](#), para.387.

the Chamber relied on P-0010's opinion about the ages of "Lamama" and the unidentified person,<sup>652</sup> and on P-0898's opinion about "Tipe's" age,<sup>653</sup> to make those findings. No one else pictured on the video was found to be under 15, reflecting the decisive weight ascribed by the Chamber to this opinion evidence.<sup>654</sup>

243. *Fifth*, no reasonable trier of fact could have accorded any corroborative weight to P-0010's testimony regarding the age of anyone, since the Chamber found that she had lied about her own age to falsely claim that she had been a child soldier.<sup>655</sup> If P-0010 was willing to lie about her own age for this purpose, then she would be inclined to do the same thing in respect of others to give her own lie more credibility. Indeed, P-0010's estimate of "Lamama's" age was made with reference to her own age<sup>656</sup> – about which she lied. Yet the Chamber, without reasons or explanation, declared her statements about Lamama's age "credible and reliable."<sup>657</sup> This compartmentalization of witness credibility systematically infects the Chamber's reasoning, this being merely one of the more egregious examples.

244. *Sixth*, the Chamber erred in finding that the unidentified person boarding a pick-up truck could be found to be under 15 years of age.<sup>658</sup> Age assessment based on size alone, without even visible facial features, is nothing more than a guess. The Chamber does not even accurately describe the subject's size, asserting that he is "barely taller than the wheel of the vehicle,"<sup>659</sup> whereas he can clearly be seen looking into the bed of a pick-up truck with jacked-up suspension.<sup>660</sup> The Chamber's mischaracterization of the evidence, and the ease with which it was willing to make a finding based on such inadequate evidence, demonstrates that it was not, in reality, applying the standard of beyond reasonable doubt in the context of age assessment.

245. *Seventh*, not even P-0010's unreliable testimony supports the view that the unidentified person was under 15. She merely says that he was a "*kadogo*,"<sup>661</sup> which the

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<sup>652</sup> [TJ](#), fn.1099.

<sup>653</sup> [TJ](#), para.388.

<sup>654</sup> This approach sets this case apart from the *Lubanga* proceedings ([Lubanga-TJ-2842](#), para.792), which underscores that specific factual findings in that case are irrelevant to current proceedings for a good reason.

<sup>655</sup> [TJ](#), para.98.

<sup>656</sup> [P-0010:T-48](#), 11:18 ("Lamama was younger than me, but I don't know exactly how old she was.")

<sup>657</sup> [TJ](#), fn.1099.

<sup>658</sup> [TJ](#), para.387.

<sup>659</sup> [TJ](#), fn.1100.

<sup>660</sup> [DRC-OTP-0120-0293](#), at 00:37:43.

<sup>661</sup> [TJ](#), fn.1100; [P-0010:T-48](#), 15:9.

Chamber itself acknowledged referred to individuals up to 18 years of age.<sup>662</sup> The Chamber's unreliable visual estimate is, accordingly, not corroborated by any witness.

246. *Eighth*, the video-imagery does not manifestly show that the person identified as "Tipe" is under 15 years of age.<sup>663</sup> While the individual looks young on the video, no reasonable trier of fact could have concluded that there is no reasonable possibility that the person could have reached his 15<sup>th</sup> birthday.<sup>664</sup> It was for the Chamber to explain how doubt could be excluded in this regard, which it did not do; indeed, its reliance on P-0898's estimate of "Tipe's" age to buttress its assessment of the visual imagery,<sup>665</sup> demonstrates that the Chamber was not satisfied beyond a reasonable doubt based on the images alone.

247. *Ninth*, the Chamber's finding that "Tipe" had been Mr. Ntaganda's escort – which is based exclusively on P-0898's testimony<sup>666</sup> – is unsafe and inadequately reasoned. The absence of corroboration, where corroboration could have been obtained by the Prosecution, is a factor that should have been considered by the Chamber, and that weighs against accepting P-0898's uncorroborated testimony, especially given its highly incriminating content.<sup>667</sup> The Prosecution never asked any of its own witnesses with knowledge of Mr. Ntaganda's escorts<sup>668</sup> whether anyone named "Tipe" even existed, or to identify his image. The burden of proof requires that an adverse inference may and should be drawn against the Prosecution:

It is the obligation of the Prosecution to ensure that its vital evidence is clear and unambiguous [...] Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, **but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution.**<sup>669</sup>

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<sup>662</sup> [TJ](#), fn.995.

<sup>663</sup> [TJ](#), para.388.

<sup>664</sup> [DRC-OTP-0103-0008](#), at 00:32:20,00:32:28.

<sup>665</sup> [TJ](#), para.388.

<sup>666</sup> [TJ](#), para.388; [P-0898:T-154](#), 23:15.

<sup>667</sup> See [ICTR-Mpambara-TJ](#), para.124 ("[t]he present situation is not one in which the lack of corroboration may be readily discounted because of the lack of potential witnesses. Accordingly, the witness's testimony must be treated with caution in light of the lack of corroboration, combined with its highly incriminating content.") (footnote omitted).

<sup>668</sup> Including, for example, P-0010 (purported fellow escort); P-0888 (purported fellow escort); or P-0014, P-0017, P-0030 or P-0290, all of whom professed knowledge of Mr. Ntaganda's escorts.

<sup>669</sup> [ICTY-Mucić-AJ](#), para.452 (emphasis added).

248. *Tenth*, the Chamber erred in giving any weight to estimates of age by witnesses in the absence of any basis on which the Chamber could assess the accuracy of those estimates.<sup>670</sup> The error of relying on this testimony was compounded by: (i) the estimates often straddling the 15-year threshold,<sup>671</sup> reflecting the witness's own doubts about age; (ii) the absence, in almost all cases, of the name of any of the subjects, which would have facilitated corroboration or contradiction; (iii) use by the witnesses of words such as “may”, reflecting uncertainty about their estimates.<sup>672</sup> Remarkably, the Chamber failed to address any of the evidential shortcomings that were expressly raised by the Defence,<sup>673</sup> and failed to address the issue that estimates of age are largely a matter of opinion. Relying on this evidence to bolster findings concerning the three escorts was erroneous: reasonable doubts in respect of the three individuals should not, as a matter of law, be resolved with reference to statistical trends that might be suitable in the civil law context.

#### **IV. Conclusion**

249. The Chamber erred in finding that any of Mr. Ntaganda's escorts – the UPC/FPLC soldiers with whom he had the closest contact – were under fifteen years of age. The consequences of this error are discussed in conjunction with the errors arising from Grounds 10, 11 and 12.

#### **GROUND 10: THE CHAMBER ERRED IN FINDING THAT CHILDREN UNDER 15 YEARS OF AGE ACTIVELY PARTICIPATED IN HOSTILITIES**

250. The Chamber's findings that two non-escorts of Mr. Ntaganda, P-0883 and P-0898, were enlisted in the FPLC and actively participated in hostilities were manifestly unreasonable or reflect a misapplication of the standard of proof.<sup>674</sup>

251. P-0883 insisted under oath that [REDACTED].<sup>675</sup> The Chamber found that this was untrue on the basis of her previous statements and victim applications in which she had repeatedly, and in detail, indicated that she had been abducted by a different force.<sup>676</sup> Despite the impossibility that P-0883 could have merely been mistaken about this testimony, the

<sup>670</sup> [TJ](#), paras.390-391.

<sup>671</sup> See [TJ](#), para.390 (e.g. P-0014, P-0030, P-0055, P-0901). The term ‘*kadogo*’ encompassed up to 18 years of age ([TJ](#), fn.995).

<sup>672</sup> See [TJ](#), para.390 (e.g. P-0290).

<sup>673</sup> [DCB](#), paras.1389-1398,1439-1491.

<sup>674</sup> [TJ](#), paras.174,179,200-208.

<sup>675</sup> [P-0883:T-167](#),93:13-94:19,95:17.

<sup>676</sup> [TJ](#), paras.182,185.

Chamber failed to expressly find, as it should have, that P-0883 had lied under oath on an issue that was highly incriminating and closely connected to her narrative about her own age and her alleged service in the UPC/FPLC. The Chamber, without even discussing this perjury, found her testimony as to age reliable, thereby ignoring that the same motivations that would have caused her to lie about who abducted her would have also underpinned her motivations in respect of age. No reasonable Chamber would have failed to qualify her testimony about her abduction as a lie; fail to even address this lie in considering the reliability and veracity of her testimony about age; and failed to conclude that her testimony as to age could not be decisively relied upon for a criminal finding.

252. These errors were reinforced by the Chamber's misappreciation of the evidence in asserting that there was "no indication"<sup>677</sup> that P-0883 had been involved in producing what the Chamber recognized<sup>678</sup> was a tampered version<sup>679</sup> of an original/authentic school record<sup>680</sup> – both of which were before the Chamber. The circumstantial indications of her involvement, direct or indirect, were strong: (i) the tampered document (but not the original) gives a date of birth corresponding precisely to the one that she gave to the Chamber;<sup>681</sup> and (ii) the tampered version was procured after P-0883 [REDACTED].<sup>682</sup> The circumstantial indications were, therefore, obvious and clear: the Chamber's statement to the contrary can only reflect a profound misappreciation of the evidence, or the application of an erroneous standard of proof. The Chamber's explanation that even the tampered date of birth would not make her under 15 at the relevant time<sup>683</sup> does nothing to reduce these strong indications of involvement in the production of the tampered document which raise significant doubt about whether either of the dates of birth could have been relied upon by the Chamber.

253. The Chamber's finding that P-0898 could be "fully relied upon,"<sup>684</sup> in particular that he was under 15 when he was enlisted and participated in hostilities, is also manifestly unreasonable.

254. P-0898's explanation for the existence of school report cards in his name during the same 5 to 7 month period<sup>685</sup> when he said he was fighting with the UPC/FPLC was found by

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<sup>677</sup> [TJ](#), para.178.

<sup>678</sup> [TJ](#), para.178 ("On another school record, which is otherwise identical to the former, the date of birth has been changed to a date that corresponds to the date of birth provided by the witness") (footnote omitted).

<sup>679</sup> [DRC-OTP-2097-0540](#), p.0541, l.7952 (tampered version).

<sup>680</sup> [DRC-OTP-2082-0368](#), l.7952 (original version).

<sup>681</sup> [DRC-OTP-2097-0540](#), p.0541, l.7952 (tampered version); **P-0883:T-167**,91:6-8.

<sup>682</sup> **P-0883:T-169**,52:21-23;**T-168**,54:10,54:16-17,54:23,55:10.

<sup>683</sup> [TJ](#), para.178.

<sup>684</sup> [TJ](#), para.208.

the Chamber to be “plausibl[e]”.<sup>686</sup> This “plausible” explanation was that the school authorities used the marks from the second semester to fabricate marks for the first semester.<sup>687</sup> Yet D-0201, the person who prepared the record, unambiguously denied that this ever happened, or that it had happened in respect of P-0898.<sup>688</sup> The mere “plausibility” of P-0898’s explanation, in the face of D-0201’s mutually exclusive testimony, was not enough: the Chamber was required to reject D-0201’s testimony. This analysis is entirely absent from the Judgment – a curious omission since it was the Presiding Judge’s question that led D-0201 to unequivocally reject P-0898’s explanation. In the absence of any such analysis or reasons, the standard of proof beyond reasonable doubt required rejection of P-0898’s testimony, even if his explanation was *prima facie* “plausible”.

255. None of the reasons given by the Chamber at footnote 498, incidentally, address this issue. In any event, the strained quality of the footnote speaks for itself. The multi-faceted contradictory evidence was more than sufficient to raise reasonable doubt, if not to prove on a balance of probability or beyond reasonable doubt. No reasonable Chamber could have found otherwise.<sup>689</sup>

256. Finally, the Chamber erred by finding that P-0898’s reliability was enhanced by his purported recognition of the registration document that he claims was prepared on his arrival for training, and upon which his name appears.<sup>690</sup> P-0898, to be clear, stated that he recognised the document itself: “that is the registration form which I just talked about on which we were registered.”<sup>691</sup> Yet elsewhere in the Judgment the Chamber found that it “has serious doubts about the authenticity of the lists.”<sup>692</sup> P-0898’s enthusiastic recognition of the document that the Chamber itself found may have been forged by his friend, P-0911, seriously damages his reliability, rather than enhancing it. The Chamber’s lack of awareness of its own contradictory findings reveals its manifest disregard of relevant evidence that had to be taken into account.

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<sup>685</sup> Notably, the Chamber fails to make a determination as to which of the two periods given by the witness was true. See **P-0898:T-155**,44:4;**T-153**,43:5.

<sup>686</sup> **TJ**, para.206.

<sup>687</sup> **TJ**, fn.497; **P-0898:T-153**,43:8-10.

<sup>688</sup> **D-0201:T-246**,90:7-91:6.

<sup>689</sup> **TJ**, para.206, fn.498.

<sup>690</sup> **TJ**, para.205, fn.493; **P-0898:T-153**,59:8-12.

<sup>691</sup> **P-0898:T-153**,59:8-12.

<sup>692</sup> **TJ**, paras.230-235.

257. No reasonable Chamber, in these circumstances, could have found beyond reasonable doubt that either P-0883 or P-0898 were, beyond reasonable doubt, child soldiers who were conscripted or participated actively in hostilities as part of the UPC/FPLC.

**GROUND 11: NO REASONABLE CHAMBER COULD HAVE FOUND THAT CHILD SOLDIERS WERE RAPED AND SEXUALLY ENSLAVED, OR THAT MR. NTAGANDA WAS AWARE OF ANY OF THE RAPES**

**I. Impugned findings and introduction**

258. The rape and sexual enslavement of child soldiers that the Chamber found Mr. Ntaganda knew would occur “in the ordinary course of events”<sup>693</sup> involved three victims: (i) a person named “Nadège,” based on the uncorroborated testimony of P-0758; (ii) P-0883, based on her own uncorroborated testimony; and (iii) a person named “Mave,” who was allegedly raped by soldiers under Kisembo’s command in a place called Mamedi during the period after the defeat and dispersion of FPLC forces by the Ugandan army.<sup>694</sup> These were the sole findings on which the convictions for Count 6 and 9 are based.<sup>695</sup>

259. No reasonable trier of fact could have found that these incidents occurred, or that Mr. Ntaganda knew about them. P-0758, as the Chamber found, lied about her own age<sup>696</sup> and her conscription into the FPLC.<sup>697</sup> Her extensive testimony that she was herself raped was not even discussed by the Chamber,<sup>698</sup> implying that it was deemed unworthy of belief. Yet the Chamber, without any discussion or reconciliation of these previous findings, accepted P-0758’s testimony that a person named a “Nadège” – whose name was mentioned by no other witness – was raped. The finding is unsafe, and once again reflects the Chamber’s failure to evaluate witness credibility in its totality – most importantly, in respect of witnesses who lied on material, incriminating, and related subjects.

260. The Chamber’s reliance on P-0883 is unsafe for similar reasons, and equally devoid of the necessary reasoning. As discussed under Ground 10 above, P-0883 gave – by the

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<sup>693</sup> [TJ](#), para.1198.

<sup>694</sup> [TJ](#), paras.409-411.

<sup>695</sup> [TJ](#), para.974.

<sup>696</sup> [TJ](#), paras.151-153.

<sup>697</sup> [TJ](#), paras.154-156.

<sup>698</sup> The Chamber explains that it “will not rely” on the “reported acts of sexual violence [she] personally [suffered],” because it had found that she was not a child soldier, [TJ](#), para.970. However, the Chamber purported to make other findings of rape in respect of other FPLC soldiers whose age it could not determine. See *e.g.* [TJ](#), fn.1156. The only reasonable inference is that the Chamber recognized that it could make no finding beyond reasonable doubt that P-0758 had herself been raped because the lies regarding her age and the circumstances of conscription too severely damaged her credibility.

Chamber's own account – false testimony in asserting that she had been abducted by the UPC/FPLC.<sup>699</sup> Yet, the Chamber accepted her closely related testimony identifying her rapists as being part of the UPC/FPLC – and without even discussing the impact of her lie about the identity of her abductors.<sup>700</sup> The Chamber's failure to address a lie with major implications for her reliability was a failure to state reasons, and resulted in a conclusion that was manifestly unreasonable.

261. The finding that “Mave”, an escort of Kisembo in Mamedì, was under 15 years old is manifestly unreasonable. The evidence of age, which is testimonial and based on no images, derived from three witnesses: P-0901, who estimated that she was [REDACTED];<sup>701</sup> P-0907, who estimated that she was “about 12”;<sup>702</sup> and P-0887 who declined to give an age estimate, stating only that “she was still very young” and that “[h]er breasts hadn't even started to develop.”<sup>703</sup> No Chamber, properly understanding the nature and caution with which age assessments should be approached, could have found beyond reasonable doubt that this person was under 15 years of age.

## **II. No reasonable trier of fact could have relied on P-0758's and P-0883's testimony about rape in light of their lies on related, material matters**

262. P-0758 was deemed not credible in respect of the two key elements of testimony on which her claim to have been a child soldier depended: (i) her birthdate; and (ii) the date of her abduction.<sup>704</sup> The Chamber failed, however, to address whether P-0758 had lied in respect of these highly material and incriminating facts – a finding that would have been vital to properly assessing her overall credibility and other incriminating elements of her testimony.

263. P-0758's first victim application form, in *Lubanga*, [REDACTED] that led to her application being rejected because she was not under 15.<sup>705</sup> On the very day that her application was rejected, [REDACTED], P-0761, requested birth certificates that showed a different, later date of birth.<sup>706</sup> P-0761 was then present when P-0758 filled out a second victim application form that gave not only a new, later date of birth, but also an earlier date of conscription that brought her under 15 years of age at the time. P-0761 lied under oath in

<sup>699</sup> [TJ](#), paras.185,188.

<sup>700</sup> [TJ](#), para.409.

<sup>701</sup> [P-0901:T-29](#),57:5-6,58:12.

<sup>702</sup> [P-0907:T-89](#),52:22.

<sup>703</sup> [P-0887:T-93](#),40:2-3.

<sup>704</sup> [TJ](#), paras.148-158.

<sup>705</sup> [TJ](#), para.150; [P-0758:T-162](#),21:13-23.

<sup>706</sup> [DRC-OTP-2051-2066](#); [P-0761:DRC-OTP-2054-8283-R05](#), para.8; [P-0761:T-163](#),5:3-4.

denying that he had been present and assisted P-0758 fill out this second application form until he was shown his own signature on the document, and shown a letter attached to the application that he had written explaining why P-0758 had given incorrect dates on the first application.<sup>707</sup> P-0761 could not even keep straight during his testimony [REDACTED], prevaricating between [REDACTED] and [REDACTED] – a fact that he would not likely have forgotten as he said he was present.<sup>708</sup>

264. P-0758 also lied under oath [REDACTED] – a fact that she could not have forgotten given the great distance that they travelled together to the location where it was prepared.<sup>709</sup> The Chamber described her as “evasive”<sup>710</sup> in response to these questions, and also found the various accounts of her abduction as “not fully compatible”<sup>711</sup> – an understatement given the three entirely different locations from which P-0758 was purportedly abducted.<sup>712</sup>

265. Despite these lies, the Chamber relies on P-0758’s uncorroborated testimony to find that “Nadège” had been raped at an FPLC camp.<sup>713</sup> The Chamber does not even discuss how this testimony could be deemed credible, let alone proof beyond reasonable doubt, in light of P-0758’s lies about material and incriminating facts. The Chamber also does not mention that it declined to place any reliance on, or to even consider, P-0758’s extensive testimony claiming that she had herself been raped,<sup>714</sup> including [REDACTED].<sup>715</sup> No other witness mentions the existence of anyone named “Nadège”, let alone that she was raped: the finding depends exclusively on the testimony of a witness, P-0758, who lied about highly incriminating and material facts, and whose testimony about her own rape was not even deemed worthy of discussion by the Chamber.

