

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **25 March 2021**

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 A and Annex B

**Public Redacted Version of “Defence response to CLR1 and CLR2 Observations on
Defence Appeal Brief – Part II”, 22 May 2020, ICC-01/04-02/06-2537-Conf**

Source: Defence Team of Mr. Bosco Ntaganda

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

The Office of the Prosecutor

Ms. Fatou Bensouda
Mr. James Stewart
Ms. Helen Brady

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*
Ms. Kate Gibson

Legal Representatives of Victims

Ms. Sarah Pellet
Mr. Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants (Participation /
Reparation)**

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Further to the “Observations of the Common Legal Representative of the Victims of the Attacks on the Defence Appeal Part II”¹ and the “Observations of the Common Legal Representative of the Former Child Soldiers on Part II of Mr Ntaganda’s Appeal against the Judgment pursuant to Article 74 of the Rome Statute”,² Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit this:

Defence response to CLR1 and CLR2 Observations on Defence Appeal

Brief – Part II

INTRODUCTION³

1. Mr. Ntaganda submits that the arguments advanced in the observations of CLR1 and CLR2 to the Defence Appeal Brief – Part II of his appeal should be rejected.

2. CLR1 and CLR2 observations regularly mirror or adopt those of the Prosecution, and remain unswervingly adverse to Mr. Ntaganda’s position. While the observations each have a different focus, both CLR1 and CLR2 have made submissions in response to the errors raised by Mr. Ntaganda in Grounds 7 and 13 of his appeal. As such, Mr. Ntaganda has responded to CLR1 and CLR2 observations in one filing, both for reasons of efficiency, and to address this partial overlap.

3. Many of the arguments raised by CLRs are non-responsive, or merely repetitive of the Trial Chamber’s findings. On more than one occasion, CLRs argue against positions that Mr. Ntaganda has never advanced. He is criticized for having made “erroneous” arguments that are nowhere in his submissions. As a result, many of the central legal errors identified in Mr. Ntaganda’s Appeal Brief – Part II remain unaddressed and unchallenged by CLRs observations.⁴

4. Mr. Ntaganda accordingly maintains his original submissions, and the errors identified therein on the part of the Trial Chamber. Although his submissions have now been scrutinised by **three** adverse parties who seek to uphold his conviction in every respect, the central errors

¹ [CLR2-Observations-2525](#).

² [CLR1-Observations-2526](#).

³ The reply as well as Annex B 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.

⁴ [Defence Appeal Brief – Part II](#), paras.6-20,63-64,70,83,86-90,91-101,107-108,111-114,116,119,125,139,145-147,148-150,154-158,167-197,199-204,206-225,263-264,285-286,294-299,300,310-316,323-339,340-347,348-352,353-356,365-371,373-376,378-387,390-395,400-411.

identified on appeal remain unscathed, and impossible to retroactively fix. These errors are significant, and warrant the Appeals Chamber's intervention.

RESPONSE TO GROUND 2 – CLR 2⁵

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

5. The Appeals Chamber has not considered or decided this issue.⁶ It was seized with the question of whether the Trial Chamber had a discretion to entertain a "no case to answer" motion,⁷ and not whether the Trial Chamber had violated Mr. Ntaganda's fair trial rights by proceeding to hear the defence evidence before the Appeals Chamber had ruled.⁸ This was being litigated at the trial level.⁹

6. Given that the process of appellate review is not an exercise in rubber-stamping interlocutory decisions, the Trial Chamber could have had no expectation that its decision would be upheld. As such, in forcing Mr. Ntaganda to testify prior to the Appeals Chamber's decision, it was taking the position that "no case to answer" submissions do not have the effect of staying the trial until their resolution. By this logic, the *Gbagbo and Blé Goudé* Trial Chamber could have proceeded to hear the defence evidence while simultaneously adjudicating the defence motions for acquittal. Of course, it did not. The objective of the 'no case to answer' assessment is to "ascertain whether the Prosecution has lead sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts **before commencing that stage of the trial.**"¹⁰

7. The Trial Chamber seems to have been aware of the precarious path it was treading. It justified the decision to proceed, in part, on the basis that "in any event the topics the Defence is expected to cover **at the start of the testimony** will relay [*sic*] to background information".¹¹ The Trial Chamber assumed that by the time Mr. Ntaganda approached the substance of the impugned charges, the Appeals Chamber would have resolved the question.

⁵ [CLR2-Observations-2525](#), paras.18-37.

⁶ [CLR2-Observations-2525](#), para.32.

⁷ [Appeal-Judgment-2026](#).

⁸ The Appeals Chamber's decision denying "suspensive effect" was limited to finding that the suspension of the proceedings could not be attained through the suspension of the Impugned Decision ([Decision-1968](#), para.9.) It was not asked to decide whether the Trial Chamber's decision to proceed in the absence of the resolution of the "no case to answer" challenge was an error.

⁹ [T-209](#),8:16-20,9:2-11:20; *See also* [T-209](#),23:22-24:14,28:13:29:1.

¹⁰ [Ruto-Sang-Decision-1334](#), para.23 (emphasis added).

¹¹ [T-209](#):24:9-11 (emphasis added).

In fact, the Appeals Chamber rendered its decision¹² after Mr. Ntaganda had been on the stand for 26 days,¹³ and after the large part of his testimony had been elicited. In reality, regardless of how much testimony had been elicited, central fair trial safeguards were undermined.¹⁴

8. That Mr. Ntaganda could have chosen not to testify, or lead any evidence at all,¹⁵ does not circumvent the unfairness. The progress of a case beyond the close of the prosecution case represents a very real form of compulsion on the accused to answer the allegations made against him.¹⁶ Such a compulsion should never have been placed on Mr. Ntaganda before the question of the sufficiency of evidence was settled. Nor can it be argued that Mr. Ntaganda could have mitigated the prejudice by testifying later in the Defence case.¹⁷ In doing so, Mr. Ntaganda would have been forced to give up the advantage gained by testifying before other defence witnesses, which “counts in his favour in the assessment of credibility”.¹⁸

RESPONSE TO GROUND 5 – CLR2¹⁹

9. CLR2’s submissions that “[w]hile it may be unfortunate that the Trial Chamber’s analysis is somewhat concise, there is no indication that it took irrelevant factors into account or failed to take relevant factors into account”²⁰ and that “the Trial Chamber’s review of the applicable law and its references to the requirements of ‘IHL’, indicates that the Trial Chamber was guided by the correct legal standard and that it applied it to the facts before it”²¹ are illustrative of the deficiencies in the Trial Chamber’s finding that “the attack was directed against a civilian population”²² as well as erroneous in many ways.