266. No reasonable Trial Chamber could have found, on the basis of P-0758’s testimony alone, that a person named “Nadège” was raped. The finding is manifestly unreasonable on its face. P-0758 not only lied about highly material facts, but the Chamber failed to say one word about these negative credibility findings in accepting the “Nadège” story.<sup>716</sup> This mechanistic

<sup>707</sup> **P-0761:T-163**,38:16-18 (indicating that he was seeing the application “[REDACTED]”) (emphasis added), 39:8 (“[REDACTED]”), 42:6-7; **DRC-OTP-2066-0154**, p.0176.

<sup>708</sup> **P-0761:DRC-OTP-2054-8283**, para.9; **P-0761:T-163**,49:18,56:17,57:2,57:11,57:18.

<sup>709</sup> **P-0761:T-163**,40:8,42:6-7.

<sup>710</sup> **TJ**, para.155.

<sup>711</sup> **TJ**, para.157.

<sup>712</sup> **P-0758:T-162**,30:3-31:7 [REDACTED]; **T-160**,78:23 [REDACTED]; **P-0773:DRC-OTP-2057-0127-R04**, paras.13,16 [REDACTED].

<sup>713</sup> **TJ**, para.410.

<sup>714</sup> **P-0758:T-160**,83:18-85:1,87:4-9.

<sup>715</sup> **P-0758:T-161**,4:22-8:21.

<sup>716</sup> **TJ**, fn.1170.

and unreasoned compartmentalization of P-0758's testimony – as if the Chamber was looking for each separate element of testimony to be disproven – fails to assess the witness's credibility holistically,<sup>717</sup> fails to give reasons, and indicates an impermissible reversal of the burden of proof. The finding is factually unsustainable and legally incorrect.

267. The Chamber failed to say one word about its finding that P-0883 had lied about the circumstances of her abduction in assessing P-0883's testimony concerning rape: that testimony is accepted at face value with no consideration of the impact of her lies in respect of other material and incriminating facts.<sup>718</sup>

268. No reasonable Trial Chamber could have relied on the uncorroborated testimony of P-0883 in light of the Chamber's own finding that she had lied under oath about the group that had conscripted her, which incriminating and material testimony that was also integrally connected with the testimony about the identity of her rapists. The Chamber's failure to even address the issue was an error of law. Its failure to recognize the indications that P-0883 had committed an article 70 offence was also a clear error of fact.

### **III. "Mave"'s age could not be established beyond reasonable doubt, and there is no evidence of Mr. Ntaganda's knowledge of her rape**

269. The third rape of a child soldier found by the Chamber was that of a person named "Mave", whose age was described by three witnesses: P-0887, P-0901 and P-0907. As explained above, one of these witnesses said that she was 15 or 16; another said that she was "about 12"; and the third would not give an age estimate.<sup>719</sup> No reasonable Trial Chamber, knowing the difficulties associated with estimates of age, facing conflicting testimony about "Mave's" age, and without any direct evidence before it of the person's appearance, could possibly have made a finding that she was below 15 years of age. The finding is not only unreasonable but, given the available evidence and the absence of reasoning, arbitrary. The finding must be reversed.

270. Furthermore, the alleged rape of Mave occurred after the defeat and dispersal of FPLC forces by the Ugandan army in early March 2003. After that defeat, Kisembo led his group to Mamedi, and Mr. Ntaganda and others were in Goma.<sup>720</sup> The Chamber made no findings, and

<sup>717</sup> See e.g. [Lubanga-AJ-3121](#), para.22 ("holistic evaluation").

<sup>718</sup> [TJ](#), para.409.

<sup>719</sup> [P-0901:T-29](#),57:5-6 [REDACTED], 58:11-12 [REDACTED]; [P-0901:T-29](#),57:5-6,58:12; [P-0887:T-93](#),40:2-3.

<sup>720</sup> [TJ](#), para.651-652; [P-0017:T-60](#),31:6-9; [P-0901:T-30](#),29:17-23; [D-0300:T-221](#),41:10-20,48:3-5.

had no evidence to indicate that Mr. Ntaganda had any knowledge of how Kisembo's forces, or Kisembo himself, were conducting themselves. The Chamber's claim that "Mr Ntaganda knew that rapes and sexual violence were occurring within the UPC/FPLC ranks" has no evidential basis in respect of this time period, and the Chamber, therefore, erred in finding that he would have foreseen that the rape of "Mave" would occur "in the ordinary course of events".<sup>721</sup>

#### **IV. Conclusion**

271. The Chamber's findings that three individuals under 15 within the UPC /FPLC were raped or sexually enslaved is unsafe. P-0758 lied as to her own age and, and in the absence of any explanation, the Chamber should not have credited as reliable her uncorroborated estimate that the person "Nadege" was under 15; the Chamber recognized that P-0883 had not told the truth about the circumstances of her abduction, yet failed to explain how this falsehood about an integral element of her narrative of having been a child soldier could not have raised reasonable doubt about her age, along with the Chamber's misappreciation of the clear evidence that she had engaged in an article 70 offence; and the Chamber's finding that a person named "Mave" was under 15 displays an egregious disregard of the caution necessary in making age determinations. None of these findings can stand, requiring that the convictions under Count 6 and 9 be quashed.

#### **GROUND 12: THE CHAMBER ERRED IN LAW AND IN FACT IN FINDING THAT MR. NTAGANDA KNEW THAT ANYONE UNDER 15 WAS ENLISTED, CONSCRIPTED OR USED TO PARTICIPATE IN HOSTILITIES**

272. Based on: (1) the presence of children "manifestly" under the age of 15 amongst his escorts; and (2) Mr. Ntaganda's participation in three recruitment events where he purportedly called on "*everybody* to enrol, explicitly inviting individuals from all gender, age or size to join,"<sup>722</sup> the Chamber erroneously found that Mr. Ntaganda "necessarily knew" that children under 15 were enlisted, conscripted and used to participate actively in hostilities.<sup>723</sup>

273. The Chamber's error as to the age of three individuals alleged to have been amongst his escort has been addressed in Ground 9, and its error as to the age of individuals not

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<sup>721</sup> [TJ](#), paras.1197-1198.

<sup>722</sup> [TJ](#), para.1193.

<sup>723</sup> [TJ](#), para.1194.

amongst his escort is addressed in Ground 10. This Ground addresses the Chamber's error in respect of the recruitment events, and its overall conclusion as to Mr. Ntaganda's *mens rea*.

274. The Chamber did not purport to rely on the *mens rea* standard of "should have known" in the Elements of Crimes, which would have violated the language of article 30, which plainly requires that the material elements of a crime be committed "with intent and knowledge."

275. None of the statements attributed to Mr. Ntaganda by the Chamber<sup>724</sup> during recruitment meetings evince any intention to recruit individuals under 15 years of age. The statements call for the recruitment of "young people" or "*kadogos*"<sup>725</sup> – expressions that can refer, as the Chamber acknowledged, to individuals up to 18 years of age.<sup>726</sup> The fact that these words might also encompass younger individuals does not exclude the reasonable possibility that these terms were used to refer to people below 18 but above the 15-year threshold. Excluding this reasonable interpretation is as unfounded as it would be of the words of General Eisenhower that "[w]e do not want to send our boys off into the Armed Services to serve in foreign lands."<sup>727</sup>

276. This reasonable possibility is also reinforced by substantial evidence that the UPC/FPLC applied a physical maturity test as an approximation of age. The Chamber simply ignored this evidence, or misappreciated that the approximation, in practice, excluded individuals under the age of 15.<sup>728</sup> This approach was reasonable in a society without reliable identification documents and, according to Prosecution witnesses deemed credible by the Chamber, frequent lying by potential recruits about their age who were eager to be trained in the face of Lendu massacres.<sup>729</sup>

277. No reasonable judge could have inferred that Mr. Ntaganda intended to recruit children under the age of 15 into the FPLC. The finding as to his own escorts is erroneous, as

<sup>724</sup> [TJ](#), paras.357-359.

<sup>725</sup> [TJ](#), paras.357-359,1193.

<sup>726</sup> [TJ](#), fn.995 (accepting that '*kadogo*' could mean anyone up to adult age).

<sup>727</sup> [Eisenhower 1955](#) (emphasis added).

<sup>728</sup> [TJ](#), fn.966 (dismissing D-0210's testimony because he was rejected from training on the basis of size, even though he was, in fact, 14 years of age at the time and was told that they were not training "little children" there). See [D-0210:T-206](#),59:15-17.

<sup>729</sup> [DRC-OTP-0152-0274](#), p.0274 (15-year old finally allowed to join UPC forces "after two unsuccessful attempts"); [P-0046:T-102](#),65:3-9 (young person had to come back "several times" before the commander "gave up and gave him something to do"); P-0769 and P-0016 described an attempted demobilization of 16 and 17 year olds that the recruits evaded and resisted, returning to the army after briefly fleeing, see [P-0911:T-157](#),40:1; [P-0769:T-120](#),48:5-7; [P-0016:DRC-OTP-2054-1625](#), p.1688, ll.17-21; [P-0116:DRC-OTP-2054-4494](#), p.4594, ll.16-24; [T-196](#),20:23-23:5 (describing the reluctance of parents to receive back recruits from training because of widespread fears that they would be exterminated by Lendu forces). See also [D-0057:T-246](#),13:8-10.

indicated in Ground 9; and none of his speeches reflects any direct intention to recruit individuals under the age of 15. Moreover, the physical size test that was applied, albeit not a perfect proxy for age and perhaps not applied with adequate rigour in all cases, meant that it was neither intended, nor virtually certain, that individuals who were under 15 years of age would be trained with the UPC forces. No inference can be drawn to the exclusion of all other reasonable inferences that Mr. Ntaganda intended, or knew as a virtual certainty, that individuals under the age of 15 would be, or were being, recruited or conscripted into the FPLC and, thereafter, used to participate in actively in hostilities.

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

#### **I. Mr. Ntaganda was found liable on the basis of a common plan for which he was not charged**

278. Mr. Ntaganda was charged with contributing to a common plan “to assume the military and political control of Ituri, occupy the non-Hema dominated areas in Ituri and expel the non-Hema civilian population”,<sup>730</sup> through the commission of identified crimes.<sup>731</sup> In convicting him, the Chamber held 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”.<sup>732</sup>

279. Mr. Ntaganda was given no notice during the trial that he was being tried on the basis of his participation in a common plan for the annihilation of an ethnic group. No reasoning is provided or evidence cited to support the expansion of the case as confirmed by the Pre-Trial Chamber,<sup>733</sup> and presented by the Prosecution,<sup>734</sup> to one in which the Accused intended destruction on this scale. The Chamber’s use of this terminology was not careless; the language is repeated.<sup>735</sup>

280. In convicting an Accused, a Trial Chamber cannot exceed the scope of a common plan as pleaded in an indictment.<sup>736</sup> The “nature and purpose” of a common plan is a material fact

<sup>730</sup> UDCC, para.1. As confirmed by the Pre-Trial Chamber, [Confirmation-Dcision-309](#), paras.105-107.

<sup>731</sup> UDCC, para.1.

<sup>732</sup> [TJ](#), paras.809-810. See also paras.805-806: “their objective to destroy the Lendu community” and the “aim of destruction”.

<sup>733</sup> [Confirmation-Dcision-309](#), paras.105-107.

<sup>734</sup> See [PCB](#), para.3.

<sup>735</sup> [TJ](#), paras.805-806. See also [SJ](#), para.116.

<sup>736</sup> See, e.g. [ICTY-Prlić-AJ](#), paras.55-56.

that must be pleaded,<sup>737</sup> in order to ensure an accused is informed “clearly of the charges against him so that he may prepare his defence.”<sup>738</sup> Material facts include all those which satisfy the legal elements of the individual crimes charged, including the accused’s responsibility for them.<sup>739</sup> As such, the opening paragraph of the UDCC properly sets out the nature and purpose of the common plan,<sup>740</sup> as is the practice of the ICC.<sup>741</sup> There was no indication at any point during the trial that the case would be amended to encompass an expanded common plan; it appeared for the first time in the Judgment.

281. Mr. Ntaganda was entitled to bring evidence to challenge the grave allegation that he intended the annihilation of the Lendu community. However, given the common plan charged, his arguments at trial were properly limited to demonstrating the absence of a plan for the “UPC-RP and/or FPLC members to drive out members of the non-Hema population [...], for the purpose of taking military and political control of Ituri.”<sup>742</sup> Mr. Ntaganda could not have known that he would also need to prepare his case to meet an allegation that he intended the destruction and disintegration of an ethnic group. As such, his ability to prepare his defence was materially impaired, causing prejudice.<sup>743</sup>

282. The common plan is at the centre of culpability for indirect co-perpetration; it is this agreement “that ties the co-perpetrators together and that justifies the reciprocal imputation of their respective acts.”<sup>744</sup> In “impermissibly exceeding the Prosecution’s case and moulding its own”,<sup>745</sup> the Chamber violated Mr. Ntaganda’s right to detailed notice of the charges,<sup>746</sup> and deprived him of the chance to defend against the case he was ultimately required to meet. This legal error invalidates his convictions as an indirect co-perpetrator, with the appropriate remedy being the reversal of his convictions under this mode of liability.

## **II. The Chamber erred in finding a common plan in the absence of direct evidence and having failed to exclude other reasonable inferences**

<sup>737</sup> [ICTY-Simić-AJ](#), para.22; [ICTY-Kvočka-AJ](#), para.28; [ICTR-Munyakazi-AJ](#), para.161, [ICTY-Tolimir-Decision-Preliminary-Motions](#), para.46; [SCSL-RUF-TJ](#), para.352; [ICTR-Uwinkindi-Decision-Defence-Appeal](#), para.11; [ICTY-Stanišić-Decision-Defence-Preliminary-Motions](#), p.5.

<sup>738</sup> [ICTY-Kvočka-AJ](#), para.28; [ICTY-Kupreškić-AJ](#), para.88.

<sup>739</sup> [E. Fry](#), p.580, citing [Gbagbo-Decision-432](#), para.19.

<sup>740</sup> [UDCC](#), para.1.

<sup>741</sup> [Katanga-Prosecution-Submission-649-Anx1A](#), paras.63,90; [Lubanga-Prosecution-Submission-1573-Anx1](#), para.13; [Bemba-Prosecution-Submission-169-Anx3A](#), paras.59-61; [Al-Mahdi-Prosecution-Submission-70-AnxA](#), para.9.

<sup>742</sup> See, e.g. [DCB](#), paras.36,221-229.

<sup>743</sup> See, e.g. [ICTR-Rutaganda-AJ](#), para.303; [ICTR-Renzaho-AJ](#), para.125.

<sup>744</sup> [Lubanga-AJ-3121](#), para.445 (footnote omitted), [Onqwen-Confirmation-Decision-422](#), para.38; [Al-Mahdi-Confirmation-Decision-84](#), para.24; [Ambos](#), p.149.

<sup>745</sup> [ICTY-Prlić-Dissenting-Opinion-Judge-Pocar](#), para.3.

<sup>746</sup> [Statute](#), article 67(1)(a).

283. The Chamber found that “Mr Ntaganda and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo” had agreed to a common plan “to drive out all the Lendu from the localities targeted during their military campaigns” meaning “the destruction and disintegration of the Lendu community”.<sup>747</sup>

284. The Chamber heard no direct evidence of this plan. Unlike in other trials in which a common plan was central to a conviction, the Prosecution did not produce evidence from witnesses present at meetings at which the common plan was agreed;<sup>748</sup> minutes of such meetings, or a manifesto detailing the plan,<sup>749</sup> or evidence of speeches,<sup>750</sup> written orders, or correspondence showing what was agreed, when, and by whom.<sup>751</sup>

285. The Chamber cites to a meeting “held among the **political** leaders of the emerging UPC/FPLC in Kampala” in June 2002, at which **one of** the co-perpetrators, Thomas Lubanga was found to be present.<sup>752</sup> The evidence of this meeting from P-0041 and P-0014 is contradictory, and insufficient to sustain a finding.<sup>753</sup> In any event, it is not evidence of a common plan involving Mr. Ntaganda, Mr. Kisembo, and the **military** leaders of the UPC/FPLC to destroy the Lendu population.<sup>754</sup> In fact, a contemporaneous record found in the documents given by UPC members to P-0014 during this June 2002 meeting [REDACTED] speak of no such goal or plan to destroy the Lendu, but rather refer to “all Iturians”.<sup>755</sup> Nor can uncorroborated hearsay evidence of a “side discussion”, which allegedly took place “in the corridors” with “limited” anonymous participants, demonstrate a common plan among co-perpetrators to use rape as a weapon of war.<sup>756</sup> There is no evidence that any of the co-perpetrators were even aware that this discussion had taken place.

<sup>747</sup> [TJ](#), paras.809-810. See also paras.805-806: “their objective to destroy the Lendu community” and the “aim of destruction”.

<sup>748</sup> See, e.g. [ICTR-Karera-TJ](#), para.25; [ICTR-Zigiranyirazo-TJ](#), para.407; [ICTY-Stakić-TJ](#), para.472; [ICTY-Prlić-TJ](#), paras.44,49,58; [ICTY-Karadžić-TJ](#), para.3438; [ICTR-Gatete-TJ](#), para.585.

<sup>749</sup> See, e.g. [ICTY-Karadžić-TJ](#), paras.3437,3438; [ICTY-Prlić-TJ](#), para.64; [ICTY-Stakić-TJ](#), paras.483-484; [ICTY-Mladić-TJ](#), para.3583.

<sup>750</sup> See, e.g. [ICTY-Krajišnik-TJ](#), para.1090; [ICTR-Zigiranyirazo-TJ](#), para.407; [ICTR-Bizimingu-TJ](#), para.1940; [ICTY-Mladić-TJ](#), paras.3595, 3620, 3711, 3712, 3716; [ICTY-Karadžić-TJ](#), paras.2668, 2670, 2673, 2841.

<sup>751</sup> See, e.g. [ICTY-Mladić-TJ](#), paras.3588, 3591, 3598, 3679, 3680, 3687, 3693.

<sup>752</sup> [TJ](#), para.799 (emphasis added).

<sup>753</sup> [TJ](#), para.290, fn.741. The Chamber “considers that it can rely on the testimony of P-0014 and P-0041 who provided first-hand evidence about the meeting”. Their accounts differ to such an extent that it appears they are describing different meetings. [REDACTED] a claim denied by Mr. Ntaganda and not addressed in the Judgment (see [DCB](#), para.57).

<sup>754</sup> [TJ](#), paras.290-293.

<sup>755</sup> [DRC-OTP-0066-0031](#), [DRC-OTP-0066-0039](#), [DRC-OTP-0066-0047](#), [DRC-OTP-0066-0048](#).

<sup>756</sup> [P-0014:T-138](#),101:13-102:7.

286. The only other meeting between the co-perpetrators identified in the Judgment is that of mid-February 2003, in which Mr. Lubanga gave an instruction to open the Main Road between Mongbwalu and Bunia following which, in his absence, tasks were divided.<sup>757</sup> There is no evidence that the co-perpetrators planned, discussed or even referenced “driving out all the Lendu”, let alone their destruction and disintegration, despite the Chamber having heard from an apparent attendee.<sup>758</sup>

287. The lack of direct evidence of the common plan is not fatal to the Prosecution’s case. A common plan for the purposes of indirect co-perpetration need not be explicit. In the absence of direct evidence, “its existence can be **inferred** from the subsequent concerted action of the co-perpetrators.”<sup>759</sup> However, for a Chamber to infer the existence of a fact upon which a conviction relies, the inference drawn must be the only reasonable one available.<sup>760</sup>

288. This is where the Chamber’s finding falls apart. Rather than looking to whether there was “subsequent concerted action of the co-perpetrators”, the Chamber simply 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 as apparent evidence from which to infer a common plan. Fatally, the Chamber then failed to consider whether conclusions other than a plan for the destruction of the Lendu community were reasonably available. In doing so, the Chamber committed a legal error which materially affects its finding, and reaches a conclusion that cannot form the basis of a conviction.

289. Whether crimes were committed, or whether orders to illegally target were given by individual commanders, is not necessarily probative of the existence of a common plan.<sup>761</sup> What is relevant, in the absence of direct evidence of the plan, is the “subsequent concerted action of the co-perpetrators” themselves;<sup>762</sup> did the co-perpetrators, after they made the common plan, act in concert in its implementation?

<sup>757</sup> [TJ](#), para.796.

<sup>758</sup> [TJ](#), paras.551-553; **P-0055:T-71**, 32:8.

<sup>759</sup> [Lubanga-Confirmation-Dcision-803](#), para.345 (emphasis added); [Katanga-Confirmation-Dcision-717](#), para.523; [Abu-Garda-Confirmation-Dcision-243](#), para.180; [Banda-Jerbo-Confirmation-Dcision-121](#), para.129; [Ruto-Kosgey-Sang-Confirmation-Dcision-373](#), para.301; [Bemba-et-al-TJ-1989](#), para.66.

<sup>760</sup> [Katanga-TJ-3436](#), para.109; [ICTY-Stakić-AJ](#), para.219; [ICTY-Mucić-AJ](#), para.458; [ICTR-Ntagerura-AJ](#), paras.304-306.

<sup>761</sup> See, e.g. [ICTY-Karadžić-TJ](#), para.3466.

<sup>762</sup> [Lubanga-Confirmation-Dcision-803](#), para.345; [Katanga-Confirmation-Dcision-717](#), para.523; [Abu-Garda-Confirmation-Dcision-243](#), para.180; [Banda-Jerbo-Confirmation-Dcision-121](#), para.129; [Ruto-Kosgey-Sang-Confirmation-Dcision-373](#), para.301.

290. The evidence cited in support of the common plan is set out in paragraphs 782-807 of the Judgment. The question of subsequent concerted action by the co-perpetrators is not addressed.<sup>763</sup> The majority of the Chamber's analysis consists of a repetition of the evidence on the formation of the UPC/FPLC and its findings on the recruitment of individuals under the age of 15,<sup>764</sup> and a recitation of the unfolding of the First and Second Operations.<sup>765</sup> The Chamber then repeats that recruits sang about targeting the Lendu and that, during the military operations, crimes were committed, including particularly grave sexual violence.<sup>766</sup>

291. This is insufficient. The Chamber was required to consider whether the evidence demonstrated that the identified co-perpetrators were acting in concert such that a common plan could be inferred from their actions. This analysis is absent. The fact that unidentified commanders taught recruits songs about targeting Lendu, or that individual soldiers were committing even vicious rapes, is not enough. Principles of individual criminal culpability preclude liability arising from a common plan inferred from *any* actions of *any* of the potentially thousands (or even hundreds of thousands) of members of an organisation or armed group. The Chamber's lack of reasoning comes perilously close to accepting that the commission of crimes was, in itself, a sufficient basis to infer the existence of a plan at the level of the co-perpetrators.

292. Apart from the attendees of the meetings addressed above, the only other individuals who feature in the Chamber's analysis are Mr. Ntaganda,<sup>767</sup> Kisembo,<sup>768</sup> and Salumu Mulenda.<sup>769</sup> It is unclear whether Salumu is considered to be one of the "other military leaders" who had agreed to the common plan. Relevantly, the Chamber found that the co-perpetrators were tied together by "relationships that they established long before the First and Second Operation".<sup>770</sup> There is no evidence of such a relationship between Salumu and any of the co-perpetrators. At the very least, the Chamber should have specified that it considered

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<sup>763</sup> To find "concerted action" in other cases, finders of fact have considered the factors such as patterns of conduct, links between the actions of various participants to determine whether groups or individuals were in fact acting in concert. See, e.g. [ICTY-Martić-AJ](#), para.195.

<sup>764</sup> [TJ](#), paras.782-792.

<sup>765</sup> [TJ](#), paras.793-796.

<sup>766</sup> [TJ](#), paras.805-806.

<sup>767</sup> [TJ](#), para.802.

<sup>768</sup> [TJ](#), para.803.

<sup>769</sup> [TJ](#), paras.802-803.

<sup>770</sup> [TJ](#), para.808.

Salumu to be a co-perpetrator. Its failure to do so leaves the relevance of its factual findings concerning Salumu as unclear and insufficiently reasoned.<sup>771</sup>

293. Regardless, like so many of the adverse findings in this case, the Chamber's indictment of Kisémbó and Mr. Ntaganda's conduct hangs on their apparent use of the term "*kupiga na kuchaji*" and orders to attack or drive out "the Lendu".<sup>772</sup> The numerous errors made by the Chamber in finding that *kupiga na kuchaji* was understood by UPC/FPLC troops as meaning "attack all the Lendu", discussed in Ground 5, are repeated and relied upon here.<sup>773</sup> The Chamber's misrepresentation of the evidence of the meaning of this phrase invalidates its finding, and similarly undermines its inference of a common plan on the basis of its use by Mr. Ntaganda and Kisémbó.

294. As for the apparent use of the term "Lendu" rather than "Lendu combatants", both Prosecution witnesses<sup>774</sup> and the Chamber itself regularly make the same conflation, repeatedly referring to "Lendu" in contexts in which they could only have meant combatants.<sup>775</sup> The Chamber states "**the Lendu** initiated a counteroffensive" and refers to "**the Lendu**" capturing UPC/FPLC heavy weapons, and there being "minimal resistance from **the Lendu**", in contexts where it was understood that reference was being made to Lendu combatants or fighters. Soldiers themselves understood that fighting against the Lendu meant fighting against other soldiers.<sup>776</sup> To hang criminal liability on the non-addition of the word "combatants" in a battlefield context is unrealistic and would implicate, for example, all Allied troops who spoke of attacking "the Germans" rather than "the German combatants", as Prime Minister Churchill himself was regularly prone.<sup>777</sup>

295. Regardless, even had the Chamber sufficiently explained why this evidence was sufficient to infer the existence of a common plan for the destruction and disintegration of the Lendu ethnic group, it was still required to say why this conclusion was the **only reasonable**

<sup>771</sup> See, E. van Sliedregt and L. Yanev, p.105: "The legal framework of co-perpetration based on joint control [...] can be used to argue that, at variance with the ad hoc Tribunals JCE jurisprudence, their identity has to be individually stated in the document containing the charges against the accused."

<sup>772</sup> [TJ](#), paras.802-803.

<sup>773</sup> See Ground 5, paras.76-90.

<sup>774</sup> See, e.g. **P-0805:T-26**,42:9-16; **P-0017:T-59**,67:8-10; **P-0901:T-29**,16:12-14.

<sup>775</sup> See, e.g. the Chamber's statements that: "The **Lendu initiated a 'counteroffensive'** on the second day involving two groups"; "During the fighting, **the Lendu were able to capture** some of the UPC/FPLC's heavy weapons"; "There was minimal resistance **from the Lendu**, as they quickly fled once the UPC/FPLC started shooting"; [TJ](#), paras.572 (emphasis added), 566 (emphasis added) (footnote omitted), 573 (emphasis added, footnote omitted).

<sup>776</sup> **P-0758:T-161**,11.

<sup>777</sup> See, e.g.: "**The Germans** are still in places resisting the Russian troops, but should they continue to do so after midnight they will, of course, deprive themselves of the protection of the laws of war, and will be attacked from all quarters by the Allied troops." [W.Churchill](#) (emphasis added).

**one available.** This step was of particular importance given the wealth of evidence presented which demonstrated that the ideology among Mr. Ntaganda and other military leaders of the UPC/FPLC was precisely the opposite.

296. In support of the position that there was **no** common plan to “drive out all the Lendu”, the Defence presented evidence that the UPC’s goal was to “restore good governance; promote reconciliation; establish peace; [and] protect all civilians without discrimination”,<sup>778</sup> and that from September 2000, the UPC stated their respect of Human Rights and international conventions related to them.<sup>779</sup> The Chamber accepted evidence of the UPC’s pacification efforts,<sup>780</sup> including the founding of the CTPR on 3 September 2002,<sup>781</sup> with the main objectives of advancing the pacification process; bringing the communities in conflict back to peaceful, lasting and sincere cohabitation;<sup>782</sup> making its army, the FPLC, a national army conscious of its role in protecting people and their goods; and instituting a military court to sanction crimes committed by soldiers.<sup>783</sup> The creation of the CTPR followed the Luanda Agreement and CPI, and its constitutive documents were explicit that it would be “representative of all the ethnic groups of Ituri, will have to incorporate others not native, of Ituri as well as some experts. Its role is to materialise the process of reconciliation and pacification”.<sup>784</sup> It was composed of 122 members from all ethnicities and religions in Ituri, including Lendus.<sup>785</sup>

297. The message of peace and reconciliation from the UPC/FPLC was a consistent one. At the end of August 2002, upon returning to Bunia along with the DRC Minister of Human Rights, Lubanga and the Minister addressed the population, stating “our second message is one of peace and reconciliation [...] We think that all the world must understand that in Ituri there are no Alur, there are no Hema, there are no Bira, there are no Lendu, there are Congolese. They all have a right to life and together must come together to build this Ituri.”<sup>786</sup> This message was repeated by Lubanga on 11 September 2002 in a speech broadcast on Radio Candip, in which he emphasized that the UPC/FPLC’s struggle was not against a tribe or a given group of people, but a destructive political system, and identified the priority as nothing

<sup>778</sup> [DCB](#), para.44.

<sup>779</sup> [DRC-OTP-0106-0169-R03](#), p.0169.

<sup>780</sup> [DCB](#), paras.80-94.

<sup>781</sup> [DRC-OTP-0092-0436](#), pp.0441-0442; [DRC-OTP-0164-0447](#).

<sup>782</sup> [DRC-OTP-0092-0436](#), p.0443.

<sup>783</sup> [DRC-OTP-0092-0436](#), p.0439.

<sup>784</sup> [DRC-OTP-0092-0436](#), p.0439.

<sup>785</sup> [DRC-OTP-0092-0436](#), pp.0442-0443, Title II.

<sup>786</sup> [DRC-OTP-0124-0002](#), at 06:11-07:33 (Transl.[DRC-OTP-0176-0027](#), pp.0033, ll.101-112); [D-0300:T-215](#), 57:22-58:21, 60:20-61:2. See also [DRC-OTP-0124-0002](#), at 01:15-04:00.

other than the restoration of reconciliation which was seen as a *sina qua non* of lasting peace.<sup>787</sup> In December 2002, a meeting was held in Arua to conduct peace negotiations with notables from several ethnicities, including Bira, Nyali, Ngiti and Lendu, which Lubanga later described as reflecting considerable efforts on the part of the UPC to bring the Congolese in Ituri around a table to share ideas with a view to acting cohesively.<sup>788</sup> Lubanga spoke again of this desire for peace among the varied ethnic groups in a speech at which Mr. Ntaganda was present on 13 January 2003, at the official inauguration of local CTPR committees, attended by MONUC and representatives of other ethnic groups.<sup>789</sup>

298. Evidence also established that between 6 and 8 February 2003, an RDC-Goma delegation visited Bunia, during which a public meeting was held where Lubanga and the RDC-Goma representatives explained their goal of restoring peace in Ituri and unity in Congo.<sup>790</sup> A further meeting was held on 7 February 2003 in Bunia, in which “all the communities of the Ituri” came together to sign a peace agreement, apart from one village in Zumbe. The process of meetings, which led to all ethnic groups in Bunia signing a peace agreement, was initiated by Lubanga.<sup>791</sup> This agreement was followed in concrete terms by Lubanga’s plan to give weapons to Lendu combatants in Libi, with the aim of forming an alliance with Lendu combatants to force the UPDF out of Ituri. Mr. Ntaganda was responsible for transporting the weapons to the Lendu combatants, which he did.<sup>792</sup>

299. Evidence was also heard of efforts to comprise FPLC units of soldiers from different ethnic backgrounds,<sup>793</sup> and the importance of discipline within the FPLC,<sup>794</sup> including video footage of a speech by Chief Kahwa to new recruits at Mandro Camp in October 2002,<sup>795</sup>

<sup>787</sup> [DRC-OTP-0147-0212](#).

<sup>788</sup> [DRC-OTP-0164-0455](#); [DRC-OTP-0037-0295](#), p.0296; **D-0300:T-218**,56:3-6; **P-0005:T-186**,27:15-28:10.

<sup>789</sup> [DRC-OTP-0092-0466](#); [DRC-OTP-0089-0075](#); [DRC-D18-0001-6643](#), ll.264-270; **D-0300:T-218**,86:13-87:9;**T-219**,8:9-14; **D-0300:T-219**,3:15-19; [DRC-D18-0001-0433](#), at 00:21:13-00:55:00;00:58:10-01:03:22 (Transl. [DRC-D18-0001-6643](#)); [DRC-D18-0001-6643](#), ll.161-168.

<sup>790</sup> [DRC-D18-0001-0427](#), at 03:10-05:25,38:40-40:20 (Transl.[DRC-D18-0001-6667](#), pp.6669, ll.18-35, 6676, ll.242-254; **D-0300:T-219**,65:9-14,71:13-18; [DRC-D18-0001-0427](#), at 46:00-50:03 (Transl.[DRC-D18-0001-6667](#), pp.6677, l.290-6678, l.324); **D-0300:T-219**,79:1-5; **D-0300:T-219**,78:16-25.

<sup>791</sup> [DRC-OTP-0193-0243](#), p.0244; [DRC-D18-0001-0427](#), 35:37-36:40 (Transl.[DRC-D18-0001-6667](#), p.6675, ll.213-219); [DRC-D18-0001-0425](#), 14:02-14:39 (Transc.[DRC-D18-0001-5540](#), pp.5543, l.56-5544, l.61); **D-0300:T-219**,67:5-68:12.

<sup>792</sup> **D-0300:T-220**,68:10-19;**T-223**,13:6-8; **D-0300:T-220**,68:24-25; **D-0300:T-220**,69:1-13;**T-219**,54:2-10,58:14-25.

<sup>793</sup> [DRC-OTP-0102-0003](#), at 15:38-17:06 (Transc.[DRC-OTP-2102-3402](#), Transl.[DRC-OTP-2102-3433](#), p.3441, ll.173-178.); **P-0030:DRC-OTP-2054-3092**, pp.3157-3182.

<sup>794</sup> **D-0300:T-216**,11:13-16,18:9-19:6; **D-0300:T-216**,6:13-16,12:7-12; **D-0300:T-213**,81:14-21; KISEMBO:[DRC-OTP-2058-0251](#) (Transl.[DRC-OTP-2102-3766](#)); [DRC-OTP-0102-0003](#), at 33:01-36:50 (Transl.[DRC-OTP-2102-3433](#), ll.344-402); KAHWA:[DRC-OTP-0082-0016](#), at 11:30-18:15,19:46-21:27,22:42-23:34,25:17-26:47 (Transl.[DRC-OTP-0164-0710](#), ll.190-264,288-310,329-346,374-397).

<sup>795</sup> [DRC-OTP-0082-0016](#).

which had been prepared with the assistance of Mr. Ntaganda.<sup>796</sup> In this speech, Chief Kahwa explained that the FPLC ideology was to protect the civilian population, and stressed that breaches of discipline, in particular the commission of crimes such as harassment of the civilian population, looting and rape would not be tolerated. Chief Kahwa highlighted the difference between the unacceptable conduct of other military groups in the DRC and that expected of FPLC troops.<sup>797</sup> No suggestion was made that this speech was coded language, or understood by the recruits in any way other than in accordance with its plain meaning. Chief Kahwa's speech to recruits at Mandro was not exceptional. On 12 February 2003, Mr. Ntaganda was present when Lubanga and Tinanzabo explained the UPC/FPLC ideology and objectives to new recruits at Rwampara, emphasizing the protection of civilians without discrimination and bringing peace to Ituri.<sup>798</sup> Moreover, corroborated evidence was heard of Lendu civilians being given shelter and assistance at Mandro Camp, after fleeing violent attacks on their homes.<sup>799</sup> Mr. Ntaganda was in charge of their protection.<sup>800</sup>

300. The Chamber's acceptance that "some of the documents produced by the UPC/FPLC indeed promoted peace, or denounced the crimes committed against the local population of Ituri"<sup>801</sup> ignored the wealth of other speeches and public announcements which corroborated this prioritization of peace by the UPC/FPLC. The Chamber was required to explain why, in light of this wall of contrary evidence, the existence of a common plan for the destruction and disintegration of the Lendu community was the **only reasonable inference available**.<sup>802</sup> The Chamber was perfectly entitled to address this evidence and explain why no other conclusion, other than a plan to wipe out the Lendu, could be reached by a reasonable finder of fact. It was not entitled to conduct its analysis and ignore it. Its error in doing so invalidates its finding of a common plan, and consequently the convictions based on Mr. Ntaganda's liability as an indirect co-perpetrator.

### **III. The Chamber erred in finding that Mr. Ntaganda agreed to the "destruction and disintegration of the Lendu community" and thus intended the crimes in Counts 1-8, 11-13, and 17-18**

<sup>796</sup> [D-0300:T-216](#),12:13-13:1.

<sup>797</sup> [DRC-OTP-0082-0016](#).

<sup>798</sup> [DRC-D18-0001-0463](#).

<sup>799</sup> [D-0300:T-213](#),70:19-71:13;[T-231](#),10:18-13:5; [D-0054:T-243](#),76:23-24,78:3-10,80:21-22,89:5-7;[T-244](#),8:19-25,7:11-13,22:3-4,18:14-25,19:5-13.

<sup>800</sup> [D-0300:T-213](#),71:11-12.

<sup>801</sup> [TJ](#), para.686.

<sup>802</sup> See, e.g. [ICTR-Renzaho-AJ](#), para.319; [ICTR-Ntagerura-AJ](#), paras.304-306; [ICTY-Mucić-AJ](#), para.458; [ICTR-Mugenzi-AJ](#), paras.91,138-141.

301. The *mens rea* for co-perpetration requires that: (i) the co-perpetrators meant to participate in the common plan and were mutually aware and accepted that its implementation would result in the crimes, (ii) the co-perpetrators carried out their actions with the purposeful will (intent) to bring about the material elements of the crimes, or were aware that in the ordinary course of events, the fulfillment of the material elements would be a virtually certain consequence;<sup>803</sup> and (iii) the accused was aware of the factual circumstances which allowed him or her to exert control over the crime to the requisite *actus reus* threshold.<sup>804</sup>

302. For crimes relating to child soldiers, the Chamber found that the co-perpetrators foresaw with virtual certainty that these would occur as a result of the implementation of the common plan.<sup>805</sup> For all remaining crimes, these were found to have been part of the plan itself. Concretely, the co-perpetrators came together and formulated a plan to commit murder, appropriation of property, destruction of property, rape of civilians, sexual slavery of civilians, forcible displacement, attacks on protected objects, with all of these crimes being targeted towards the Lendu community so as to constitute persecution.<sup>806</sup>

303. This is a common plan almost unparalleled in scope. It appears that by creating the broadest of umbrellas, namely the “the destruction and disintegration of the Lendu community,”<sup>807</sup> the Chamber felt entitled to hang any crime underneath, thereby circumventing the need to explain why each of these distinct and varied crimes was a virtually certain consequence of the plan. This approach is unsound. Impermissibly expanding the case in an attempt to create an all-encompassing common plan does not obviate the need for evidence that the co-perpetrators agreed and intended that each of the crimes occur in its implementation.

304. Again, there is no direct evidence that the co-perpetrators came together to agree that civilians should be murdered, raped, subjected to sexual slavery, persecuted, forcibly displaced, and have their property attacked and destroyed. No written or testimonial evidence comes close to providing direct evidence of this agreement. As such, the Chamber’s findings

<sup>803</sup> [Bemba-Confirmation-Decision-424](#), para.370 ; [Lubanga-TJ-2842](#), para.1018; [Katanga-TJ-3436](#), para.1399; [Gbagbo-Confirmation-Decision-656](#), paras.235-236 ; [Lubanga-AJ-3121](#), para.447.