10. Article 74(5) of the Statute requires that a Judgment give a “full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.” In respect of many findings, including on the nature of the ‘article 7 attack’ and whether the contextual elements have been proved beyond reasonable doubt, the Judgment in this case doesn’t. While the Trial Chamber identified the applicable standard, *i.e.* “[...] means that the civilian

¹² [Appeal-Judgment-2026](#).

¹³ [T-209](#); [T-211](#) to [T-235](#).

¹⁴ [R. v. P. \(M.B.\)](#), para.36.

¹⁵ [CLR2-Observations-2525](#), para.30.

¹⁶ [R. v. P. \(M.B.\)](#), para.36.

¹⁷ [CLR2-Observations-2525](#), para.30.

¹⁸ [ICTY-Limaj-TJ](#), para.22. This reflects the domestic position, see *e.g.* [RPS v. The Queen](#), para.84; [R. v. Karamitsos](#), para.54; [R. v. Turino](#), para.102; [R. v. Pasloski](#), paras.28-30; [R. v. Smith](#).

¹⁹ [CLR2-Observations-2525](#), paras.38-50.

²⁰ [CLR2-Observations-2525](#), para.40.

²¹ *Ibid.*

²² [TJ](#), para.672.

population **must be the primary, as opposed to an incidental, object of the attack**”²³ it failed to make this very finding, merely referred to certain factual findings and sections of the Judgment without explaining why or how these findings supported the **primary object** criteria. This was an error.

11. As such, it is not possible to tell whether, in reaching this finding, the Trial Chamber took irrelevant factors into account or accorded undue weight to others. It appears from the emphasis placed by the Trial Chamber on “(...) whether a military operation, alleged to form part of the alleged attack against a civilian population, complied with the requirements of IHL”²⁴ that it placed undue weight on the legality of certain military operations to the detriment of the **primary object** criteria,²⁵ yet failed to consider relevant factors. Indeed, while the Trial Chamber referred to so-called contextual assaults put forward by the Prosecution (in which no crimes were charged) to establish the contextual elements of article 7, as the Pre-Trial Chamber did,²⁶ it refused to look at similar events put forward by the Defence, finding that: [t]he Chamber has not made factual findings going beyond the allegations of the Prosecution” and “[i]n any case, 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 has no bearing on the validity of the factual findings”.²⁷ This is but one type of relevant factors, which the Chamber failed to consider. There are others.²⁸

12. While the CLR2 is correct that “[t]he Trial Chamber did not have to articulate every step of its reasoning”,²⁹ it is not entitled to enter a conviction without making the requisite legal findings. Simply “[s]etting out the law correctly and moving on to the considerations [sic] of individual facts thereafter before concluding that it was satisfied beyond reasonable doubt that the attack was directed against a civilian population”³⁰ does not meet the article 74(5) standard. At a minimum, the relationship between the two, which would have allowed Mr. Ntaganda to understand the Trial Chamber’s reasoning, is missing, in particular when considering the **primary object** criteria.

13. CLR2’s argument that “[t]he reading of the Trial Judgment as a whole demonstrates

²³ [TJ](#), para.668 (emphasis added).

²⁴ *Ibid.*

²⁵ [TJ](#), para.668.

²⁶ [Confirmation-Division-309](#), para.22.

²⁷ [TJ](#), para.665; *Contra*, [CLR2-Observations-2525](#), para.44.

²⁸ [Defence Appeal Brief – Part II](#), paras.61-68.

²⁹ [CLR2-Observations-2525](#), para.41.

³⁰ *Ibid.*

that the Trial Chamber was satisfied beyond reasonable doubt that the **primary object**, and thus, the common plan, was to ‘*drive out the Lendu*’³¹ is undermined by the fact that the existence of a common plan and whether the civilian population was the **primary object** of an ‘article 7 attack’ are two distinct issues. If indeed the Trial Chamber was satisfied, this finding should have been included in its reasons. It was not.³²

14. Referring to paragraph 671 of the Judgment, CLR2 submits, that “[t]he Trial Chamber correctly considered and found that the way in which the attacks were carried out was such as to demonstrate that they were unlawfully directed against a civilian population”.³³ In this paragraph, there is no such reasoning, and no such link drawn. On the same issue, CLR2 submits that “[t]he issue at hand is whether the way the military action was carried out was criminal or not”, thereby confusing IHL with the law applicable to crimes against humanity and ignoring the difference between an ‘article 7 attack’ and the war crime of intentionally directing attacks against the civilian population.³⁴ Whether unlawful attacks against civilians took place during the ‘article 7 attack’ might be a relevant consideration in determining whether a civilian population was the primary object of the overall attack. It is not, however, determinative.³⁵

15. In his observations, CLR2 repeatedly advances that the Defence merely repeats previous arguments at trial and disagrees with the Trial Chamber.³⁶ This is incorrect. Any previous arguments were cited to demonstrate that the Trial Chamber had not considered them, which is a valid submission on appeal. The Trial Chamber’s failure to consider logbook entries related *inter alia* to the UPC/FPLC conduct of military operations³⁷ as well as to the prevailing situation in Mongbwalu³⁸ is a relevant example. Mr. Ntaganda’s logbook(s) adduced in evidence by the Prosecution,³⁹ contain contemporaneous evidence of operations conducted by the UPC/FPLC, on all fronts, during a period of four months and contain Mr. Ntaganda’s own words when addressing UPC/FPLC senior leaders, in a forum, which he believed would never be seen by the enemy, let alone by a trial chamber. This evidence is thus

³¹ [CLR2-Observations-2525](#), para.42 (first emphasis added).

³² [TJ](#), para.672.

³³ [CLR2-Observations-2525](#), para.42.

³⁴ [Statute](#), article 8(2)(e)(i); [Fenrick \(2004\)](#), pp.3-4.

³⁵ [ICTY-Kunarac-AJ](#), para.91.

³⁶ [CLR2-Observations-2525](#), paras.42-43,45-46.