<sup>804</sup> [Lubanga-TJ-2842](#), para.941 (“aware of the factual circumstances that enabled him to exercise functional control over the crime”); [Lubanga-Confirmation-Decision-803](#), para.366; [Katanga-TJ-3436](#), para.1416 (“aware of the factual circumstances which allow the person to exert control over the crime”); [Ruto-Kosgey-Sang-Confirmation-Decision-373](#), para.348; [Muthaura-Confirmation-Decision-382](#), para.419.

<sup>805</sup> [TJ](#), para.811.

<sup>806</sup> [TJ](#), para.810.

<sup>807</sup> [TJ](#), paras.809-810. See also paras.805-806: “achieve the objective to destroy the Lendu communities in the localities under assault”, “the aim of destruction”.

are again based on inference, and without explanation as to why the co-perpetrators' intent for each of these crimes was the only reasonable conclusion available. The fact that crimes occurred is an insufficient basis to infer that they were carried out pursuant to a common plan.

305. Indirect co-perpetration gives rise to personal liability for a potentially huge spectrum of crimes in the absence of any evidence that the accused committed, ordered, aided or abetted, or was the superior of the perpetrators. An important counter-balance to this potentially distorted causal link between the accused's conduct and the crimes is the common plan; the co-perpetrators' mutual agreement and their purposeful intent to commit the charged crimes. The evidence of this plan and the intent of the perpetrators must consist of more than just the commission of crimes. The Chamber's reasoning falls far below that required by article 74(5) and the convictions for co-perpetration should be reversed.

**IV. The Chamber erred in finding that the co-perpetrators foresaw rape and sexual slavery as a virtual certain consequence of the implementation of the common plan**

306. Apart from the crimes which formed part of the common plan, the Chamber also found Mr. Ntaganda liable for (i) the recruitment and active use in hostilities of children under the age of 15; and (ii) the rape and sexual slavery of these children. The sole reason for extending liability to these additional crimes was "the circumstances prevailing at the time". The Chamber held that "in the circumstances prevailing in Ituri at the time, the occurrence of these crimes was not simply a risk that [the co-perpetrators] accepted, but crimes they foresaw with virtual certainty."<sup>808</sup> This is the full extent of the Chamber's reasoning.

307. In the *Lubanga* case, Trial Chamber I's consideration of whether Mr. Lubanga was aware that the conscription, enlistment or use of children would occur in the ordinary course of events spanned 74 paragraphs and took into account not only the prevailing circumstances in Ituri (for which evidence was cited),<sup>809</sup> but a multitude of other factors, including his relationships with the co-perpetrators and their level of knowledge and involvement in the relevant crimes; his movements, including attendance at relevant meetings and trainings; consideration of whether there was a policy to commit the crimes, and the relevance of demobilisation efforts.<sup>810</sup>

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<sup>808</sup> [TJ](#), para.811.

<sup>809</sup> [Lubanga-TJ-2842](#), para.1277.

<sup>810</sup> [Lubanga-TJ-2842](#), paras.1274-1348.

308. This level of reasoning reflected the practice at the ICTY and ICTR. Despite material differences in both the subjective and objective elements of indirect co-perpetration and JCE III,<sup>811</sup> before concluding that it was reasonably foreseeable to an accused that “extended crimes” falling outside the common plan would occur, ICTY and ICTR Trial Chambers regularly considered factors such as the accused’s level of knowledge at the time; the knowledge of the co-perpetrators and their level of contact with the accused; the scale, gravity and frequency of the extended crimes, as well as their temporal and geographical scope; the accused’s knowledge of past actions of the perpetrators and any relevant failures to prevent and/or punish; the prevailing circumstances; and evidence of what the accused was being told, when and by whom.<sup>812</sup>

309. The Chamber’s reasoning is manifestly insufficient. Simply asserting “well, this was Ituri in 2002” is an inadequate basis to find that a group of co-perpetrators mutually foresaw that these two specific and distinct crimes were a virtually certain consequence of effecting the common plan. Nor did the Chamber engage in any way with the meaning of “virtual certainty”,<sup>813</sup> nor, more importantly, explain why and how in its view the co-perpetrators foresaw the crimes with this level of certainty. The Chamber’s error constitutes a failure to provide adequate reasons,<sup>814</sup> and undermines Mr. Ntaganda’s convictions as an indirect co-perpetrator for Counts 6-9 and 14-16.

## **V. The Chamber’s findings on the use of Hema civilians were erroneous**

310. Mr. Ntaganda was convicted not only for the actions of UPC/FLPC troops during the first operation, but also the actions of Hema civilians in Mongbwalu.<sup>815</sup> These civilians, according to the Chamber, participated in the killings and lootings in Mongbwalu and Sayo, and the looting of private homes after the assault on Bambu. As such, they were found to have executed the material elements of murder as a crime against humanity and as a war crime (Counts 1 and 2) and pillage as a war crime (Count 11).<sup>816</sup> Putting Mr. Ntaganda on the hook

<sup>811</sup> At the Tribunals, extended crimes falling outside the common plan were only required to be a natural and foreseeable consequence of the plan’s implementation, rather than a virtually certain consequence of its implementation. See e.g. [ICTY-Karadžić-TJ](#), para.570; [ICTY-Kvočka-AJ](#), para.86.

<sup>812</sup> See, e.g. [ICTY-Stanišić-Župljanin-TJ](#), paras.523-527,770-779; [ICTY-Karadžić-TJ](#), paras.3513-3521; [ICTY-Martić-TJ](#), para.454; [ICTR-Karemera-TJ](#), paras.1465,1474-1490.

<sup>813</sup> [Bemba-Confirmation-Dcision-424](#), para.370; [Lubanga-AJ-3121](#), para.447; [Katanga-TJ-3436](#), para.777: “the person knows that his or her actions will necessarily bring about the consequence in question, barring an unforeseen or unexpected intervention or event to prevent its occurrence. In other words, it is nigh on impossible for him or her to envisage that the consequence will not occur.”

<sup>814</sup> [Statute](#), article 74(5).

<sup>815</sup> [TJ](#), paras.821-822,824.

<sup>816</sup> [TJ](#), paras.820-821.

for these crimes, the Chamber concluded that “the conduct of the Hema civilians in the execution of the crimes must be attributed to the co-perpetrators as if it were their own.”<sup>817</sup>

311. In order to convict Mr. Ntaganda for the actions of Hema civilians, the Chamber was required to find that the co-perpetrators controlled the actions of these civilians to such a degree that their will became “irrelevant”.<sup>818</sup> The Hema civilians could not be “at liberty to decide whether the crime is to be executed”,<sup>819</sup> but rather were required to demonstrate almost “automatic compliance” with orders from the co-perpetrators.<sup>820</sup> The Chamber found that this was the case.<sup>821</sup>

312. This finding is undermined by two main errors. *First*, the evidence comes nowhere near establishing any kind of automatic compliance by Hema civilians with apparent orders to commit crimes. In **none** of the evidence cited do Prosecution witnesses discuss any kind of obligation to comply with orders, or automatic compliance by civilians, or an inability to exercise free will.<sup>822</sup> In fact, the Chamber accepted P-0963’s evidence that the Hema civilians who committed pillage in Mongbwalu “[REDACTED]”,<sup>823</sup> which is manifestly different from being coerced to such an extent that they had no choice but to pillage. The Chamber also accepted the evidence of P-0898 that despite the UPC/FPLC’s instruction that crimes in Mongbwalu must stop, the civilians continued looting and killing.<sup>824</sup> This evidence is incompatible with a finding of automatic compliance with orders.

313. This lack of reasoning exposes the weakness of this finding. The Chamber finds that Hema civilians “followed the orders”,<sup>825</sup> and then refers to “the general coercive circumstances”, but with no reference to any evidence of these circumstances, or discussion of whether they were sufficient to deprive civilians of their ability to exercise free will.<sup>826</sup> With no further discussion, the Chamber then makes the huge leap to find that the Hema civilians’ will had become irrelevant, but again, with no reference to any evidence.<sup>827</sup> This is insufficient. This finding is unsafe, particularly given that the Chamber heard no direct

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<sup>817</sup> [TJ](#), para.824.

<sup>818</sup> [TJ](#), para.777 (footnotes omitted); See also [Blé-Goudé-Confirmation-Decision-186](#), para.136; [Al-Bashir-Decision-3](#), para.213; [Ruto-Kosgey-Sang-Confirmation-Decision-373](#), paras.291-292.

<sup>819</sup> [TJ](#), para.778 (footnotes omitted).

<sup>820</sup> [Katanga-TJ-3436](#), para.1410.

<sup>821</sup> [TJ](#), paras.821-822,824.

<sup>822</sup> [TJ](#), para.512, fn.1513.

<sup>823</sup> [P-0963:T-78](#),86:11.

<sup>824</sup> [TJ](#), para.512.

<sup>825</sup> [TJ](#), para.512.

<sup>826</sup> [TJ](#), para.824.

<sup>827</sup> [TJ](#), para.824.

evidence of civilians following orders.<sup>828</sup> This central plank in the Chamber's already inadequate reasoning is based on indirect and hearsay evidence.

314. In other indirect co-perpetration cases at the ICC, finders of fact have considered in detail whether near automatic compliance has arisen through, for example, "intensive, strict and violent training regimens"<sup>829</sup> or through mechanisms of payment and punishment for the non-execution of crimes.<sup>830</sup> In this case, the Hema civilians were neither trained by the UPC/FPLC, nor were they paid to commit crimes, or punished if they did not. Regardless, the Chamber failed entirely to engage in any of this type of analysis.

315. Basic principles of individual criminal responsibility only allow for the imputation of liability to an accused for the actions of others in strict and particular circumstances. Ambos posits that liability as an indirect co-perpetrator requires "sufficiently tight control" by the accused "over the direct perpetrator, similar to the relationship between the superior and the subordinate in the case of command responsibility."<sup>831</sup> The accused must inflict coercion on the direct perpetrator "to such an extent that the latter is excluded from criminal responsibility",<sup>832</sup> and the accused assumes "sole control over the crime".<sup>833</sup> A situation whereby civilians are taking advantage of chaos, and then disobey instructions to stop committing crimes, is patently insufficient. Particularly in the absence of reasoning explaining why.

316. Moreover, the Chamber never found that "Hema civilians" formed part of the UPC/FPLC, nor does this find any support in the evidence. The civilians were outsiders and were neither interchangeable nor replaceable.<sup>834</sup> As such, this is not a situation where "the existence of an **organisation** [was] used to subjugate the will of the direct perpetrators".<sup>835</sup>

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<sup>828</sup> [TJ](#), para.512.

<sup>829</sup> [Katanga-Confirmation-Decision-717](#), paras.518,547.

<sup>830</sup> [Ruto-Kosgey-Sang-Confirmation-Decision-373](#), paras.320-323,324-326.

<sup>831</sup> Ambos, p.159 citing Albin Eser, "Individual Criminal Responsibility", in Cassese, p.795.

<sup>832</sup> Ambos, p.155.

<sup>833</sup> [Ongwen-Confirmation-Decision-422](#), para.40 citing [Lubanga-AJ-3121](#), para.465.

<sup>834</sup> [TJ](#) para.778, citing [Katanga-TJ-3436](#), para.1411: "the liability of the perpetrator also rests on the exertion of control and genuine authority over the organisation. The Chamber considers that the criterion of control must be construed as requiring that the indirect perpetrator use at least part of the apparatus of power subordinate to him or her, so as to steer it intentionally towards the commission of a crime, **without leaving one of the subordinates at liberty to decide whether the crime is to be executed.**"(emphasis added, footnotes omitted) See also E. van Sliedregt and L. Yanev, p.118: "indirect co-perpetration additionally requires the existence of a hierarchical, organized structure of power (OSP), which is controlled by the said co-perpetrators and which ensures the commission of the charged crime(s) by automatic compliance with their orders. The requisite 'automatic compliance' with orders can be secured by fungibility (replaceability) of the rank-and-file members of the hierarchical power apparatus, as well as through intensive, strict and violent training regimes."

<sup>835</sup> [TJ](#), para.778 (emphasis added).

There is no evidence of any commanders, let alone co-perpetrators, using the apparatus of power to steer Hema civilians to the point that they had no choice but to commit crimes. The elements of indirect co-perpetration in relation to the Hema civilians have not been met, and Mr. Ntaganda's convictions on the basis of their actions must be reversed.

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

317. In relation to the First Operation, Mr. Ntaganda was found liable as a direct perpetrator of murder as a crime against humanity and a war crime (Counts 1 and 2) and persecution as crime against humanity (Count 10), in relation to the killing of the Abbé.<sup>836</sup> The finding that Mr. Ntaganda shot and killed the Abbé, based on the uncorroborated testimony of accomplice witness P-0768, has been challenged in Ground 8 above, occasioned a miscarriage of justice, and should be reversed on appeal.

318. For the remainder of the crimes charged in relation to the First Operation, Mr. Ntaganda was found liable as an indirect co-perpetrator.<sup>837</sup>

**I. The subjective elements of co-perpetration**

319. As noted above, the *mens rea* of co-perpetration requires the Prosecution to establish that: (i) the co-perpetrators meant to participate in the common plan and were mutually aware and accepted that its implementation would result in the crimes, (ii) the co-perpetrators carried out their actions with the purposeful will (intent) to bring about the material elements of the crimes, or were aware that in the ordinary course of events, the fulfillment of the material elements would be a virtually certain consequence;<sup>838</sup> and (iii) the accused was aware of the factual circumstances which allowed him or her to exert control over the crime to the requisite *actus reus* threshold.<sup>839</sup>

320. In the absence of direct evidence of Mr. Ntaganda's purposeful will or awareness of a virtual certainty in relation to each of the 13 counts stemming from the First Operation, the

<sup>836</sup> [TJ](#) paras.737-742,745-752.

<sup>837</sup> [TJ](#), paras.1188-1189.

<sup>838</sup> [Bemba-Confirmation-Dcision-424](#), para.370; [Lubanga-TJ-2842](#), para.1018; [Katanga-TJ-3436](#), para.1399; [Gbagbo-Confirmation-Dcision-656](#), paras.235-236; [Lubanga-AJ-3121](#), para.447.

<sup>839</sup> [Lubanga-TJ-2842](#), para.941 ("aware of the factual circumstances that enabled him to exercise functional control over the crime"); [Lubanga-Confirmation-Dcision-803](#), para.366; [Katanga-TJ-3436](#), para.1416 ("aware of the factual circumstances which allow the person to exert control over the crime"); [Ruto-Kosgey-Sang-Confirmation-Dcision-373](#), para.348; [Muthaura-Confirmation-Dcision-382](#), para.419.

Chamber again inferred Mr. Ntaganda's intent from the evidential record before it. Central to this inference is the phrase, *kupiga na kuchaji*.<sup>840</sup> The numerous errors in the Chamber's analysis of the meaning of this phrase are set out in Ground 5. Given the centrality of the phrase to the *mens rea* analysis for the First Operation, these errors also materially affect this finding.

321. The Chamber also put significant weight on the "presence, actions and directives" of the Accused himself.<sup>841</sup> This was the correct approach. An accused's intent "should be determined, above all, from his words and deeds".<sup>842</sup> In particular, the Chamber relied on its findings regarding two directives given by Mr. Ntaganda before and during the First Operation;<sup>843</sup> (i) that the night before he left Bunia for Mongbwalu, Mr. Ntaganda ordered troops to attack using the term *kupiga na kuchaji*;<sup>844</sup> and (ii) once on the ground, he ordered an attack on "the Lendu" without making a difference between Lendu civilians and militia.<sup>845</sup>

322. The Chamber was not entitled to reach either conclusion. The legal and factual errors committed by the Chamber materially affect its finding that Mr. Ntaganda possessed the necessary *mens rea* analysis for each of the 13 counts charged in relation to the First Operation, and warrant its reversal.

## **II. P-0010's *kupiga na kuchaji* allegation the night before Mongbwalu**

323. The Chamber found that the night before leaving Bunia for Mongbwalu, Mr. Ntaganda "spoke to some of the UPC/FPLC troops, telling them that they were going to Mongbwalu to fight against the Lendu and ordering them to attack using the term '*kupiga na kuchaji*'".<sup>846</sup>

324. P-0010 is the sole source of this allegation. This witness lied under oath about her age, date, and place of birth. She lied about being abducted by the UPC when she was 13 years old. She lied about having trained with the UPC in the Rwampara and Mandro training camps. She lied about [REDACTED]. She is a witness incapable of reliance, and the acceptance of any of her testimony, particularly when uncorroborated, was a legal error amounting to a miscarriage of justice.

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<sup>840</sup> [TJ](#), paras.1181,1186.

<sup>841</sup> [TJ](#), para.1180.

<sup>842</sup> [ICTR-Bagilishema-TJ](#), para.63, [ICTR-Nahimana-AJ](#), para.524, [ICTY-Tolimir-AJ](#), para.576, [ICTR-Karera-TJ](#), para.534.

<sup>843</sup> [TJ](#), paras.1181,1186-1189.

<sup>844</sup> [TJ](#), paras.415,484,1181,1186.

<sup>845</sup> [TJ](#), paras.493,1181,1186.

<sup>846</sup> [TJ](#), paras.484,1181.

325. P-0010 gave at least six different dates of birth.<sup>847</sup> She variably said she was born in [REDACTED],<sup>848</sup> in [REDACTED],<sup>849</sup> and in [REDACTED].<sup>850</sup> In her victims' application form she claimed to have been abducted (untrue) at 15 years old,<sup>851</sup> but then testified that she had been 13 at the time.<sup>852</sup> The Chamber held that it "cannot establish beyond reasonable doubt that she was under 15 at the time of the events referred to during her testimony."<sup>853</sup>

326. P-0010 falsely claimed to have been abducted by the UPC. In reality, she had been recruited into the APC, with whom she served for two years, despite lying about this under oath.<sup>854</sup> In 2003, P-0010 gave an interview to a MONUC Child Protection Advisor, nearly contemporaneously with the events she described, saying she enlisted with the APC at the end of 1999. She discussed the details of her recruitment, her training, and gave a detailed account of her subsequent deployments.<sup>855</sup> Her training and deployment with the APC found corroboration in extrinsic evidence,<sup>856</sup> and the testimony of other witnesses.<sup>857</sup> Regardless, she testified that she was "[REDACTED]";<sup>858</sup> and the "[REDACTED]".<sup>859</sup>

327. The Chamber found that it "cannot exclude the possibility that P-0010 **misrepresented the truth** when stating that she was abducted by the UPC when she was 13 years old, and then followed training with the UPC in the Rwampara and Mandro training camps" and so declined to rely on this aspect of her testimony.<sup>860</sup> It concluded that, in light of her remaining testimony, which the Chamber accepted, this misrepresentation of the truth "does not warrant a finding" that she was "entirely unreliable". The Chamber then concluded that P-0010 was "credible",<sup>861</sup> and relied on her testimony even when uncorroborated and

<sup>847</sup> [DCB](#), paras.1267-1268 referring to [P-0010:T-46](#),28:16-18;[T-50](#),27:23-28:1; [P-0046:T-100](#),81:17-89:19; [DRC-OTP-0206-0120](#), p.0120, para.145; [DRC-OTP-0132-0012](#); [DRC-D01-0003-5482](#); [DRC-OTP-0231-0275](#); [DRC-OTP-2078-2252](#).

<sup>848</sup> [P-0010:T-46](#),28:16-18;[T-50](#),27:23-28:1.

<sup>849</sup> [DRC-OTP-0206-0120](#), p.0120, para.145; [P-0046:T-100](#),81:17-89:19.

<sup>850</sup> [DRC-OTP-0231-0275](#).

<sup>851</sup> [DRC-OTP-0206-0255](#), p.0263, [P-0010:T-48](#),53:25-55:20.

<sup>852</sup> [P-0010:T-46](#),31:14.

<sup>853</sup> [TJ](#), para.94.

<sup>854</sup> [P-0010:T-50](#),12:12;[T-49](#),71:24-25.

<sup>855</sup> [DCB](#), para.1262 referring to [P-0046:T-100](#),81:17-89:19; [DRC-OTP-0206-0120](#), pp.0120-0121.

<sup>856</sup> [DCB](#), para.1263 referring to [P-0014:DRC-OTP-2054-0429](#), p.0490, ll.15-20; [P-0016:DRC-OTP-0126-0422](#), paras.178,207; [P-0190:T-96](#),18:9-14; [DRC-OTP-0037-0512](#); [DRC-OTP-0037-0536](#); [DRC-OTP-0214-0116](#), pp.0120-0121,0123; [D-0300:T-215](#),26:17-20; [P-0010:T-46](#),32:4-8,35:8-23,38:13-14; [P-0901:T-30](#),56:17-25; [DRC-OTP-0033-0058](#), p.0061; [DRC-OTP-0066-0047](#).

<sup>857</sup> [DCB](#), para.1263 referring to [D-0211:T-248](#),31:18-32:8;[T-247](#),14:9-11; [D-0017:T-253](#),34:4-7; [D-0251:T-260](#),19:19-21; [DRC-OTP-0221-0375](#), ll.152,217.

<sup>858</sup> [P-0010:T-50](#),12:12.

<sup>859</sup> [P-0010:T-49](#),71:24-25.

<sup>860</sup> [TJ](#), para.98.

<sup>861</sup> [TJ](#), para.105. The Chamber held that it "shall determine on a case-by-case basis which other aspects of her testimony can be relied upon with or without corroboration."

without any apparent caution.

328. This was a legal error. While a Chamber has discretion to accept some parts of a witness' testimony and not others,<sup>862</sup> it must still consider the credibility of a witness as a whole. In this case, the Chamber carved off the rotten non-credible parts of P-0010's testimony, and found that since it believed the rest, she was not "entirely unreliable".<sup>863</sup> This logic is backwards. The Chamber should have considered whether, in light of the "misrepresentations of the truth" and rampant inconsistencies throughout her statements and testimony, her evidence as a whole was still safely capable of reliance.<sup>864</sup> The entitlement of a Chamber to believe a witness in part, does not also entitle it to turn a blind eye to the impact of false testimony on the reliability of the witness as a whole. Similarly, a blanket statement that "[i]t is possible for a witness to be accurate and truthful [...] on some issues, and inaccurate and/or untruthful [...] on others"<sup>865</sup> at the outset of the Judgment, does not give the Chamber a *carte blanche* to accept the "truthful" parts of a testimony in the absence of any reasons as to why the witness can still be believed, particularly when the lies and apparently truthful excerpts form part of the same narrative and are so closely intertwined.

329. Having made this error, the Chamber reached a conclusion not available to a reasonable finder of fact. In plain terms, the Chamber found that P-0010 lied under oath. Euphemisms like "misrepresented the truth" aside, P-0010 lied, repeatedly, about central parts of her testimony, and gave so many different answers on central questions as to reveal herself as someone who lies with absolute ease.

330. Importantly, P-0010 also demonstrated that she was capable of not only frequent, but **detailed** lies, providing directly contradicting stories with names, dates, places that were entirely divergent. Concerning her abduction, in her first victims' application form, she declared she was abducted (untrue) "[REDACTED]",<sup>866</sup> whereas in her testimony she was abducted (untrue) while fleeing to Beni from Bunia.<sup>867</sup> In her second victims' application form (prepared with OPCV's assistance), she was (i) "[REDACTED]" for 2 weeks immediately after being abducted; (ii) then taken to [REDACTED]; (iii) then taken back to [REDACTED]; and (iv) fought in battles at [REDACTED], [REDACTED] and

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<sup>862</sup> [TJ](#), para.80.

<sup>863</sup> [TJ](#), para.105.

<sup>864</sup> See, for example, [Lubanga-TJ-2842](#), paras.247,288,406,415,429,441,473; [Katanga-TJ-3436](#), paras.152,167-168,177-179,259-261,291-292.

<sup>865</sup> [TJ](#), para.80.

<sup>866</sup> [DRC-OTP-0206-0255](#), p.0264.

<sup>867</sup> [P-0010:T-46](#),29:12-19.

[REDACTED].<sup>868</sup> By contrast, she testified that she was: (i) [REDACTED];<sup>869</sup> (ii) then Mandro for further training;<sup>870</sup> (iii) then back to Rwampara where she received “weapons and military uniform”;<sup>871</sup> (iv) then to Aru prior to becoming Mr. Ntaganda’s bodyguard;<sup>872</sup> (v) [REDACTED];<sup>873</sup> before (vi) participating in various battles.

331. As such, on the question of her abduction, she gave two detailed, equally false, yet different stories to the OPCV and the Chamber. This necessarily impacts on her overall reliability, which the Chamber was wrong to dismiss as having no impact on the remainder of her testimony.

332. The danger in relying on a witness like P-0010, particularly when uncorroborated, is well illustrated by the *kupiga na kuchaji* allegation. P-0888’s testimony that he did not remember any particular instructions or orders given to escorts<sup>874</sup> certainly casts doubt on the veracity of P-0010’s account and should have formed part of the Chamber’s analysis. Notably, the Prosecution did not seek corroboration of this speech from the other bodyguards who testified. As noted above, in this circumstance the burden of proof requires that an adverse inference may and should be drawn against the Prosecution.<sup>875</sup>

333. In fact, this was only the tip of the iceberg in terms of P-0010’s false claims about the First Operation, which were raised at trial<sup>876</sup> and ignored. P-0010 said that the UPC forces going to fight at Mongbwalu took “the Kobu Road”.<sup>877</sup> The Chamber found they did not.<sup>878</sup> Despite having testified that during this operation “[w]herever he went, we followed him”,<sup>879</sup> P-0010 never said Mr. Ntaganda went to Sayo.<sup>880</sup> The Chamber found that he did.<sup>881</sup> P-0010 testified that Kisembo was present during the attack.<sup>882</sup> Uncontested video and testimonial

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<sup>868</sup> [DRC-OTP-0206-0255](#), p.0281.

<sup>869</sup> [P-0010:T-49](#), 7:18-23.

<sup>870</sup> [P-0010:T-46](#), 41:11-18.

<sup>871</sup> [P-0010:T-46](#), 31:2-32:22.

<sup>872</sup> [P-0010:T-47](#), 20:10-24.

<sup>873</sup> [P-0010:T-47](#), 20:23-24; [T-50](#), 7:21-23.

<sup>874</sup> See, e.g. [P-0888:T-105](#), 84:20-85:18.

<sup>875</sup> [ICTY-Mucić-AJ](#), para.452.

<sup>876</sup> [DCB](#), para.1278.

<sup>877</sup> [P-0010:T-47](#), 10:2.

<sup>878</sup> [TJ](#), para.487.

<sup>879</sup> [P-0010:T-47](#), 13:3-6.

<sup>880</sup> [P-0010:T-50](#), 19:3-9.

<sup>881</sup> [TJ](#), para.507.

<sup>882</sup> [P-0010:T-50](#), 17:2-3.

evidence place his arrival after it.<sup>883</sup> Most bizarrely, P-0010 testified that the UPC “didn’t manage to take Mongbwalu”.<sup>884</sup> The Chamber found that it did.<sup>885</sup> These errors in basic facts about the First Operation mean either that P-0010 was not present during it, or gave unreliable evidence about it. The number of inconsistencies between P-0010’s testimony and the Chamber’s own First Operation findings should have been taken into account in assessing her uncorroborated evidence of a speech that allegedly preceded it. In failing to do so, the Chamber erred.

334. The Chamber attempts to bolster the allegation by stating that “P-0010 provided the information on this specific briefing **spontaneously**, in the context of being questioned on a broader topic not exclusively related to the operation in Mongbwalu”.<sup>886</sup> This is incorrect. P-0010 was led there step by step. She was asked “Do you know what *kupiga na kuchaji* means?” then “Where did you hear this term being used” then “Did your commanders use that term?” then “Which commanders used this term and boosted your morale this way?” Then, after failing to name Mr. Ntaganda, P-0010 was led with the question “For instance, did you ever hear Mr Bosco use that term or not?” before giving the story of the pre-Mongbwalu meeting. Still not having named Mr. Ntaganda, she is then asked “And who gave you these instructions at that meeting?” and “Who was speaking to you at that meeting?” before first naming “Claude” and finally naming “Mr. Bosco”.<sup>887</sup> The idea that this testimony was spontaneous is laughable. Moreover, these questions were asked in the middle of her examination about the Mongbwalu operation, which is discussed immediately before and immediately after this exchange.<sup>888</sup>

335. Lastly, the Chamber also was wrong to accept P-0010’s testimony that [REDACTED]. This was another allegation which could never have occurred, and accordingly further undermines P-0010’s credibility. *First*, P-0010 testified in chief that she was raped “[REDACTED]”<sup>889</sup> This contradicted her prior statement that the rape occurred “[REDACTED]” when the UPC/FPLC troops had “[REDACTED]”.<sup>890</sup> In this prior statement, the rape is closely linked to the victory in Mongbwalu, with P-0010 stating: [REDACTED]

<sup>883</sup> **D-0300:T-217**,76:21-77:2; **DRC-OTP-2058-0251** at 45:56-49:54. This video taken in Mongbwalu shows Kisembo at the *Appartements* with Kasangaki, Salumu and Mr. Ntaganda being briefed about the operation after the fact.

<sup>884</sup> **P-0010:T-47**,16:6-16.

<sup>885</sup> **TJ**, para.499.

<sup>886</sup> **TJ**, fn.1387.

<sup>887</sup> **P-0010:T-47**,14:16-15:16.

<sup>888</sup> **P-0010:T-47**,13:3-15:16.

<sup>889</sup> **P-0010:T-47**,32:2-3.

<sup>890</sup> **DRC-OTP-2079-2011-R01**, para.21.

and that [REDACTED].<sup>891</sup> In cross-examination, P-0010 confirmed this prior statement, and was insistent that [REDACTED].<sup>892</sup>

336. The Chamber held that it “does not find that P-0010’s inability to recall whether a certain event happened in Mabanga “before” or “after” the First Operation unduly undermines her credibility.”<sup>893</sup> However, this was not an “inability to recall” when a certain event happened. P-0010 was insistent that her prior statement that [REDACTED].<sup>894</sup> She was categorical that the attack occurred **after** Mongbwalu. This is significant because the Chamber heard corroborated, unchallenged evidence that Mr. Ntaganda returned from Mongbwalu to Bunia by plane.<sup>895</sup> [REDACTED]. As such, the Chamber was required to consider the corroborated evidence that this event as described could never have happened, rather than mischaracterise P-0010 as having been unable to recall when it occurred.

337. Moreover, P-0010 failed to say she was raped [REDACTED] in prior statements, or to a close friend with whom she lived after the events. The Chamber excused these omissions on the basis that the “delayed reporting of rape” does not, as such, affect a witness’ credibility.<sup>896</sup> While this is not disputed, these were not simple instances of “delayed reporting”, but rather in these prior statements P-0010 made positive statements about Mr. Ntaganda’s prohibition of sexual assault, and his punishment of perpetrators.

338. In her 2003 statement, P-0010 said nothing about being raped [REDACTED], but said that she had been raped by [REDACTED]; that [REDACTED] for this crime; and that [REDACTED].<sup>897</sup> Similarly, in her 2005 statement, P-0010 denied that [REDACTED], stating that “[REDACTED]”.<sup>898</sup> D-0211 was P-0010’s “good friend”, with whom she lived after her military service. P-0010 shared intimate and personal information with D-0211, including that [REDACTED].<sup>899</sup> Not only did P-0010 never tell D-0211 that [REDACTED]<sup>900</sup> These are not examples of “delayed reporting”, they are prior inconsistent statements, which the Chamber was required to consider as such in determining whether to rely on P-0010’s testimony to the contrary.

<sup>891</sup> [DRC-OTP-2079-2011-R01](#), paras.22-23.

<sup>892</sup> **P-0010:T-50**,35:17-42:5.

<sup>893</sup> **TJ**, fn.242.

<sup>894</sup> **P-0010:T-50**,41:24-42:5.

<sup>895</sup> **D-0300:T-218**,5:5; **D-0017:T-253**,43:4-5.

<sup>896</sup> **TJ**, paras.88,102,103.

<sup>897</sup> [DRC-OTP-0206-0120](#), p.0121. P-0010’s subsequent statements and testimony do not include this accusation that [REDACTED] raped her, although she accuses him of raping other girls. **P-0010:T-47**,36:12-13.

<sup>898</sup> [DRC-OTP-0126-0122-R03](#), para.38.

<sup>899</sup> **D-0211:T-248**,32:16-35:1.

<sup>900</sup> **D-0211:T-248**,34:25-35:1.

339. Accepting P-0010's uncorroborated evidence of an alleged speech in Bunia by Mr. Ntaganda, in light of the errors identified above, was a miscarriage of justice. This finding should be reversed, as should the finding that Mr. Ntaganda's possessed the requisite *mens rea* for the First Operation crimes.

### III. P-0768's "attack the Lendu" allegation

340. The only other directive relied upon by the Chamber in support of Mr. Ntaganda's *mens rea* for the First Operation crimes comes from P-0768.<sup>901</sup> That it happened, is similarly impossible.

341. P-0768 said that on the "evening of the first day" of the assault on Mongbwalu, Mr. Ntaganda gave an order "to attack all the RDC-K/ML soldiers who were in Mongbwalu and the Lendu militia". P-0768 then corrected himself and said "[REDACTED]".<sup>902</sup> He was then led with the question "[REDACTED]?" to which P-0768 answered that he did not, but that "[REDACTED]".<sup>903</sup>

342. *First*, this equivocation on the part of P-0768 reflects the reality that Lendu combatants were not routinely distinguished from civilians with uniforms,<sup>904</sup> and were also comprised of women, children, and the elderly.<sup>905</sup> As such, in reality, when the UPC/FPLC engaged in a battle, the targets were "[REDACTED]",<sup>906</sup> and recruits were trained that they were "supposed to fire at the enemy who were firing at us or who were—was throwing bombs at us".<sup>907</sup> In this context, which the Chamber accepted,<sup>908</sup> the UPC/FPLC troops could not have reasonably understood Mr. Ntaganda's directive as being one to wipe out the Lendu community, and ensure their disintegration and destruction.

343. *Second*, and more significantly, P-0768 was not in Mongbwalu on the evening of the first day of the assault.<sup>909</sup> Nor was Mr. Ntaganda. The Chamber accepted that on 19 November 2002, when giving the final order for the troops to advance towards Mongbwalu, Mr. Ntaganda was not with the troops, and would "soon join them".<sup>910</sup> In fact, in the message cited by the Chamber, Mr. Ntaganda explains to Commander Salumu and Commander Seyi,

<sup>901</sup> [TJ](#), paras.1181,493.

<sup>902</sup> [P-0768:T-33](#),37:2-7.

<sup>903</sup> [P-0768:T-33](#),37:11-16.

<sup>904</sup> [TJ](#), para.472.

<sup>905</sup> [TJ](#), paras.885-886.

<sup>906</sup> [P-0017:T-63](#),47:18-19.

<sup>907</sup> [D-0017:T-252](#),59:12-16.

<sup>908</sup> [TJ](#), paras.472,885-886.

<sup>909</sup> See Ground 8, paras.161-165.

<sup>910</sup> [TJ](#), para.485.

who are advancing with the two brigades towards Mongbwalu, that he is waiting for his vehicles to be repaired in Bunia.<sup>911</sup> The Chamber accepted that the assault on Mongbwalu began on 20 November 2002.<sup>912</sup> Mr. Ntaganda does not leave Bunia for Mongbwalu until 21 November,<sup>913</sup> therefore he was not in Mongbwalu on the evening of the first day of the assault. P-0768's alleged instruction is an invention, which may also explain this testimony's equivocal, confused, and uncorroborated form. The Chamber was wrong to accept this evidence, which conflicts with other findings,<sup>914</sup> in the absence of any reasons as to how they could be reconciled.

344. The Chamber also erred in relying on the uncorroborated evidence of P-0768, an accomplice witness, in the absence of any caution or reasoning as to why the resultant finding was still safe. While a Chamber may rely on the evidence of accomplice witnesses, even when uncorroborated, it "must exercise appropriate caution in assessing such evidence and carefully consider the totality of the circumstances in which it was tendered", including that the witness "may have motives or incentives to incriminate the accused or lie".<sup>915</sup> P-0768's ample motivation to incriminate Mr. Ntaganda, and the Chamber's errors in dismissing P-0768's hatred for the Accused, are discussed in Ground 8, and relied upon here.<sup>916</sup> This was not an accomplice who could safely be relied upon as the sole witness for a central plank of the Chamber's intent finding.

345. Regardless, even if this directive had been given exactly as P-0768 recounted, Mr. Ntaganda's liability cannot hang on a failure to add the word "combatants" to "Lendu" in a wartime context. Prime Minister Churchill and General Eisenhower's wartime speeches were brimming with references to "the Germans", without them being understood as a call to murder the civilian population of Germany.<sup>917</sup>

346. The Chamber ascribes an invented and inflated significance to a term which carries

<sup>911</sup> [TJ](#), para.486, fn.1358. See also [TJ](#), para.489: "Mr. Ntaganda travelled from Bunia towards Mongbwalu".

<sup>912</sup> [TJ](#), para.486.

<sup>913</sup> [TJ](#), para.489. **D-0300:T-217**, 21:23-24:3

<sup>914</sup> [TJ](#), para.485.

<sup>915</sup> [ICTR-Bizimungu-AJ](#), paras.63-64; [Bemba-et-al-AJ-2275](#), para.1531: "The condition of a witness as an "accomplice" is a circumstance that needs to be carefully considered when assessing the reliability of his or her evidence". See also para.1534.

<sup>916</sup> See Ground 8, para.160.

<sup>917</sup> [Eisenhower](#): "But this is the year 1944! Much has happened since the Nazi triumphs of 1940-41. The United Nations have inflicted upon **the Germans** great defeats, in open battle, man-to-man. Our air offensive has seriously reduced their strength in the air and their capacity to wage war on the ground." (emphasis added); [Lord Mayor's luncheon](#): "**The Germans** have received back again that measure of fire and steel which they have so often meted out to others. Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning." (emphasis added).

none. In reality, throughout the Judgment, the Chamber uses the same shorthand, repeatedly referring to “Lendu” in contexts where it could only mean combatants.<sup>918</sup> Nor is there any evidence that Mr. Ntaganda’s alleged reference to “the Lendus” was understood by the UPC/FPLC troops as a call to murder civilians. P-0768 said that “everybody had to assess that in their own way.”<sup>919</sup> His testimony, despite the Prosecution’s best efforts, went no further.

347. Mr. Ntaganda never gave these two directives. The findings that he did were not open to a reasonable Chamber and are invalidated by legal errors. Given their place at the centre of the finding that Mr. Ntaganda possessed the *mens rea* for the 13 counts for which he was convicted, this should be reversed.

#### **IV. The other factors relied upon do not establish Mr. Ntaganda’s criminal intent**

348. None of the other factors relied upon to infer Mr. Ntaganda’s intent for the 13 counts, collectively or individually, support its finding of *mens rea*.