³⁷ [CLR2-Observations-2525](#), para.46; [Defence Appeal Brief – Part II](#), para.72; [DRC-D18-0001-5748](#), pp.5754,5756, (Transl.[DRC-D18-0001-5778](#), pp.5784,5786).

³⁸ [Defence Appeal Brief – Part II](#), para.71.

³⁹ [DRC-OTP-0017-0003](#) (Transl.[DRC-OTP-2102-3828](#)); [DRC-OTP-0017-0033](#).

highly relevant to determining whether a civilian population was the **primary object** of the alleged ‘article 7 attack’. Yet, the Trial Chamber did not consider it. There is a huge difference between the Trial Chamber saying that it “considered the item carefully in relation to each questions of fact for which it is relevant, and has borne in mind the submissions of the parties and Mr Ntaganda’s testimony”⁴⁰ and the Trial Chamber actually referring to entries put forward by the Defence and giving reasons why evidence was relied on, or disregarded. The Trial Chamber’s failure to do so, particularly given the probative value and relevance of the logbook(s), was an error.⁴¹

16. Another example concerns the Trial Chamber’s assessment of the evidence provided by P-0963 and P-0017 regarding alleged meetings they would have attended.⁴² The evidence considered by the Trial Chamber was incomplete and contrary to CLR2’s submissions,⁴³ Mr. Ntaganda highlighted the missing elements in detail,⁴⁴ which render the Trial Chamber’s related findings wholly unreasonable.⁴⁵ Again, CLR2’s argument that “[t]he Trial Chamber was under no obligation to articulate every step of its reasoning”⁴⁶ does not excuse the paucity of the Trial Chamber’s reasoning on central conflicting aspects of witness’ evidence.

17. As regards to the interpretation of ‘*kupiga na kuchji*’, CLR2’s submission that “the witnesses were specifically asked and spoke about the literal meaning of the term”⁴⁷ is unsupported by the evidence. CLR2 does not address the Trial Chamber’s errors in the assessment of relevant evidence including, in particular, the incriminatory evidence provided by accomplice witnesses,⁴⁸ the lack of corroboration,⁴⁹ and the manner in which some witnesses were questioned.⁵⁰ The crux of the matter regarding the expression ‘*kupiga na kuchaji*’ is how the expression was understood by all members of the UPC/FPLC. The Trial Chamber’s finding that the expression ‘*kupiga na kuchaji*’ was **commonly used** within the UPC/FPLC, and was **understood by the soldiers** to mean attacking all the Lendu, including

⁴⁰ [CLR2-Observations-2525](#), para.46; [TJ](#), para.65.

⁴¹ [Defence Appeal Brief – Part II](#), para.72.

⁴² [CLR2-Observations-2525](#), para.48.

⁴³ *Ibid.*

⁴⁴ [Defence Appeal Brief – Part II](#), paras.83-87.

⁴⁵ [TJ](#), para.488; [Defence Appeal Brief – Part II](#), para.87.

⁴⁶ [CLR2-Observations-2525](#), para.48.

⁴⁷ [CLR2-Observations-2525](#), para.47; [Defence Appeal Brief – Part II](#), paras.76-90.

⁴⁸ [Defence-Reply-2534](#), paras.10-15.

⁴⁹ [Defence-Reply-2534](#), paras.4-9.

⁵⁰ [Defence Appeal Brief – Part II](#), para.78.

civilians, and to loot their property,⁵¹ is unsupported by the evidence.⁵² No reasonable Trial Chamber, having analysed the totality of the evidence could have reached such a finding.⁵³

18. In sum, CLR2's observations in relation to Ground 5 lend support to the conclusion that the Trial Chamber erred in fact and in law in finding that the UPC/FPLC directed an attack against the civilian population pursuant to article 7. The Trial Chamber's finding must be reversed and Mr. Ntaganda acquitted of all charges laid pursuant to article 7 of the Statute.⁵⁴

RESPONSE TO GROUND 4 – CLR2⁵⁵

19. CLR2's submissions⁵⁶ neither engage with *nor* rebut Mr. Ntaganda's arguments⁵⁷ and fail to address the Trial Chamber's errors, namely that it **failed to provide a reasoned opinion** and inferred the existence of a UPC/FPLC actively promoted policy,⁵⁸ which was evidently **not the only reasonable inference that could be drawn** on the basis of the evidence.

20. As a preliminary matter, CLR2 fails to consider that despite the abundance of evidence in the form of UPC/FPLC documents,⁵⁹ statements,⁶⁰ speeches,⁶¹ audio-visual recordings⁶² and other exhibits admitted, such as Mr. Ntaganda's logbook(s)⁶³ – which provide a contemporaneous account of UPC/FPLC military operations – there is no documentary evidence which establishes the existence of a UPC/FPLC policy to attack and chase away the Lendu civilians and those perceived as non-Iturians. *A contrario*, on the basis

⁵¹ [TJ](#), para.688.

⁵² [Defence Appeal Brief – Part II](#), paras.76-90.

⁵³ [Defence Appeal Brief – Part II](#), paras.90.

⁵⁴ Murder and attempted murder as a crime against humanity (Count 1), rape as a crime against humanity (Count 4), sexual slavery as a crime against humanity (Count 7), persecution as a crime against humanity (Count 10), forcible transfer of population as a crime against humanity (Count 12).

⁵⁵ [CLR2-Observations-2525](#), paras.51-57.

⁵⁶ [CLR2-Observations-2525](#), para.6 (emphasis added).

⁵⁷ [Defence Appeal Brief – Part II](#), paras.104-128.

⁵⁸ [TJ](#), para.689.

⁵⁹ [DRC-OTP-0014-0140](#), [DRC-OTP-0091-0039](#), [DRC-OTP-0113-0052](#), [DRC-OTP-0092-0436](#), [DRC-OTP-0093-0004](#).

⁶⁰ [DRC-OTP-0127-0126](#), [DRC-OTP-0164-0447](#), [DRC-OTP-0164-0452](#), [DRC-OTP-0093-0134](#), [DRC-OTP-0037-0281](#), [DRC-OTP-0037-0280](#), [DRC-OTP-0017-0026](#), [DRC-OTP-0014-0152](#), [DRC-OTP-0092-0466](#), [DRC-OTP-0164-0455](#), [DRC-OTP-0037-0295](#).

⁶¹ [DRC-OTP-0147-0212](#), [DRC-OTP-2058-0251](#), [DRC-OTP-0127-0064](#), [DRC-OTP-0159-0477](#), [DRC-OTP-0082-0016](#), [DRC-OTP-0124-0002](#), [DRC-D18-0001-2488](#).

⁶² [DRC-OTP-0127-0058](#), [DRC-D18-0001-0427](#), [DRC-OTP-0193-0243](#), [DRC-OTP-0120-0293](#), [DRC-OTP-0127-0061](#), [DRC-D18-0001-0463](#), [DRC-OTP-0127-0064](#), [DRC-OTP-0159-0477](#), [DRC-OTP-0082-0016](#), [DRC-OTP-0124-0002](#).

⁶³ [DRC-D18-0001-5748](#) (Transl.[DRC-D18-0001-5778](#)); [DRC-OTP-0017-0033](#).

of this evidence, a different reasonable inference of a policy not aimed at attacking civilians, let alone Lendu civilians, may be drawn.

21. CLR2 also fails to address the article 7(2) requirement that a link be established between **the alleged attack directed at a civilian population** and **a policy** that must be actively promoted and encouraged by the organisation.⁶⁴ In this case, the ‘article 7 attack’ refers to the course of conduct identified by the Trial Chamber between the assault on Bunia in August 2002 and the assault on the same city in May 2003,⁶⁵ which delineates the evidence relevant to the Trial Chamber’s determination.

22. CLR2 argues that “the Trial Chamber inferred the existence of an organisational policy from a number of factual findings”.⁶⁶ The issue, however, is not the number of factual findings but rather, whether the Trial Chamber considered the totality of the relevant evidence and explained the link between its factual findings and legal conclusions, thereby providing a reasoned opinion in accordance with article 74 of the Statute. The Trial Chamber failed to do so.

23. Mr. Ntaganda referred to certain arguments raised at trial⁶⁷ to demonstrate the Trial Chamber’s failure to consider them, which amounts to a legal error. CLR2 points to paragraphs 116-118 and 125-126 of Mr. Ntaganda Appeal Brief – Part II. In fact, none of the submissions therein were considered by the Trial Chamber, including but not limited to: the creation of the *Commission Vérité Paix et Réconciliation* of which some Lendu civilians were members; the Arua peace negotiations of December 2002, including Lubanga’s order not to shoot down the plane that transported Lendu *notables* to this meeting; Lubanga’s speech at the *Pères Blancs* congregation in Bunia addressing the security of civilians, including Lendu civilians; negotiations with Lendu *notables* in Ngongo involving a multi-ethnic UPC/FPLC delegation, comprising a UPC Lendu *secrétaire national*, including the reopening of a secondary route between Lipri and Bunia for the benefit of all civilians.⁶⁸

⁶⁴ [Statute](#), articles 7(1) and 7(2)(a); [Elements of Crimes](#), article 7(3).

⁶⁵ [TJ](#), para.690.

⁶⁶ [CLR2-Observations-2525](#), para.52.

⁶⁷ [CLR2-Observations-2525](#), para.51.

⁶⁸ [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](#),3:1519,8:9-14; [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; [DRC-D18-0001-2488](#); [DRC-D18-0001-2489](#) (Transl.[DRC-D18-0001-6710](#)); [D-0300:T-219](#),12:4-18,16:9-19; [DRC-OTP-0127-0058](#), at 17:00-17:43

24. The common thread between these UPC/FPLC actions and events is (i) their relevance to the existence of a UPC/FPLC policy concerning civilians, including Lendu civilians; and (ii) the fact that they were not considered by the Trial Chamber, either in paragraphs 673 to 689 of the Judgment or their footnotes. The Trial Chamber did not explain why they were, or were not, relevant to the existence of a UPC/FPLC policy and, if so, what weight they were attributed. That the Trial Chamber addressed these events elsewhere does not circumvent this error.

25. Some of the events, addressed by CLR2, which were not considered by the Trial Chamber deserve special attention. Chief Kahwa's speech in Mandro, shortly before the beginning of the First Operation⁶⁹ is direct evidence of the UPC/FPLC objectives; UPC/FPLC policy regarding the protection of the civilian population, without discrimination; UPC/FPLC policy regarding the use of force by its soldiers; and the active promotion of the policy to UPC/FPLC members involved in the course of conduct identified by the Trial Chamber.⁷⁰ While CLR2 points to paragraph 305, footnote 789 of the Judgment, the Trial Chamber does not refer to it. The Trial Chamber erred by not considering such a significant event. The Trial Chamber's conclusion that Chief Kahwa's speech did not "reflect the reality of the disciplinary system within the UPC/FPLC" was manifestly unreasonable.⁷¹ Significantly, there is no evidence supporting the conclusion that this was a propaganda video.⁷²

26. Thomas Lubanga's speech at the Rwampara training camp in February 2003, shortly before the beginning of the Second Operation, addressed by CLR2,⁷³ is another significant event which the Trial Chamber failed to consider. For reasons akin to Mr. Ntaganda's submissions in relation to the Mandro speech, in relation to the content of the UPC/FPLC policy regarding the protection of the civilian population without discrimination and the active promotion of the policy directly to UPC/FPLC members, the Trial Chamber erred. At a minimum, the Trial Chamber had to explain why it was relevant or not to the issue at hand. It did not.

(Transl. [DRC-OTP-2102-3675](#), pp.3689, ll.320-328); **P-0105:T-133**, 58:5-14, 59:21-62:8; **P0005:T-189**, 13:25-14:8; [DRC-OTP-0017-0033](#), p.0137 (third) ([DRC-OTP-2102-3854](#), p.3959).

⁶⁹ [CLR2-Observations-2525](#), para.53.

⁷⁰ [DRC-OTP-0082-0016](#); **D-0300:T-216**, 12:3-13:1.

⁷¹ [Defence Appeal Brief – Part II](#), para.123.

⁷² [Defence Appeal Brief – Part II](#), para.123.

⁷³ [CLR2-Observations-2525](#), para.51, fn.130.

27. One of the most important events which the Trial Chamber failed to consider was the conclusion of an Ituri-wide peace agreement promoted by the UPC/FPLC,⁷⁴ addressed by CLR2.⁷⁵ The conclusion of this agreement, which included signatories from among the Lendu community, was the UPC/FPLC's greatest achievement.⁷⁶ At a minimum, the Trial Chamber was required to reconcile the tremendous efforts of the UPC/FPLC in reaching out to all ethnic groups in Ituri, in accordance with its stated aim, with its inference of a UPC/FPLC policy to target Lendu civilians. The Trial Chamber failed to do so.