349. The Chamber relied on the finding that “murders and rapes committed in Mongbwalu occurred at the *Appartements* camp, Mr. Ntaganda’s base.”<sup>920</sup> The murders referred to are those of alleged prisoners, and the *Abbé*. Mr. Ntaganda’s involvement is based on the uncorroborated testimony of accomplice witnesses P-0768 and P-0017. The incredibility of these allegations has been discussed in submissions under Ground 8, which are repeated and relied upon herein.<sup>921</sup>

350. As for the rapes which “occurred at the *Appartements* camp”, the Chamber cites to “V.C.4.c Rape as a crime against humanity and as war crime”, the “positive findings” for which are found in paragraph 940. For Mongbwalu, the Chamber cites only to paragraphs “518 to 523, 535”.<sup>922</sup> Paragraphs 518 to 523 do not concern the *Appartements* camp. Paragraph 535 does not contain a finding that women were raped at the *Appartements*, with the Chamber going only as far as finding that the only reasonable conclusion on the evidence was that “UPC/FPLC soldiers and commanders had sexual intercourse with the women they brought back to the camp”.<sup>923</sup> Even had Chamber made a finding that the women were raped, this

<sup>918</sup> See, e.g. the Chamber’s statements that: “During the fighting, **the Lendu were able to capture** some of the UPC/FPLC’s heavy weapons” (emphasis added); “There was minimal resistance **from the Lendu**, as they quickly fled once the UPC/FPLC started shooting” (emphasis added); “The **Lendu initiated a ‘counteroffensive’** on the second day involving two groups” (emphasis added); [TJ](#), paras.566,573,575.

<sup>919</sup> [P-0768:T-33](#),37:11-16.

<sup>920</sup> [TJ](#), para.1184.

<sup>921</sup> See Ground 8, paras.167-177,209-225.

<sup>922</sup> [TJ](#), para.940, fn.2712.

<sup>923</sup> [TJ](#), para.535.

paragraph fails to support the more general conclusion that “Mr Ntaganda was present and aware that [...] these women were raped in the camp”.<sup>924</sup> The paragraph relied on only goes as far as to find that “Mr Ntaganda was among the soldiers and commanders who brought women back to the *Appartements*”.<sup>925</sup> The Chamber errs in mischaracterising its own findings.

351. Similarly, the fact that Mr. Ntaganda gave orders “to fire the heavy weapons, and decided which objects to be shot at” is not indicative of criminal intent for any of the charged crimes.<sup>926</sup> The only example cited of an illegal order is [REDACTED] of shooting at a column in Sayo, the errors in which are discussed in Ground 8, and repeated here.<sup>927</sup> Even if this manifestly unreasonable finding stands, the number of findings of lawful orders by UPC/FPLC commanders reveals this attack on the column as an anomaly.<sup>928</sup>

352. As for the reliance on the “appropriation of goods by soldiers”,<sup>929</sup> the Chamber finds that “importantly”, “some of the goods looted from Mongbwalu were actually brought to Mr Ntaganda’s residence in Bunia.”<sup>930</sup> This finding is invalidated by the Chamber’s erroneous analysis of the conflicting evidence. Again, the Chamber considers its initial findings that the Prosecution witnesses who made this allegation are “credible”, and therefore its finding (made before consideration of the Defence evidence and submissions) “is not affected by the Defence challenge”.<sup>931</sup> This is backwards. The Chamber was required to assess whether the allegation could be established beyond reasonable doubt in light of the Defence evidence. These repeated burden shifts weaken the entire fabric of the conviction, and undermine the central protection afforded to an accused; the presumption of innocence.

#### **V. Failure to consider the reasonable possibility of other available conclusions, and associated relevant evidence**

353. In addition to the above errors, the Chamber’s analysis of Mr. Ntaganda’s intent is undermined by a significant and overarching flaw. In order for a Chamber to infer the existence of a fact upon which a conviction relies, the inference drawn must be the only

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<sup>924</sup> [TJ](#), para.1184.

<sup>925</sup> [TJ](#), para.1184, citing [TJ](#), para.535, fn.1601.

<sup>926</sup> [TJ](#), para.491 (footnote omitted).

<sup>927</sup> See Ground 8, paras.194-208.

<sup>928</sup> [TJ](#), paras.475,482,490,499,550-553,559.

<sup>929</sup> [TJ](#), para.1183.

<sup>930</sup> [TJ](#), para.1183, citing para.516.

<sup>931</sup> [TJ](#), fn.1530.

reasonable one available.<sup>932</sup> A Chamber is not entitled to simply cite the evidence which supports its conclusion, and then enter a finding. It must also eliminate any other reasonable possibility, having considered all the relevant evidence.<sup>933</sup> The Chamber failed to take this second step.

354. The evidence the Chamber failed to consider is the testimony and contemporaneous records which point to the UPC/FPLC generally, and Mr. Ntaganda in particular, striving to direct a disciplined force that protected all civilians without distinction, in furtherance of the ultimate goal of peace in Ituri.<sup>934</sup> This alternative narrative features no-where in the analysis of Mr. Ntaganda's *mens rea*. For example, the Chamber had before it a contemporaneous (and reliable)<sup>935</sup> record of the messages being sent and received with the UPC/FPLC during the relevant events; the logbooks. From an evidential point of view, this was an absolute gift. Rather than needing to resort solely to the recollections of witnesses two decades after the fact, the Chamber had a contemporaneous record of what was happening within the organization at the time. In message after message, Mr. Ntaganda refers explicitly to sanctions being meted out in cases of any indiscipline within the UPC/FPLC, and exhibits concern that any troops engaging in misconduct be reprimanded.<sup>936</sup> These messages raise doubt as to his apparent intent that the troops "attack and kill Lendu civilians, to engage in sexual violence against this population, and to loot and destroy their belongings".<sup>937</sup> The Chamber was required to consider these records and provide sufficient reasons why they did not raise doubt as to its conclusion that Mr. Ntaganda wanted his troops to rape and kill. It was not entitled to ignore them.

355. These messages also undermine the Chamber's dismissal of other exculpatory evidence. For example, another contemporaneous window into the ideology of the UPC/FPLC is the video recording of Chief Kahwa's speech at Mandro, prepared with the

<sup>932</sup> [Katanga-TJ-3436](#), para.109; [ICTY-Stakić-AJ](#), para.219; [ICTY-Mucić-AJ](#), para.458; [ICTR-Ntagerura-AJ](#), paras.304-306.

<sup>933</sup> [ICTR-Mugenzi-AJ](#), para.91.

<sup>934</sup> See Ground 4, paras.109,119,123-126; Ground 13, paras.296-300.

<sup>935</sup> [TJ](#), para.64.

<sup>936</sup> [DRC-OTP-0017-0033](#), p.0194 (second) (Transl.[DRC-OTP-2102-3854](#), p.4016); [DRC-OTP-0017-0033](#), p.0178 (first) (Transl.[DRC-OTP-2102-3854](#), p.4000); [DRC-OTP-0017-0033](#), p.0190 (second) (Transl.[DRC-OTP-2102-3854](#), p.4012); [DRC-OTP-0017-0033](#), p.0200 (second) (Transl.[DRC-OTP-2102-3854](#), p.4022); [DRC-OTP-0017-0033](#), pp.0193-0195 (Transl.[DRC-OTP-2102-3854](#), pp.4015-4017); [DRC-OTP-0017-0033](#), p.0191 (first) (Transl.[DRC-OTP-2102-3854](#), p.4013); [DRC-OTP-0017-0033](#), p.0177 (first) (Transl.[DRC-OTP-2102-3854](#), p.3999); [DRC-OTP-0017-0033](#), p.0194 (second) (Transl.[DRC-OTP-2102-3854](#), p.4016); [DRC-OTP-0017-0033](#), p.0205 (first,second) (Transl.[DRC-OTP-2102-3854](#), p.4027); [DRC-OTP-0017-0033](#), p.0210 (third) (Transl.[DRC-OTP-2102-3854](#), p.4032).

<sup>937</sup> [TJ](#), para.1187.

assistance of Mr. Ntaganda,<sup>938</sup> in which he impresses on the troops prior to the First Operation<sup>939</sup> that the aim of the organization is to protect all civilians without discrimination, and the prohibition on looting and rape was forcibly underscored.<sup>940</sup> The Chamber disregards this speech on the basis that it did not “reflect the reality of the disciplinary system within the UPC/FPLC”.<sup>941</sup> In fact, the reality of discipline within the UPC/FPLC is set out in the messages ordering and reporting on sanctions for indiscipline, which the Chamber ignored. The Chamber’s reasoning is impermissibly circular.

356. As set out in Ground 13, the Chamber also heard evidence that Mr. Ntaganda gave shelter, assistance, and protection to Lendu civilians who had fled to Mandro Camp after attacks on their homes.<sup>942</sup> In the evening of 19 February 2003, Mr. Ntaganda delivered weapons to the Lendu combattants in Libi, in order to form a military alliance with them to force the UPDF out of Ituri. The Lendu Chief to whom he delivered the weapons spoke of it as an unforgettable date, when “pacification became a reality.”<sup>943</sup> These are not the actions of a man who simultaneously intends for the Lendu community to be wiped out. The Chamber was required to consider the full evidential picture before it, and not just cherry-pick and rely on the evidence that supported its conclusion.

357. Perhaps the best evidence of Mr. Ntaganda’s “presence, actions and directives”<sup>944</sup> comes from the contemporaneous video taken in Mongbwalu after the First Operation.<sup>945</sup> The footage shows him being welcomed by the population, and his jovial exchanges with a “Maman Lendu” where, after accepting her invitation to return to her house to share a drink next Wednesday, he assures her that she can now live calmly in Mongbwalu, and that if anyone bothers her, she can call for “*chef Bosco*” and he will always come to her rescue. In the video, he draws a clear distinction between the combatants who were chased from

<sup>938</sup> **D-0300**: [T-216](#),12:13-13:1.

<sup>939</sup> [TJ](#), fn.790.

<sup>940</sup> [DRC-OTP-0082-0016](#) (Transc.[DRC-OTP-0164-0567](#), pp.0575, 1.200 to 0576, 1.246), (Transl.[DRC-OTP-0164-0710](#), pp.0718, 1.202-0720, 1.261). See, e.g. [p.0719, 1.220-222](#) “Cette armée-ci sera une armée sans discrimination. Ce sera une armée pour tous les Congolais, et ce sera une armée qui redonnera du respect aux Congolais.” [p.0719, 1.239-240](#) “Nous voulons que vous soyez une armée qui veille sur toutes les ethnies, une armée qui protège les habitants et leurs biens.” [p.0719, 1. 248 to p.0720, 1.252](#) “Nous ne voulons pas d’une armée qui va euh ... prendre les filles et les violer, s’approprier les biens des gens, ou bien harceler la population. Et je crois que nous serons sévères envers les militaires car si nous voulons progresser, il faut qu’il y ait de la discipline. Et toute armée doit avoir de la discipline.”

<sup>941</sup> [TJ](#), para.305, fn.790.

<sup>942</sup> **D-0300**:[T-213](#),70:19-71:13;[T-231](#),10:18-13:5; **D-0054**:[T-243](#),76:23-24,78:3-10,80:21-22,89:5-7;[T-244](#),7:11-13,8:19-25,18:14-25,19:5-13; **D-0300**:[T-213](#),71:11-12.

<sup>943</sup> [DCB](#), para.1073 referring to **D-0300**:[T-220](#),70:6-9.

<sup>944</sup> [TJ](#), para.1180.

<sup>945</sup> [DRC-OTP-2058-0251](#).

Mongbwalu and the civilians who should feel safe to remain, stating in the film that “[n]ous n'avons pas l'intention de tuer les habitants. Ce que nous voulons, par contre, c'est protéger les habitants et leurs biens. Le reste est absolument faux. [Silence] Je réfute cela.”<sup>946</sup>

358. These are not the actions and words of a man who wants the Lendu community to be wiped out. This video corroborates the other evidence of Mr. Ntaganda's emphasis on discipline and the protection of the civilian population. Evidence of Mr. Ntaganda protecting Lendu civilians in Mandro Camp, and arming Lendu combatants in Libi, and reassuring the Lendu community in Mongbwalu stands in contrast to the Chamber's findings that he had the intent to murder, rape, and persecute them all. The Chamber was required to consider all this evidence, and then engage with the question of whether the conclusion that it reached was the only reasonable one available on the record. Its failure to do so undermines Mr. Ntaganda's convictions for the crimes found to have been committed in the First Operation.

## **VI. Conclusion**

359. When *kupiga na kuchaji* is pulled out from the centre of this *mens rea* finding, it quickly collapses. The evidence of Mr. Ntaganda's “directives” is incapable of belief, and the mash-up of other findings are insufficient to sustain the Chamber's finding of intent for 13 counts. Regardless, even if these findings could be independently sustained, the finding of his *mens rea* for the First Operation crimes would still be fatally undermined by the Chamber's failure to look outside the evidence cited in support of its conclusion and consider whether it was the only reasonable one available. As such, Mr. Ntaganda must be acquitted of the crimes committed during the First Operation.

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

### **I. Introduction**

360. Mr. Ntaganda was convicted of having co-perpetrated the crimes of the Second Operation, including the two events of singular gravity in this case: (i) the massacre at Kobu of 49 individuals,<sup>947</sup> preceded by a number of other individual brutal killings and rapes;<sup>948</sup> and

<sup>946</sup> [DRC-OTP-2058-0251](#), [DRC-OTP-2102-3708](#), p.3762 (Transl. [DRC-OTP-2102-3766](#), p.3824). See also [DRC-OTP-2102-3708](#), pp.3714,3719 (Transl. [DRC-OTP-2102-3766](#), pp.3773,3779).

<sup>947</sup> [TJ](#), para.633.

<sup>948</sup> [TJ](#), paras.597-601 (at Sangi); 622-623 (at Kobu).

(ii) the execution of nine patients at the Bambu Hospital.<sup>949</sup> Mr. Ntaganda was convicted of having committed these crimes as an indirect co-perpetrator.

361. The Chamber erred. Mr. Ntaganda's direct contributions to the Second Operation – even as found by the Chamber – were *de minimis*. The circumstances do not demonstrate that any such contributions were made with the necessary *mens rea*, namely, awareness that he was exerting control over the crimes of the Second Operation.

362. The Chamber purports to overcome this deficiency by relying heavily on Mr. Ntaganda's contributions to the First Operation as if they were contributions to the Second. This approach depends on the Chamber's assertion that the two operations, despite being "separate in place and time," were a "logical succession of events" and "part of one and the same course of conduct."<sup>950</sup> The Chamber, relying on this assertion, treated Mr. Ntaganda's contributions to the First Operation, and the indications of his *mens rea*, as if they were contributions, and indications of *mens rea*, to the crimes of the Second Operation.

363. The Chamber's approach is legally erroneous. The purported "logical" connectedness of the two operations does not correspond to the applicable legal test, which requires determination of whether Mr. Ntaganda's contributions to the First Operation gave him control over the crimes of the Second. The corresponding *mens rea* is whether Mr. Ntaganda, at the time of his contributions to the First Operation, had knowledge of that control. The Chamber's characterization of the relationship between the two operations, based on an ill-defined objective evaluation of the relationship between the two operations, short-circuited the appropriate analysis of *mens rea*; over-stated Mr. Ntaganda's degree of contribution and control; and was an error of law. Furthermore, the Chamber's subsidiary findings indicate no such control, let alone knowledge that he had such control.

364. The Chamber also erred in fact and in law in finding, and then relying, on the uncorroborated testimony of P-0055 that Mr. Ntaganda was informed of the Kobu massacre soon after it had occurred. The Chamber's summary dismissal of P-0317's contradictory account – that the UN had no information about this massacre at the time that P-0055 said he was informed of the massacre by UN officials<sup>951</sup> – reflects a failure to give a reasoned opinion and was manifestly unreasonable.

## **II. The law of co-perpetration**

<sup>949</sup> [TJ](#), para.587.

<sup>950</sup> [TJ](#), paras.664,793.

<sup>951</sup> [TJ](#), fn.2029.

365. As referenced above, the *mens rea* for co-perpetration requires that: (i) the co-perpetrators meant to participate in the common plan and were mutually aware and accepted that its implementation would result in the crimes; (ii) the co-perpetrators carried out their actions with the purposeful will (intent) to bring about the material elements of the crimes, or were aware that in the ordinary course of events, the fulfillment of the material elements would be a virtually certain consequence;<sup>952</sup> and (iii) the accused was aware of the factual circumstances which allowed him or her to exert control over the crime to the requisite *actus reus* threshold.<sup>953</sup>

366. This ground of appeal primarily concerns the latter requirement: that the accused at least be aware, if not intend, that his or her contributions amount to exercising control over the crime to such an extent that he or she would frustrate its commission by not making the contribution.

367. Article 30 prescribes that this intent or awareness must relate to each objective element of the crime, thus enshrining the “correspondence” principle.<sup>954</sup> “Intent” is further defined as requiring that the person “means to” engage in, or to bring about, the material element; or is at least aware that a prohibited consequence “will occur in the ordinary course of events,” which means as a “virtual certainty.”<sup>955</sup> “Knowledge” is similarly defined as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”

368. Importantly, the *mens rea* is the same for each of the modes of commission liability:<sup>956</sup> the *mens rea* is no less stringent for indirect co-perpetration than for direct perpetration.

369. Co-perpetration requires, at a minimum, that the accused make “an essential contribution with the resulting power to frustrate the commission of the crime.”<sup>957</sup> There is ambiguity as to whether this “essential contribution” must be to the common plan pursuant to

<sup>952</sup> [Bemba-Confirmation-Decision-424](#), para.370; [Lubanga-TJ-2842](#), para.1018; [Katanga-TJ-3436](#), para.1399; [Gbagbo-Confirmation-Decision-656](#), paras.235-236; [Lubanga-AJ-3121](#), para.447.

<sup>953</sup> [Lubanga-TJ-2842](#), para.941 (“aware of the factual circumstances that enabled him to exercise functional control over the crime”); [Lubanga-Confirmation-Decision-803](#), para.366; [Katanga-TJ-3436](#), para.1416 (“aware of the factual circumstances which allow the person to exert control over the crime”); [Ruto-Kosgey-Sang-Confirmation-Decision-373](#), para.348; [Muthaura-Confirmation-Decision-382](#), para.419.

<sup>954</sup> Card, p.94. See Ashworth, p.85; [U.S. Model Penal Code](#) s.2.02(1); [German Penal Code](#), s.16(1); Shigemitsu, p.152.

<sup>955</sup> [Lubanga-AJ-3121](#), para.447.

<sup>956</sup> [Lubanga-AJ-3121](#), paras.446-447,450; [Bemba-et-al-TJ-1989](#), para.55.

<sup>957</sup> [Lubanga-AJ-3121](#), para.469. See [TJ](#), para.774; [Lubanga-TJ-2842](#), paras.999,1006 (“the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime.”)

which the crime is committed, or to the crime itself;<sup>958</sup> either way, however, the “power to frustrate” must be in relation to the crime.<sup>959</sup> Only by having the power to frustrate the crime does the accused possess the control over the crime necessary for liability:<sup>960</sup> “The decisive consideration [...] is whether the individual contribution of the accused within the framework of the agreement was such that without it, the crime **could not have been committed or would have been committed in a significantly different way.**”<sup>961</sup> The contribution must demonstrate that “the person nevertheless had **control over** the crime.”<sup>962</sup>

370. ICC jurisprudence has held, controversially,<sup>963</sup> that this level of control can arise not only from contributions to “the execution stage of the crime, but also, depending on the circumstances, at its planning or preparation stage”.<sup>964</sup> However, the Appeals Chamber has underscored that “[a]t the core of this approach is the assumption that a co-perpetrator **may compensate for his or her lack of contribution at the execution stage of the crime if, by virtue of his or her essential contribution, the person nevertheless had control over the crime.**”<sup>965</sup> One author has explained that the distinction between “execution” and “preparation” is less important than whether the contribution is “directly and immediately linked to the execution of the objective elements of the crime”<sup>966</sup> – a criterion that was easily satisfied, for example, in the *Katanga* Confirmation Decision where the preparatory contributions were made to a crime that was directly and immediately in view.<sup>967</sup>

371. In any event, regardless of the timing of the contribution, the *mens rea* remains the same: the accused must be aware of the factual circumstances that allow him or her to exert control over the crime to the requisite *actus reus* threshold. It is submitted that the more causally remote the contribution, the more this must be “compensate[d] for”<sup>968</sup> in the form of distinct evidence that the accused knew that he or she was exercising control over the eventual crimes.