28. Both executions by firing squad, in Ndromo before the First Operation and in Mongbwalu before the Second Operation,⁷⁷ addressed by CLR2,⁷⁸ are also significant events which should have been considered by the Trial Chamber, but were not. Both punishments were meted out in public by, the UPC/FPLC against members of the UPC/FPLC for stealing from a Nande civilian in Bunia and for killing a Lendu civilian in Mongbwalu.⁷⁹ Both events corroborate Chief Kahwa's speech as well as the testimony of Mr. Ntaganda regarding the UPC/FPLC ideology towards the civilian population without discrimination. At a minimum, the Chamber was required to explain and reconcile the imposition of the most severe punishment on UPC/FPLC members for the murder of a Lendu civilian with its inference of a UPC/FPLC policy to target Lendu civilians. Not doing so was an error. Moreover, the Trial Chamber's conclusion in footnote 893 that the UPC/FPLC member in Mongbwalu was actually punished "for a number of reasons" was manifestly unreasonable in the face of the plain reading of the entries in Mr. Ntaganda's logbook⁸⁰ and Mr. Ntaganda's testimony.⁸¹ The entries in the logbook were yet another reason for the Trial Chamber to apply caution when considering the testimony of P-0768.⁸²

29. All of the above issues, which the Trial Chamber failed to consider were raised by Mr. Ntaganda during oral arguments and characterised at the time as 'determining issues'⁸³

⁷⁴ [Defence Appeal Brief – Part II](#), para.117.

⁷⁵ [CLR2-Observations-2525](#), para.54.

⁷⁶ [Defence Appeal Brief – Part II](#), para.117.

⁷⁷ [Defence Appeal Brief – Part II](#), para.126.

⁷⁸ [CLR2-Observations-2525](#), para.55.

⁷⁹ **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; [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.

⁸⁰ [Defence Appeal Brief – Part II](#), para.126.

⁸¹ [Defence Appeal Brief – Part II](#), para.126, fn.351.

⁸² **P-0768**:[T-34](#),16:11-15.

⁸³ [T-263](#),54:14-65:25.

30. CLR2 fails to engage with Mr. Ntaganda's argument⁸⁴ concerning the UPC/FPLC's apparent "parallel goals" of both promoting peace and chasing those perceived as non-Iturians.⁸⁵ Mr. Ntaganda did not claim that the Trial Chamber's finding that the Lendu were targeted was based on the parallel goal of chasing the RCD/K-ML.⁸⁶ Rather, the error raised was that no reasonable finder of fact could have found that the planning and unfolding of UPC/FPLC military actions directly contradicted the stated ambition of the UPC/FPLC to defend the population as a whole.

31. Notably, in this finding, the Trial Chamber does not mention either Lendu combatants or Lendu civilians. Nor does it identify which internal communications, documents, and military actions undertaken by the UPC/FPLC support its finding, thereby failing to provide a reasoned opinion. The evidence does not support a finding that Lendu combatants were a component of RCD-K/ML.⁸⁷

32. Two paragraphs later, the Trial Chamber concludes that "[...] the unfolding of its military operations demonstrates **how** the UPC/FPLC was not only attempting to chase away the RCD-K/ML but, also the Lendu."⁸⁸ *First*, this finding falls short of identifying a policy, as opposed to its finding at paragraph 686 above. *Second*, although the leap is huge, it appears to be based solely on the legality of the conduct of military operations, thereby confusing possible war crimes of attacking civilians with the identification of a policy.⁸⁹ Other criteria must be considered for this purpose.

33. More importantly, the Trial Chamber failed to provide a reasoned opinion. Whereas CLR2 refers to "the manner in which the UPC/FPLC planned and conducted its operations and the way in which it taught its recruits that the Lendu were the enemy",⁹⁰ the evidence considered by the Trial Chamber is not identified. It is plainly insufficient for the Trial Chamber to state that troops committed different types of violent acts, and targeted civilians specifically with reference to an entire section in the Judgment.⁹¹ Which operations were considered by the Trial Chamber remains unknown, let alone what weight was attributed to the evidence related to specific aspects of these operations. What is more, in order to identify

⁸⁴ [Defence Appeal Brief – Part II](#), paras.113-115.

⁸⁵ [TJ](#), para.686 (emphasis added)

⁸⁶ [TJ](#), para.687 (emphasis added)

⁸⁷ [Defence Appeal Brief – Part II](#), para.110.

⁸⁸ [TJ](#), para.688.

⁸⁹ [Defence-Reply-2534](#), paras.32,34.

⁹⁰ [CLR2-Observations-2525](#), para.53.

⁹¹ [TJ](#), para.688, fn.2173.

a policy related to the article 7 attack/course of conduct identified from August 2002 to May 2003, the Trial Chamber was bound to analyse all military operations undertaken by the UPC/FPLC during this period⁹² or, at a minimum, all operations raised by the parties as being relevant. Clearly, the Trial Chamber did not.⁹³

34. At this stage, the Trial Chamber's failure to address all of the relevant issues addressed by Mr. Ntaganda becomes crucial.⁹⁴ Yet, there are additional issues, which the Trial Chamber failed to consider, related specifically to the conduct of operations.

35. The Trial Chamber made reference to UPC/FPLC military alliance with a group of APC dissidents under the command of Jérôme Kakwavu, integrating the latter into its forces.⁹⁵ However, the Trial Chamber did not consider the evidence related to the purpose of this exchange which was, *inter alia*, to mix troops from different ethnic background to ensure they would fight pursuant to UPC/FPLC ideology to defend the civilian population as a whole.⁹⁶ The Trial Chamber also failed to consider many other measures taken by the UPC/FPLC to ensure its troops would fight in accordance with IHL and the UPC/FPLC ideology to protect all civilians.⁹⁷ With respect to the singing of songs, the Trial Chamber referred to one **song** inciting recruits to kill the Lendu, relying on the testimony of P-0769.⁹⁸ It failed, however, to consider the testimony of the same witness that "he was told during his training that 'the UPC was not a tribal militia', that its aim was to 'take over the Congo in its entirety', and that they weren't just fighting 'enemies, be they Bahema or Balendu' but the government",⁹⁹ which was also relevant to the question of the UPC/FPLC ideology. P-0016, who was not cross-examined, was never a recruit in Mandro¹⁰⁰ which undermines the reliability and relevance of his testimony.

36. The multi-ethnic composition of the UPC/FPLC and its importance for the identification of a UPC/FPLC policy,¹⁰¹ addressed by CLR2,¹⁰² was also not considered by the Trial Chamber. In particular, concerning the conduct of military operations by the

⁹² [Defence-Reply-2534](#), para.32.

⁹³ [Defence-Reply-2534](#), para.32.

⁹⁴ [Defence Appeal Brief – Part II](#), paras.60-74.

⁹⁵ [TJ](#), para.680.

⁹⁶ [CLR2-Observations-2525](#), para.54; [Defence Appeal Brief – Part II](#), para.119; [DCB](#), paras.167-171.

⁹⁷ *Ibid.*

⁹⁸ [TJ](#), para.373, fn.1049.

⁹⁹ [P-0769:T-120](#),31:7-11.

¹⁰⁰ [DRC-OTP-0126-0422-R03](#), para.47.

¹⁰¹ [Defence Appeal Brief – Part II](#), para.118.

¹⁰² [CLR2-Observations-2525](#), para.54.

UPC/FPLC, the Trial Chamber failed to consider that the two Brigade commanders who participated in the First Operation in Mongbwalu – Salumu and Seyi – were not Hema. As such, the operation was conducted in accordance with the UPC/FPLC ideology to protect the civilian population, without discrimination. At a minimum, the Trial Chamber should have reconciled its inference at paragraph 689 of the Judgment with the multi-ethnic composition of the UPC/FPLC, including Lendu *secrétaires nationaux*.

37. CLR2 fails to address, and the Trial Chamber failed to consider, the evidence related to the implementation of the UPC/FPLC plan to provide weapons to Lendu combatants, for the purpose of joining forces to oust the UPDF from Ituri. The plan was real as evidenced by entries in Mr. Ntaganda's Logbook¹⁰³ and the testimony of Mr. Ntaganda, who was intimately involved in delivering weapons to Libi at the request of Thomas Lubanga.¹⁰⁴ At a minimum, the Trial Chamber should have attempted to reconcile its inference of a policy to attack and chase away Lendu civilians with the UPC/FPLC plan and actual delivery of weapons to Lendu combatants.

38. P-0005's evidence was raised by Mr. Ntaganda¹⁰⁵ to demonstrate the Trial Chamber's failure to consider his arguments thereon. [REDACTED].¹⁰⁶ At a minimum, the Trial Chamber should have considered the testimony of P-0005 – who explained the Kivu holding situation, which he described as a real issue of a political nature but that did not involve attacking or chasing away non-Iturians¹⁰⁷ – before drawing an inference regarding the existence of a policy to chase away those who were perceived as non-Iturians.

39. In light of the foregoing, three issues arise from Ground 4, namely whether the Trial Chamber erred by inferring the existence of a UPC/FPLC policy to (i) attack and chase away the Lendu civilians; (ii) to attack and chase away those perceived as non-Iturians; and (iii) which was actively promoted.

40. In respect of the three issues, the Trial Chamber failed to provide a reasoned opinion as required by article 74 of the Statute. Notably, the Trial Chamber failed to consider evidence highly relevant to the three issues, which precluded the Trial Chamber from issuing a reasoned decision. Even when the Trial Chamber can be said to have considered the relevant

¹⁰³ [Defence Appeal Brief – Part II](#), para.117; [DCB](#), paras.112-114.

¹⁰⁴ [D-0300:T-220](#), 68:10-70:10.

¹⁰⁵ [Defence Appeal Brief – Part II](#), para.112.

¹⁰⁶ [Defence Appeal Brief – Part II](#), para.118.

¹⁰⁷ [Defence Appeal Brief – Part II](#), para.112.

evidence available, it failed to explain and establish the links between its factual findings and its legal conclusions.

41. More importantly, taking into consideration: (i) the evidence that was considered by the Trial Chamber; (ii) the evidence related to highly relevant events it failed to consider; (iii) and the Trial Chamber's failure to provide a reasoned opinion, it is evident that the its inference at paragraph 689 of the Judgment was not proved beyond reasonable doubt and was certainly not the only reasonable inference that could be drawn on the basis of the evidence adduced at trial.

42. Another reasonable inference available on the evidence, is that the UPC/FPLC had a policy to restore good governance, promote reconciliation, re-establish peace and security and protect all civilians without discrimination.

43. CLR2's submissions must thus be rejected and the Trial Chamber's inference at paragraph 689 reversed.

RESPONSE TO GROUND 7 – CLR1,¹⁰⁸ CLR2¹⁰⁹

44. The Defence agrees that a Trial Chamber can rely on some parts of an accused's testimony and reject others.¹¹⁰ However, this rejection or reliance must result from a larger process of assessment of evidence, whereby the Trial Chamber turns its mind to whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.

45. By insisting that a Trial Chamber has a right to reject a testimony in part, CLR2 fails to engage with the error raised; that the Trial Chamber pre-ordained witnesses as "credible", including in respect of particular events, without having considered the contradictory Defence evidence. The Chamber then used that "credible" ranking to reject the very Defence evidence it failed to take into account.¹¹¹

46. Take, for example, the finding that "after the *Abbé* was killed, Mr Ntaganda ordered that the three nuns locked in a room at the *Appartements* be killed."¹¹² The allegation comes from P-0768. Like so much of his evidence, this allegation was uncorroborated. After citing to his testimony, the Trial Chamber noted it was "contradicted by Mr Ntaganda who testified

¹⁰⁸ [CLR1-Observations-2526](#), paras.5-6.

¹⁰⁹ [CLR2-Observations-2525](#), paras.67-74.

¹¹⁰ [CLR2-Observations-2525](#), paras.69-70.

¹¹¹ [Defence Appeal Brief – Part II](#), para.138.

¹¹² [TJ](#), para.534.

that after authorising the interrogation of the *Abbé*, he returned to his home which was elsewhere at the *Appartements* and did not see the *Abbé* or the nuns again”.¹¹³ The Chamber resolved these conflicting testimonies in the following way:

However, recalling its finding on P-0768’s credibility, the Chamber considers Mr Ntaganda’s version of events not credible and does not rely on it.