<sup>958</sup> [Al-Mahdi-TJ-171](#), para.31; [Bemba-et-al-AJ-2275](#), para.825.

<sup>959</sup> [Lubanga-AJ-3121](#), para.469; [Bemba-et-al-TJ-1989](#), para.62; [Katanga-Confirmation-Decision-717](#), para.525; [Al-Mahdi-TJ-171](#), para.19 (“[t]he person makes an essential contribution with the resulting power to frustrate the commission of the crime”); [Banda-Jerbo-Confirmation-Decision-121](#), para.136 (“[a] person has been assigned an essential task if he or she has the power to frustrate the commission of the crime, in the way it was committed, by not performing his or her tasks.”)

<sup>960</sup> [Bemba-et-al-TJ-1989](#), para.69.

<sup>961</sup> [Bemba-et-al-AJ-2275](#), para.820 (emphasis added).

<sup>962</sup> [Lubanga-AJ-3121](#), para.469 (emphasis added).

<sup>963</sup> Jain, pp.123-124.

<sup>964</sup> [Lubanga-AJ-3121](#), para.469; [Bemba-et-al-AJ-2275](#), para.819.

<sup>965</sup> [Lubanga-AJ-3121](#), para.469 (emphasis added, footnotes omitted).

<sup>966</sup> Olásolo, p.279.

<sup>967</sup> [Katanga-Confirmation-Decision-717](#), paras.555-557.

<sup>968</sup> [Lubanga-AJ-3121](#), para.469.

**III. The Chamber erred in finding that the purported contributions of Mr. Ntaganda to the crimes of the Second Operation were performed with the requisite *mens rea***

**A. Introduction**

372. The Chamber’s findings regarding Mr. Ntaganda’s awareness that he was controlling the crimes of the Second Operation fall into two categories: (i) immediate contributions to the Second Operation;<sup>969</sup> and (ii) contributions to the First Operation, which, because of the “logical-succession-of-events” characterisation, were treated as also being contributions to the Second.<sup>970</sup> The Chamber’s inference, on the basis of these actions, that Mr. Ntaganda possessed the *mens rea* for co-perpetration of the crimes of the Second Operation, was manifestly unreasonable and, often, based on findings made without an adequate statement of reasons.

**B. Awareness of direct contributions to the Second Operation**

373. Mr. Ntaganda’s purported direct contributions fall far short of showing the requisite degree of control over the crimes of the Second Operation, and that he made those contributions with the necessary awareness of the crimes and his ability to frustrate them.

374. Mr. Ntaganda was found by the Chamber to have participated in one “planning” meeting in relation to that Second Operation in which his total contribution consisted of: (i) “asking”, jointly with Kisémbu who subsequently commanded the Second Operation, two commanders to “handle” operations along the “Lipri road”; (ii) asking a commander to proceed along the Bambu road; (iii) identifying an arms depot in Centrale from which arms could be obtained by one of the field commanders; and (iv) advising Kisémbu to fly to Mongbwalu.<sup>971</sup> The Second Operation, as the Chamber found, was not really “planned” during the meeting attended by Mr. Ntaganda in Bunia, but rather at a later meeting conducted by Kisémbu in Mongbwalu.<sup>972</sup> No other instructions were given by Mr. Ntaganda, and there was no discussion of the treatment of civilians.<sup>973</sup> Mr. Ntaganda’s contributions during this first meeting in Bunia had no meaningful impact on any of the subsequent crimes; reveals no

<sup>969</sup> [TJ](#), paras.551-554,565,638-639,846,1179,1185.

<sup>970</sup> [TJ](#), paras.664,793,838.

<sup>971</sup> [TJ](#), paras.552,837.

<sup>972</sup> [TJ](#), para.553.

<sup>973</sup> [P-0055:T-72](#),6:12-15;[T-71](#),40:3-7.

control over those crimes (or even the Second Operation as a whole); and reveals no knowledge of, or intent for, those crimes.

375. The Chamber ascribed the following other actions of Mr. Ntaganda as being contributions to the crimes of the Second Operation: distributing a “new operational structure” of brigades and battalions; reminders to commanders regarding disciplinary matters in general; and asking for designations of personnel within units to be updated.<sup>974</sup> These extremely generic actions, however, are not indicative of control over the Second Operation; of control over the crimes that occurred in the context of that Operation; or of the requisite *mens rea* – i.e. awareness of the virtual certainty that crimes would be committed, and that these putative “contributions” amounted to control over the crimes.

376. The Chamber tries to fortify Mr. Ntaganda’s knowledge of the Second Operation by virtue of four purported communications that occurred before or at the very beginning of the Second Operation: (i) being copied on a *radiophonie* message about a skirmish at Kilo preceding the Second Operation;<sup>975</sup> (ii) being informed by Thuraya about the failure of the first day of the Second Operation at Lipri on 17 February;<sup>976</sup> (iii) being copied on a *radiophonie* message about a field commander refusing to advance, prompting Mr. Ntaganda to respond that no commander could refuse such an order;<sup>977</sup> and (iv) being copied on a *radiophonie* message that the troops had arrived in Kobu, Bambu and Lipri.<sup>978</sup>

377. These four communications, even assuming that they all occurred, are manifestly insufficient to demonstrate the knowledge of crimes – or even of the operational details of the Second Operation – necessary to satisfy the *mens rea* for co-perpetration of the crimes of the Second Operation. The Chamber ignores that Mr. Ntaganda’s communications logbook shows that in the lead-up to the Second Operation through 22 February, Mr. Ntaganda received 171 *radiophonie* messages,<sup>979</sup> and sent 58 others, on subjects unrelated to the Second Operation<sup>980</sup> – in particular concerning matters relating to the areas of operations that had been assigned to

<sup>974</sup> [TJ](#), para.554.

<sup>975</sup> [TJ](#), para.555. See [DRC-OTP-0017-0033](#), p.0160 (Transl. [DRC-OTP-2102-3854](#), p.3982); **D-0300:T-223**,13:3-4,14:4-14;**T-238**,17:6-18:5.

<sup>976</sup> [TJ](#), para.565, 1<sup>st</sup> bullet.

<sup>977</sup> [TJ](#), para.565, 2<sup>nd</sup> bullet. See [DRC-OTP-0017-0033](#), p.0176 (third) (Transl. [DRC-OTP-2102-3854](#), p.3998); **D-0300:T-220**,74:13-18.

<sup>978</sup> [TJ](#), para.565,3<sup>rd</sup> bullet.

<sup>979</sup> Out of 174 messages received from 15 January to 22 February 2003 ([DRC-OTP-0017-0033](#),p.0105 (second) to p.0173) only 3 related to the relevant area: [DRC-OTP-0017-0033](#), pp.0160 (second), 0168 (second) and 0171 (first).

<sup>980</sup> Out of 60 messages sent from 15 January to 22 February 2003 ([DRC-OTP-0017-0033](#), pp.0174-0198 (second)) only 2 related to the relevant area: [DRC-OTP-0017-0033](#), p.0176 (fourth and fifth).

him.<sup>981</sup> This means that 2% of Mr. Ntaganda's *radiophonie* messages during this period concerned the Second Operation – a fraction that is strongly indicative of Mr. Ntaganda's lack of involvement in the Second Operation, and which is disregarded by the Chamber.

378. The four communications themselves: (i) contain no significant operational details; (ii) in all but one case were not addressed to Mr. Ntaganda, but were provided to him in copy or for “info”; (iii) in all but one case Mr. Ntaganda does not even respond; and (iv) occurred at the very start of the Second Operation before the singularly serious Kobu massacre had occurred.<sup>982</sup> The message concerning the skirmish in Kilo and the request for ammunition is not addressed to Mr. Ntaganda, but rather to Salongo,<sup>983</sup> demonstrating that Mr. Ntaganda is not the commander, let alone a significant player, in the lead-up to the Second Operation.

379. These communications, taken at their highest, do not evince any awareness of crimes, let alone awareness that any action of Mr. Ntaganda constitutes a contribution tantamount to control over any of the crimes of the Second Operation.

380. The Chamber mischaracterizes the one message to which Mr. Ntaganda does respond, asserting that his response demonstrates that he “exercised oversight over the unfolding of the Second Operation”.<sup>984</sup> The content of the message, responding to the “info” message that a field commander had refused to advance, was that “*Tu es informé [...] cela n'est pas encore arrive dans l'armée, il n'y a aucun comd qui a le pouvoir de refuser un ordre venant d'en haut.*”<sup>985</sup> Mr. Ntaganda's response is not even an order, but merely a generic and self-evident comment addressing discipline in general. The Chamber's assertion that Mr. Ntaganda's message was making “sure that the forces deployed were carrying out **the project as planned**”<sup>986</sup> – (i.e. criminal acts) – is unsupported by any reference to evidence and is wholly speculative. The Chamber's characterization of this message as reflecting “oversight”, let alone control, over any crime, is devoid of any evidential basis; mischaracterizes the character of the communication, including by ignoring Mr. Ntaganda's explanation for the message;<sup>987</sup> and ignores the broader context that this was the only message sent by Mr. Ntaganda concerning the Second Operation.

<sup>981</sup> DCB, paras.1054 and 1032, referring to DRC-OTP-0017-0033, pp.0105 et seq. In particular DRC-OTP-0017-0033, pp.0144,0146 (first), 0148 (first) (Transl. DRC-OTP-2102-3854, pp.3966,3968,3970).

<sup>982</sup> The Kobu massacre is dated by the Chamber as having occurred on or around 26 February (TJ, paras.604 et seq.)

<sup>983</sup> TJ, para.555.

<sup>984</sup> TJ, para.846.

<sup>985</sup> DRC-OTP-0017-0033, p.0176 (third); TJ, fn.1723.

<sup>986</sup> TJ, para.846 (emphasis added).

<sup>987</sup> TJ, fn.1723; DCB, para.1061.

381. The Chamber also relied on the general testimony of P-0055 and P-0901 to “conclude[...]” that Mr. Ntaganda “was monitoring the unfolding of the Second Operation.”<sup>988</sup>

382. The Chamber’s reliance on P-0901 was entirely misplaced. P-0901 was unable, as the Chamber acknowledged,<sup>989</sup> to offer a single example of such monitoring. P-0901 offered nothing more than conjecture based on his understanding of Mr. Ntaganda’s general functions: “[REDACTED],”<sup>990</sup> and asserted that generally Mr. Ntaganda “[REDACTED].”<sup>991</sup> Yet P-0901, who claimed to have [REDACTED],<sup>992</sup> did not identify Mr. Ntaganda as being amongst the interlocutors whom he [REDACTED].<sup>993</sup> Furthermore, the Chamber overlooked P-0055’s testimony that he had to [REDACTED]<sup>994</sup> – a distance of just 25 kilometres,<sup>995</sup> which is far less than the distance between anywhere in the area of the Second Operation and Fataki (where Ntaganda was located for most of the Second Operation).<sup>996</sup> P-0055’s and P-0901’s testimony not only does not support the inference that Mr. Ntaganda was participating in such Motorola communications; it supports the inference that he was not.<sup>997</sup>

383. P-0055 likewise offered nothing more than surmise, asserting generally that “[REDACTED].”<sup>998</sup> The Chamber ignored, however, that P-0055’s presumption – at least in respect of the Manpack – was directly contradicted by Mr. Ntaganda’s *radiophonie* logbook, which shows only the three messages mentioned above. The Chamber nevertheless relied on P-0055’s general surmise without addressing the specific and concrete evidence to the contrary provided by the logbook (in respect of the Manpack), and the tacit contradiction arising from P-0901’s testimony (in respect of the Motorola).

384. The Chamber also failed to give any account of Mr. Ntaganda’s whereabouts between 18 February and 4 March 2003, when the crimes that he “committed” occurred. This failure is relevant not because physical presence at the scene of the crime is required for co-perpetration, but because of the Chamber’s finding, albeit vague, that Mr. Ntaganda “used

<sup>988</sup> [TJ](#), para.565,4<sup>th</sup> bullet.

<sup>989</sup> [TJ](#), para.565,4<sup>th</sup> bullet (“did not discuss specific examples”).

<sup>990</sup> [P-0901:T-29](#),13:9 (emphasis added).

<sup>991</sup> [P-0901:T-29](#),13:14-16 (emphasis added).

<sup>992</sup> [P-0901:T-29](#),11:9-15:11.

<sup>993</sup> [TJ](#), fn.1726; [P-0901:T-29](#),13:1-3.

<sup>994</sup> [P-0055:T-71](#),41:16-42:8;[T-74](#),22:14-17.

<sup>995</sup> [P-0105:T-133](#),48:5.

<sup>996</sup> [DRC-OTP-2080-0239](#).

<sup>997</sup> See [TJ](#), fn.1727. The absence of such evidence is particularly significant given the Chamber’s finding that “[t]he Motorola network was used during UPC/FPLC operations to transmit orders and reports.” [TJ](#), para.343.

<sup>998</sup> [P-0055:T-71](#),43:17-18 (emphasis added).

radio devices to communicate during the Second Operation” and was “monitoring the unfolding of the Second Operation.”<sup>999</sup>

385. This inference is sustainable only if Mr. Ntaganda was within range of the “radio devices” in question. Yet the Chamber does not address the evidence that Mr. Ntaganda was well out of Motorola radio range during the entire period of the most serious crimes.<sup>1000</sup> The Chamber tacitly accepted that Mr. Ntaganda was in Fataki at some point,<sup>1001</sup> and P-0055 acknowledged that Mr. Ntaganda was still there as of early March.<sup>1002</sup> P-0055 also specified that, while there, Mr. Ntaganda was “[REDACTED]” “[REDACTED].”<sup>1003</sup> The Chamber was obliged to address Mr. Ntaganda’s testimony<sup>1004</sup> and the Defence’s arguments<sup>1005</sup> concerning Mr. Ntaganda’s whereabouts during this time period before reaching the conclusion that he was monitoring, and communicating with, the Second Operation through “radio devices.” It is extraordinary that a Chamber could make a finding of co-perpetration, with its high threshold of awareness of contribution, while neglecting to make findings of where the accused was located when he “committed”<sup>1006</sup> the crimes, and whether those whereabouts precluded effective communication with the alleged perpetrators of the crimes.

386. These whereabouts were otherwise relevant to the Chamber’s *mens rea* findings. A commander making an essential contribution to an operation is not likely to travel far from the operational zone “[REDACTED]”<sup>1007</sup> including for a purpose as trivial as a “[REDACTED].”<sup>1008</sup> Mr. Ntaganda, significantly, was not found to have had any contact with, let alone to have given any briefings or instructions to, soldiers in anticipation of the

<sup>999</sup> [TJ](#), para.565,4<sup>th</sup> bullet.

<sup>1000</sup> Even the Chamber’s own indication of the “normal” range of a hand-held Motorola as being “15 to 20 kilometres,” ([TJ](#), para.343) would certainly exclude Motorola communications between the area of the Second Operation and Aru or Fataki, [DRC-OTP-2080-0239](#). The Chamber implicitly accepts that such communications were out of Motorola range at footnote 1726, explaining that it was plausible that P-0901 had heard such communications after his return to Bunia from Aru, thus implying that such communications were not possible from Aru.

<sup>1001</sup> The Chamber appears to accept that Mr. Ntaganda did go to Fataki during this period, but without any specification of dates, and without addressing how this trip could be compatible with communications with the Second Operation through “radio devices.” See [TJ](#), para.552 (“Mr Ntaganda was to go to Fataki for a graduation ceremony.”)

<sup>1002</sup> [REDACTED], [DRC-OTP-2067-1976](#), paras.1-2, [DRC-OTP-0018-0113](#). See [P-0055:T-74](#),72:3-74:11. [REDACTED]: [P-0055:T-74](#),71:16-73:15. The Chamber’s finding that the timing of Kisembo’s return to Bunia was “peripheral” is, therefore, wrong.

<sup>1003</sup> [P-0055:T-71](#),34:12-19. See also [P-0055:T-74](#),73:7-8,80:20 (testifying that Ntaganda was in Fataki).

<sup>1004</sup> [D-0300:T-220](#),58:1-80:15;[T-221](#),4:1-27:25.

<sup>1005</sup> [DCB](#), paras.1048-1083.

<sup>1006</sup> [Statute](#), article 25(3)(a).

<sup>1007</sup> [P-0055:T-71](#),34:15-20.

<sup>1008</sup> [TJ](#), para.552. See [P-0055:T-72](#),5:4-10.

Second Operation.<sup>1009</sup> The Chamber's systematic disregard of Mr. Ntaganda's whereabouts in relation to the timing of the crimes was an egregious failure to state reasons rising to the level of a legal error.

387. The Chamber, in addition to its unwarranted legal conclusions and its failures to give reasons as discussed above, also reached manifestly unreasonable findings:

- That Mr. Ntaganda was informed over Thuraya about the failed operation on Lipri on 16 February<sup>1010</sup> because: (i) it was based on the uncorroborated hearsay testimony of P-0055 alone;<sup>1011</sup> (ii) the finding was too important, given the significance attached to it by the Chamber, to be based on a proposition that could not be cross-examined; (iii) the only specific information that P-0055 mentions as having been provided to Mr. Ntaganda was the death of a commander during that attack, which falls short of being information about "the failed assault" in general or being indicative of operational level control;<sup>1012</sup> and (iv) P-0055 revealed his lack of reliability in respect of this information by claiming that the person who told him about the death of the commander during the failed attack on Lipri (Salongo)<sup>1013</sup> was actually, according to the Chamber's own findings, not in Lipri "immediately before and during" the Second Operation, but rather in Mongbwalu;<sup>1014</sup> and
- The finding that Mr. Ntaganda's account of the Second Operation was damaged because of his purported "categorical denial of knowledge of the Second Operation in the days prior to its beginning,"<sup>1015</sup> despite elsewhere acknowledging that Mr. Ntaganda had testified that he was aware of a general intention to open that key road.<sup>1016</sup>

### C. Conclusion in respect of direct contributions to the Second Operation.

<sup>1009</sup> [TJ](#), fn.1701.

<sup>1010</sup> [TJ](#), para.565, 1<sup>st</sup> Bullet.

<sup>1011</sup> [P-0055:T-72](#),42:14-15.

<sup>1012</sup> [TJ](#), fn.1720. The Chamber characterizes P-0055's testimony as being that Ntaganda "followed the developments relating to the failed attack on Lipri," whereas P-0055's offered only the very general statement that Mr. Ntaganda was "following developments relating to the battle" – which appears to be a reference to the Second Operation as a whole. [P-0055:T-71](#),42:9-15. However, the only specific information that P-0055 cites as having been conveyed to Ntaganda was "the death of the commander" in the failed Lipri assault. [P-0055:T-71](#),42:12-13. Notably, P-0055 does not mention Salongo or Tchaligonza having provided any other information to Ntaganda.

<sup>1013</sup> [TJ](#), fn.1720.

<sup>1014</sup> [TJ](#), fn.1673. This finding is reinforced by the logbook messages of 13 and 18 February addressed to Salongo (Tiger One) as « COMD OP SECTOR SE », which was in Mongbwalu. [DRC-OTP-0017-0033](#), p.0176 (third), p.0181 (third), pp.0182-0184. See also [P-0907:T-90](#),59:4-64:1.

<sup>1015</sup> [TJ](#), fn.1672.

<sup>1016</sup> [TJ](#), fn.1725.

388. The Chamber's factual findings concerning Mr. Ntaganda's awareness of the Second Operation falls far short of what is required to establish his *mens rea* for crimes committed in relation thereto; are often unsupported by reasons for adequate evidence; and/or are manifestly unreasonable. The evidence did not come close to showing, as decided in the Confirmation Decision, that it was "agreed that Mr. Ntaganda was to 'control the fighting as it was happening' from Bunia" and that he "issued operational orders concerning the fighting."<sup>1017</sup> Neither the evidence, nor the Chamber's findings, reflects any such agreement or any such orders. His role in the Second Operation was *de minimis*. These *de minimis* contributions to the Second Operation reveal no awareness that he was exercising control over, or making an essential contribution to, the crimes of the Second Operation.