47. Having pre-emptively decided that P-0768 was “credible”, and that he gave “credible” testimony about the killing of the *Abbé*,¹¹⁴ the Trial Chamber felt entitled to reject Mr. Ntaganda’s testimony on this basis alone.¹¹⁵ This is the opposite of a Trial Chamber considering whether the accused’s evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. The resultant findings must be reversed.

48. CLR2 maintains that the Trial Chamber’s approach was correct, citing to ICTY and ICTR cases which are apparently authority for the difference between “an accused who might testify as a witness if he so chooses, and a witness”.¹¹⁶ The distinction was made in these cases on the basis of provisions in the ICTY and ICTR rules “relating to the testimony of witnesses that are inapplicable to an accused and incompatible with his rights”, and the fact that “the Rules contain separate definitions and separate substantive positions for accused as opposed to witnesses”.¹¹⁷ These cases are not authority for process whereby a Trial Chamber is entitled to disregard an accused’s testimony where it contradicts that of Prosecution witnesses, for no other reason than he might have incentive to exculpate himself.¹¹⁸

49. If indeed the Trial Chamber was rejecting Mr. Ntaganda’s testimony on the basis of a possible “incentive to provide exculpatory evidence”,¹¹⁹ then it failed to meet its obligation to provide a reasoned judgment. By referencing this possible incentive at the outset of a Judgment,¹²⁰ a trial chamber does not write itself a blank cheque to reject an accused’s testimony whenever it contradicts the Prosecution case, and never indicate why or how. The

¹¹³ [TJ](#), fn.1598.

¹¹⁴ [TJ](#), paras.169,173.

¹¹⁵ [TJ](#), fn.1598.

¹¹⁶ [CLR2-Observations-2525](#), para.68. See also [CLR1-Observations-2526](#), para.5.

¹¹⁷ [CLR2-Observations-2525](#), para.68, citing [ICTY-Kvočka-AJ](#), para.125, [ICTY-Mucić-Decision](#), para.35.

¹¹⁸ See [Defence Appeal Brief – Part II](#), para.139, fn.374. See also [CLR1-Observations-2526](#), para.5.

¹¹⁹ [CLR2-Observations-2525](#), para.70.

¹²⁰ [TJ](#), para.262.

process of “considering the possibility” that Mr. Ntaganda had an incentive to exculpate himself must mean something.¹²¹

50. Where the accused testifies before other Defence witnesses, this “counts in his favour in the assessment of credibility”.¹²² CLR2 is right that this is a “strategic choice”.¹²³ He is wrong that because it is a strategic choice, this disentitles the accused to any credit. Nor is there any requirement, either in domestic or international criminal cases, that the accused make it “clear” that the decision was taken to avoid any impression of having tailored his testimony. Nor a requirement that the decision can have no other advantages in terms of scheduling, stated or otherwise.¹²⁴

RESPONSE TO GROUND 8 – CLR2¹²⁵

51. The Defence does not dispute that the Trial Chamber’s analysis of the credibility of P-0768, P-0017 and P-0963 is “lengthy”,¹²⁶ as is the CLR2 recitation thereof. This results from the sheer number of problems inherent in the testimony of these witnesses, which the Trial Chamber recognized was necessary to explicitly address.

52. Addressing other credibility issues – even a large number – does not mean a Trial Chamber can skip over other essential considerations; such as whether the witnesses might have had motives or incentives to implicate the accused.¹²⁷ CLR2 asserts that the Trial Chamber “duly took into account the individual circumstances of the witnesses, as well as their role in the events”.¹²⁸ In fact, this is precisely what is missing from the Trial Chamber’s analysis; any link between the role of these witnesses, and a potential motivation to implicate Mr. Ntaganda. This was a legal error which undermines the convictions based on their testimony.¹²⁹ These witnesses were accomplices.¹³⁰ They were involved in the criminal events which underpin the Indictment.¹³¹ Treating their evidence with caution was not optional.¹³²

¹²¹ [TJ](#), para.262.

¹²² [ICTY-Limaj-TJ](#), para.22. This reflects the domestic position, see e.g. [RPS v. The Queen](#), para.84; [R. v. Karamitsos](#), para.54; [R. v. Turino](#), para.102; [R. v. Pasloski](#), paras.28-30; [R. v. Smith](#).

¹²³ [CLR2-Observations-2525](#), para.68. See also [CLR1-Observations-2526](#), para.5.

¹²⁴ [CLR2-Observations-2525](#), para.68. See also [CLR1-Observations-2526](#), para.5.

¹²⁵ [CLR2-Observations-2525](#), paras.75-82.

¹²⁶ [CLR2-Observations-2525](#), paras.77-78.

¹²⁷ [ICTY-Karadžić-TJ](#), para.16; [ICTY-Tolimir-TJ](#), para.42; [ICTY-Krajišnik-AJ](#), para.146; [ICTY-Popović-TJ](#), fn.36; [Lubanga-TJ-2842](#), para.102; [Katanga-TJ-3436](#), para.85; [TJ](#), para.77.

¹²⁸ [CLR2-Observations-2525](#), para.81.

¹²⁹ [Defence-Reply-2534](#), paras.10-15.

¹³⁰ [Defence-Reply-2534](#), paras.11-12.

¹³¹ See, e.g. [ICTY-Popović-TJ](#), para.26.

Regardless, their status as “insiders”¹³³ also required the Trial Chamber to turn its mind to the question of motives or incentives.¹³⁴ It did not.