**D. Indications of awareness arising from contributions to the First Operation as indirect contributions to the Second Operation**

389. The Chamber, given the minimal nature of Mr. Ntaganda's contributions to the Second Operation, attempted to establish his essential contribution to those crimes, and the corresponding *mens rea*, on the basis of a factual characterization of the inter-relatedness of the two operations, which:

were part of the **same military campaign** and constituted a **logical succession of events**. As such, although separate in place and time, the acts performed by the UPC/FPLC troops during the First and Second Operation are part of **one and the same course of conduct**.<sup>1018</sup>

390. The Chamber's factual labelling of the two operations as part of the "same [...]" campaign", as a "logical succession of events", and as part of the "same course of conduct", subverts the proper legal test. The test that needed to be applied was whether Mr. Ntaganda's contributions to the First Operation were contributions to the crimes of the Second Operation, to such a degree that he was in a position to frustrate those crimes, and knowing that his contribution was so essential that he could frustrate their commission by not participating.

391. Objective evaluations of the factual connectedness of the two operations deviate from the control test, and the corresponding *mens rea*. The Chamber circumvents the proper question by starting with a factual conclusion that such an analysis is unnecessary because the two operations were one and the same. This inverts the reasoning that had to be followed, which was to analyse first the extent to which the contributions to the First Operation were

<sup>1017</sup> [Confirmation-Dcision-309](#), para.114.

<sup>1018</sup> [TJ](#), paras.664,793 (emphasis added).

contributions to the crimes of the Second Operation, and whether those contributions were made with the requisite *mens rea*.

392. The Chamber's ultimate conclusions on *mens rea* in respect of the Second Operation are set out at paragraphs 1176 to 1188. The Chamber relies almost entirely on contributions to the First Operation to substantiate conclusions "in relation to the First and Second Operation".<sup>1019</sup> The Chamber itself acknowledges that the main basis for inferring Mr. Ntaganda's intent relates to the First Operation: "Mr Ntaganda's presence, actions, and directives illustrates [*sic*] how he intended the troops to behave in the field, **notably in the context of the First Operation.**"<sup>1020</sup> The Chamber's approach does little more than transfer its findings of *mens rea* from the First Operation to the Second Operation, based on its factual assessment that the two were "one and the same course of conduct," because they were a "logical succession of events."<sup>1021</sup>

393. The Pre-Trial Chamber recognized that this was not the proper approach. The Confirmation Decision analyses Mr. Ntaganda's conduct in relation to each of the two operations separately. The Chamber confirmed the existence of an essential contribution to the crimes of the Second Operation based almost exclusively on purported contributions in contemplation of the Second Operation (which, at trial, were unproven).<sup>1022</sup> The Pre-Trial Chamber relied on one specific instruction by Mr. Ntaganda prior to the First Operation, but only because that instruction was expressly made in contemplation of an event that occurred in the Second Operation.<sup>1023</sup> The Pre-Trial Chamber recognized, accordingly, that it would be improper to indiscriminately treat contributions to the First Operation as contributions to the Second for the purpose of evaluating whether there was the requisite degree of control for co-perpetration of the crimes of the Second Operation.

394. The situation differs from that of the *Katanga* case, where all contributions related to an attack on a single day;<sup>1024</sup> to the *Al Mahdi* case, where the contributions related to a more or less continuous attack over a 12-day period;<sup>1025</sup> to the *Lubanga* case, where continuous

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<sup>1019</sup> [TJ](#), para.1188.

<sup>1020</sup> [TJ](#), para.1180 (emphasis added).

<sup>1021</sup> The reliance, at paragraph 1185, on post facto sentiments purportedly expressed by Mr. Ntaganda is addressed in the next section.

<sup>1022</sup> [Confirmation-Dcision-309](#), paras.114-115.

<sup>1023</sup> [Confirmation-Dcision-309](#), para.115 (relying on evidence, not heard at trial, that Mr. Ntaganda gave specific instructions during the First Operation that related to a location that was part of the Second Operation).

<sup>1024</sup> [Katanga-Confirmation-Dcision-717](#), para.548.

<sup>1025</sup> [Al-Mahdi-TJ-171](#), para.38.

contributions related to concurrent crimes;<sup>1026</sup> or to the *Bemba et al.* case, where the scope of the offences to tamper with witnesses fell within a narrow ambit, to whose implementation the accused could be seen to have contributed.<sup>1027</sup> The *Bemba et al.* Appeals Chamber held in that context that a contribution to the “implementation”<sup>1028</sup> of the crimes as a whole could suffice, even where the “the exact contours of all the crimes or offences that will be committed as part of the plan’s implementation are not yet known”.<sup>1029</sup>

395. Unlike the foregoing cases, the crimes of the Second Operation are clearly distinct from those of the First in terms of timing, circumstances, scale, geographic location, identity of perpetrators and degree of involvement of the accused. The Second Operation commenced almost three full months after the end of the First Operation.<sup>1030</sup> While something resembling the Second Operation may have been a probability, the Chamber did not, and could not, find that it was so definite or proximate in time or space that only the “contours” of the crimes to be committed were in doubt. Mr. Ntaganda’s actions in relation to the First Operation, remote as they were in time and space, and succeeded as they were by the actions of other essential actors, cannot be said to have been committed with the required knowledge of control over the crimes of the Second Operation.

396. Agreeing and contributing to the common plan cannot, incidentally, be presumed to be sufficient to have the degree of control necessary for any and all crimes committed pursuant to the common plan. The *Gbagbo* Trial Chamber found that it was “difficult to see how Mr Gbagbo could have exercised any control over the individuals that committed” crimes pursuant to an alleged common plan after he had lost the capacity to direct, or contribute to, that common plan.<sup>1031</sup> In other words, Gbagbo’s previous participation in the common plan was not sufficient to impute to him control, and the *mens rea* of control, over any and all future crimes that might be committed pursuant to the common plan. Likewise, it was improper to simply impute to Mr. Ntaganda the *mens rea* of control over the crimes of the Second Operation based on nothing more than the finding that these crimes were part of a “logical succession of events.” More is required: knowledge of control over the crimes to be committed.

<sup>1026</sup> [Lubanga-TJ-2842](#), paras.914,916,1356.

<sup>1027</sup> [Bemba-et-al-AJ-2275](#), para.825.

<sup>1028</sup> [Bemba-et-al-AJ-2275](#), paras.824,825 (finding that the scope of the offences agreed upon was to “illicitly interfere with defence witnesses” and that the accused had made “essential contributions to the *implementation* of the common plan” as a whole).

<sup>1029</sup> [Bemba-et-al-AJ-2275](#), para.821.

<sup>1030</sup> [TJ](#), para.554.

<sup>1031</sup> [Gbagbo-Opinion-Judge-Henderson-1263](#), para.1913.

397. A concrete demonstration of the improperly reduced degree of contribution threshold is the Chamber's explanation that the two operations could be treated as a unity because "control of Mongbwalu, most notably of its airstrip" permitted the Second Operation to succeed.<sup>1032</sup> This "but for" reasoning would imply an open-ended and indefinite commission liability: whether one murder was committed with weapons funnelled through the Mongbwalu airstrip, or 5000 such murders were committed, Mr. Ntaganda would equally satisfy the Chamber's criterion for liability. This degree of contingency is not compatible with basic principles of culpability and misunderstands the concept of co-perpetration, which invariably requires control over the crime.

#### **E. Conclusion concerning awareness of control over the crimes**

398. Mr. Ntaganda did not control the crimes of the Second Operation, so as to make him a co-perpetrator of those crimes, nor does his contribution indicate awareness that he was controlling those crimes. Any contributory acts were so remote in time that, notwithstanding his participation in the common plan, Mr. Ntaganda's contributions cannot properly be characterized as so essential that he could have frustrated the crimes of the Second Operation. None of Mr. Ntaganda's purported contributions to the crimes of the Second Operation are demonstrative that he had the capacity to prevent those crimes by not participating, or that he knew that he had the capacity to prevent those crimes by not participating. The imposition of this highest form of liability on Mr. Ntaganda, for crimes of which he had no contemporaneous knowledge, stretches the notion of co-perpetration beyond its proper meaning and substantially overstates Mr. Ntaganda's personal responsibility. His convictions for the crimes of the Second Operation on this basis should be quashed.

#### **IV. Errors in finding that [REDACTED] informed Mr. Ntaganda about the Kobu massacre, and error in relying on this information to impute *mens rea* for that crime to Mr. Ntaganda**

##### **A. Introduction**

399. Mr. Ntaganda's *mens rea* for co-perpetrating the Kobu massacre was substantiated, in the Chamber's view, by finding that he was informed of the massacre soon after it occurred, and that he reacted in a way that showed he "approved of the behaviour of the troops in this

<sup>1032</sup> [TJ](#), para.838. See also [TJ](#), para.854.

context”.<sup>1033</sup> The only evidence that Mr. Ntaganda was so informed, and of his purported reaction, was provided by P-0055. No reasonable trier of fact could have decisively relied on this testimony, in particular, because P-0055 gave detailed and emphatic testimony claiming that his first information about the massacre came from MONUC, which had purportedly complained to Thomas Lubanga about it. Yet P-0317, a senior MONUC human rights official with responsibility over this area, testified that she could not recall that MONUC had any information about the Kobu massacre at that time. No reasonable Chamber could have failed to acknowledge that her testimony was at least sufficiently reliable and informed to raise reasonable doubt about P-0055’s account. Furthermore, the Chamber improperly imputed *mens rea* based on an expression of *post facto* approval, without any evidence that Mr. Ntaganda performed the *actus reus* of the crime with the requisite *mens rea*.

**B. P-0055’s testimony that Mr. Ntaganda was informed contemporaneously about the Kobu massacre, and his reaction, was manifestly unreliable**

400. The Chamber found, relying on the testimony of P-0055, that Mr. Ntaganda was informed by the G2 about the Kobu massacre shortly after it happened. According to P-0055, Mr. Ntaganda indicated that he was already aware of the incident; that he “was glad with how things had turned out”; and that the commander on the spot during the Kobu massacre, Salumu Mulenda, was a “gentleman,” and “brave, a fine person” or a ““real man””.<sup>1034</sup>

401. P-0055 gave specific testimony about the initial source of information about the Kobu massacre that spurred the G2’s inquiries: two MONUC officials told Thomas Lubanga about the massacre shortly before the FPLC’s defeat at the hands of the Ugandan Army,<sup>1035</sup> which occurred on 6 March 2003. P-0055, who said that the MONUC officials visited Mr. Lubanga at his residence,<sup>1036</sup> purported to remember the names of the two officials: [REDACTED]<sup>1037</sup> (whom P-0055 professed to know well)<sup>1038</sup> and [REDACTED].<sup>1039</sup> P-0055 testified that these two officials were physically present when Mr. Lubanga asked his G2 to conduct further investigations into the purported Kobu massacre.<sup>1040</sup>

<sup>1033</sup> [TJ](#), para.1187.

<sup>1034</sup> [TJ](#), para.638.

<sup>1035</sup> [TJ](#), para.637; **P-0055: T-71**,52:10-11,53:8-9.

<sup>1036</sup> **P-0055:T-71**,52:19.

<sup>1037</sup> **P-0055:T-71**,51:14,53:12-14.

<sup>1038</sup> **P-0055:T-71**,53:16-19 (“[we] would often meet [...] [w]e knew one another.”)

<sup>1039</sup> **P-0055:T-74**,59:21-24.

<sup>1040</sup> **P-0055:T-74**,70:4-5.

402. P-0055's account that MONUC was the source of the information about the Kobu massacre, deemed reliable by the Chamber because it was "detailed,"<sup>1041</sup> is not supported by any MONUC document – to which the Prosecution had ample access for evidential purposes.<sup>1042</sup> No MONUC witness was called to confirm that they were the source of, or possessed, this blockbuster information at the time.

403. On the contrary, MONUC's senior human rights officer present in Bunia less than three weeks after the Kobu massacre<sup>1043</sup> (P-0317) testified that she could not recall that MONUC had any contemporaneous information about a massacre at Kobu.<sup>1044</sup> If MONUC officials had had sufficiently substantiated information to raise it during a meeting with Lubanga, then this information would undoubtedly have been recorded, reported and communicated as a matter of the highest importance to the human rights officer with direct responsibility for such matters.<sup>1045</sup>

404. The Chamber dismisses this contradiction on the basis that "the Chamber does not believe that [P-0317] reliably knew what information was or was not available to MONUC before 6 March 2003".<sup>1046</sup> The implication is that there is a reasonable possibility that P-0317 was ignorant that MONUC possessed this information.

405. The Chamber's approach is unexplained and inexplicable. It is inconceivable that MONUC officials would have informed Thomas Lubanga, but not P-0317, about a massacre at Kobu. P-0317 was the head of the special investigations unit of the human rights section of MONUC at the time.<sup>1047</sup> She received reports of other crimes, including the much smaller attack on civilians that had occurred at Mandro.<sup>1048</sup> Not only did she not recall any MONUC

<sup>1041</sup> [TJ](#), fn.2035.

<sup>1042</sup> The OTP had wide access to MONUC documents from this period as is reflected by tendered evidence: [DRC-OTP-0052-0049](#) (8 April 2003), [DRC-OTP-0052-0199](#) (21 April 2003), [DRC-OTP-0138-0106](#) (26 March 2003), [DRC-OTP-2067-1945](#) (19 February 2003), [DRC-OTP-2067-1949](#) (20 February 2003), [DRC-OTP-2067-1976](#) (3 March 2003), [DRC-OTP-2067-1980](#) (4 March 2003), [DRC-OTP-2067-1989](#) (6 March 2003), [DRC-OTP-2067-1994](#) (7 March 2003), [DRC-OTP-2067-2003](#) (11 March 2003), [DRC-OTP-2078-0586](#) (5 February 2003), [DRC-OTP-0035-0076](#) (1 April 2003), [DRC-OTP-0152-0274](#) (26 March 2003), [DRC-OTP-2067-2002](#) (11 March 2003).

<sup>1043</sup> [P-0317:T-191](#),83:21.

<sup>1044</sup> [P-0317:T-192-FRA](#),44:10-19;[T-192](#),45:18-25.

<sup>1045</sup> [P-0317:T-191](#),24:10-11.

<sup>1046</sup> [TJ](#), fn.2029.

<sup>1047</sup> [P-0317:T-191](#),8:20-21.

<sup>1048</sup> [P-0317:T-191](#),38:17-18; [T-192](#),44:6-8.

reports about the Kobu massacre,<sup>1049</sup> but she distinctly recalled receiving her first information about it from a Lendu civilian, not from anyone in MONUC.<sup>1050</sup>

406. P-0317's testimony raises reasonable doubt about the veracity of P-0055's account. P-0055's story was that the MONUC officials had information that was sufficiently concrete that Thomas Lubanga then instructed his G2 to investigate the incident.<sup>1051</sup> Information of this level of gravity would have been big news within MONUC, and would at least probably have been reported to P-0317. P-0317's testimony to the contrary raises reasonable doubt about P-0055's account, on which the Chamber placed decisive reliance in making highly incriminating findings regarding Mr. Ntaganda's knowledge of the Kobu massacre.

407. P-0055's veracity is further undermined by the inconsistency of this testimony as to the timing of [REDACTED], which he initially indicated was a [REDACTED] after Mr. Ntaganda's return from Fataki, but prior to the FPLC's defeat on 6 March.<sup>1052</sup> Yet P-0055's subsequent narrative of the timing of Mr. Ntaganda's arrival in Bunia omits this purported meeting, with P-0055 [REDACTED],<sup>1053</sup> [REDACTED] allegations of a massacre at Kobu were not discussed.<sup>1054</sup> This contradiction, which the Chamber unreasonably dismissed in a footnote as "peripheral,"<sup>1055</sup> casts further doubt on P-0055's account of having been informed of a massacre at Kobu by Thomas Lubanga, who had been informed by MONUC, [REDACTED].

408. P-0055, incidentally, does not even say that [REDACTED], or that Mr. Ntaganda expressly acknowledged his awareness of it. The testimony adduced by the Prosecution was only that Mr. Ntaganda was "already aware of the incident",<sup>1056</sup> without confirming exactly what the incident was.<sup>1057</sup> On its face, P-0055's testimony on an absolutely vital subject is left ambiguous, leaving the Chamber to remedy this ambiguity through inference. No reasonable Chamber, given the range of incidents that Mr. Ntaganda may have understood were being discussed, could have inferred without more that this was a reference to the Kobu massacre.

<sup>1049</sup> P-0317:T-192,44:16-17; P-0317:T-192-CONF-FRA,44:10-19. The complete question was not captured in the English transcript, see T-192,45:18-25.

<sup>1050</sup> P-0317:T-192,44:20-45:3.

<sup>1051</sup> P-0055:T-71,52:9-53:2;T-74,59:4-7.

<sup>1052</sup> P-0055:T-71,52:19-20.

<sup>1053</sup> P-0055: T-74,81:23-82:8.

<sup>1054</sup> P-0055:T-74,83:20-25.

<sup>1055</sup> TJ, fn.2029.

<sup>1056</sup> TJ, para.638.

<sup>1057</sup> P-0055:T-71,52:23.

409. The Chamber's reliance on P-0055's testimony was determinative in reaching its conclusions about Mr. Ntaganda's purported knowledge of, and reaction to, the Kobu massacre. The other elements of evidence footnoted by the Chamber – a press conference or meeting involving Thomas Lubanga discussing military operations in general (with no reference to any massacre or crimes),<sup>1058</sup> evidence that some FPLC soldiers discussed the Kobu massacre with one another,<sup>1059</sup> and evidence that a vice-governor learned about the killing of one massacre victim<sup>1060</sup> – are of little to no probative value in establishing that Mr. Ntaganda was informed of the massacre, let alone that news of this massacre was widely known at the time. This peripheral evidence carries little to no weight in establishing that Mr. Ntaganda knew of the massacre at the relevant time. Accordingly, it is clear that the Chamber did, or had to, place decisive weight on the unsafe testimony of P-0055 for this vital fact.

410. This finding was, in turn, essential for the Chamber's findings concerning Mr. Ntaganda's *mens rea* in relation to the crimes of the Second Operation. In fact, Mr. Ntaganda having "approved of the behaviour of the troops in this context" was the only element of Mr. Ntaganda's conduct separate from the First Operation upon which the Chamber relied to find that "he intended the troops to continue with the same criminal conduct during the course of the Second Operation."<sup>1061</sup> The Chamber's erroneous acceptance of P-0055's testimony, accordingly, "materially affected" its finding that Mr. Ntaganda possessed the *mens rea* for the crimes of the Second Operation, in particular, for the Kobu massacre.

### C. Conclusion

411. No reasonable Trial Chamber could have found, by placing determinative reliance on P-0055's testimony, that Mr. Ntaganda was contemporaneously informed of the Kobu massacre and expressed approval of that event. P-0055's testimony was uncorroborated. A core aspect of his testimony – the purported initial source of his own information about the massacre – was not corroborated where it should have been corroborated; indeed, it was flatly contradicted by a UN witness who was in a position to know the information in question. No trial chamber could have failed to entertain reasonable doubts about this uncorroborated testimony.

<sup>1058</sup> [TJ](#), fn.2035, referring to [DRC-OTP-0127-0061](#).

<sup>1059</sup> [TJ](#), fn.2035.

<sup>1060</sup> [TJ](#), fn.2035 (regarding Burombi).

<sup>1061</sup> [TJ](#), para.1187.

**RESPECTFULLY SUBMITTED THIS 30<sup>TH</sup> DAY OF JUNE 2020**

A handwritten signature in dark ink, appearing to read 'StB' with a small flourish at the end.

Me Stéphane Bourgon, *Ad.E* Counsel representing Bosco Ntaganda  
The Hague, The Netherlands