53. The fact that the Trial Chamber considered, and dismissed, the evidence that P-0768 hated Mr. Ntaganda does not remedy this failure.¹³⁵ Whether P-0768 had a motive or incentive to implicate the accused goes beyond personal history and animus. P-0768 imbued himself with credibility in the eyes of the Trial Chamber because of his asserted centrality to the events in question.¹³⁶ Whether he had a motive to lay blame for the crimes in which he participated (and about which he freely testified) at Mr. Ntaganda’s feet would have formed part of the assessment of a reasonable trial chamber. The failure to consider motive undermines the Trial Chamber’s assessment of P-0768, P-0963 and P-0017, thereby warranting a reversal of the findings central to the First Operation which relied on their uncorroborated evidence¹³⁷ and the convictions that rest thereon.¹³⁸

RESPONSE TO GROUND 9-12 - CLR1¹³⁹

I. The Trial Chamber erred in its approach to visual assessment of age and the applicable margin of error

54. In relation to the Trial Chamber’s reliance on video-imagery to assess Lamama’s age, CLR1 misconstrues the domestic jurisprudence relied on by the Defence. CLR1 cites *Lanning*¹⁴⁰ to counter an argument that the Defence never advanced: that expert testimony is **required** to establish age beyond reasonable doubt.¹⁴¹ What the *Lanning* decision reiterates –

¹³² [Bemba-et-al-AJ-2275](#), paras.1531,1534. See also [ICTR-Nchamihigo-AJ](#), para.48; [ICTR-Muvunyi-AJ](#), para.128.

¹³³ [CLR2-Observations-2525](#), para.81.

¹³⁴ [Mbarushimana-Confirmation-Decision-465](#), para.50, recognizing “the risks that attach to the statements of insider witnesses”; [Bemba-TJ-3343](#), paras.306-307; [Gbagbo-Prosecution-Response-1207](#), paras.64-66,70-71,1584: “when testifying, some insiders may try to minimize their own conduct to avoid incriminating themselves or to protect others [...] particularly the case when they are asked to testify on evidence which indicates their own complicity with or, at minimum, tacit acquiescence as of the commission of crimes.” See also [Del Ponte](#), p.547: “the Prosecution must certainly approach the evidence provided by insider witnesses with caution”; See also [ICTY-Tolimir-TJ](#), para.466; [ICTY-Karadžić-TJ](#), fn.4524, para.4955, para.5766, fns.10717,19616; [ICTY-Dordević-TJ](#), paras.1228,1357-1358; [ICTY-Limaj-TJ](#), paras.29,576; [ICTR-Bizimungu-TJ](#), paras.366,833,954; [ICTR-Ngirabatware-TJ](#), para.934; [ICTR-Kordić-TJ](#), para.629.

¹³⁵ [CLR2-Observations-2525](#), para.78.

¹³⁶ [P-0768:T-33](#),28:9-12,28:21-22,29:4-6,33:5-7,34:1-3,42:13-15,55:23-56:5;[T-35](#),53:13-18,56:9-13,61:2-12,63:14-16,64:2-5.

¹³⁷ [TJ](#), paras.494,508,509-510,524,528,533.

¹³⁸ [TJ](#), paras.737-742,743-744,748-752,848-850, 873(1st),873(2nd),891,922,997,1182,1184.

¹³⁹ [CLR1-Observations-2526](#), paras.8-75.

¹⁴⁰ [CLR1-Observations-2526](#), para.12.

¹⁴¹ [CLR1-Observations-2526](#), para.13; cf. [Defence Appeal Brief – Part II](#), paras.237-240.

albeit less explicitly than *Katz* and *Loring*¹⁴² – is the degree of age differentiation required before a finder of fact is able to make a finding of age beyond reasonable doubt based on video or photographs.¹⁴³ CLR1’s reliance on the *Lubanga* Appeals Judgment in relation to domestic jurisprudence is incomplete. While the assessment of age is a question of fact, the Appeals Chamber stated that this assessment has to be performed with the outmost caution and it must be “clear” that a child is under the age of 15.¹⁴⁴

55. The photographs of asylum seekers¹⁴⁵ are not tendered to prove any fact in issue in this case,¹⁴⁶ but illustrate the degree of certainty required in age determination cases based on visual appearance.¹⁴⁷ The fact that the relevant age threshold is different for child soldiers, and that the finding pertains to people who are over rather than under a threshold,¹⁴⁸ is immaterial to understanding the “margin of error” applicable. Similarly, that the individuals do not look like Lamama, or are not from Ituri,¹⁴⁹ is immaterial. CLR1 neither explains nor supports its claim that the Defence are “misleading”¹⁵⁰ in suggesting that several of the people appear to be 18 years of age or older – as they facially do.

II. The Trial Chamber erred in finding that Mr. Ntaganda had escorts under the age of 15

A. The age assessment of Lamama

56. The distinction between “lying”¹⁵¹ and “misrepresenting the truth”¹⁵² is a distinction without difference. The Defence position about P-0010’s ability to give credible and reliable testimony about Lamama’s age, when it was made with reference to her own about which she lied,¹⁵³ remains intact even if the euphemistic “misrepresented the truth” is substituted throughout. The Defence did not accept that P-0010 might have been under 15 at the time. As

¹⁴² [Defence Appeal Brief – Part II](#), para.238.

¹⁴³ [Lanning](#), para.24: “[w]hile I can say that I believe that the girl(s) depicted are probably under the age of 18, that is not sufficient. Looking at the photos as objectively and honestly as I can, I simply cannot conclude beyond a reasonable doubt that they are under the age of 18.”

¹⁴⁴ [Lubanga-AJ-3121](#), para.221.

¹⁴⁵ [CLR1-Observations-2526](#), para.14.

¹⁴⁶ *Contra* [Lubanga-AJ-3121](#), para.224; [CLR1-Observations-2526](#), fn.32.

¹⁴⁷ [DCB](#), paras.1286-1292. See also [Loring](#), [Katz](#), [Merton](#).

¹⁴⁸ [CLR1-Observations-2526](#), paras.14.

¹⁴⁹ [CLR1-Observations-2526](#), para.14.

¹⁵⁰ [CLR1-Observations-2526](#), para.14.

¹⁵¹ [CLR1-Observations-2526](#), para.18.

¹⁵² [TJ](#), para.98.

¹⁵³ [Defence Appeal Brief – Part II](#), para.243.

such, CLR1's arguments are based on a mistaken understanding of the Defence submissions.¹⁵⁴

57. P-0017's testimony concerning Lamama's age was not "ambiguous".¹⁵⁵ He testified that the person resembling Lamama [REDACTED].¹⁵⁶ CLR1 is wrong that a "similar" argument was rejected by the *Lubanga* Appeals Judgment.¹⁵⁷ In that case, the Prosecution had sought to elicit an age estimate from a witness, using images which it claimed were of the same person. The Appeals Chamber was addressing whether the Prosecution's failure to substantiate that the images were of the same person, affected whether it had fulfilled its duty to fully contextualize the images on which age estimates were being sought.

B. The age assessment of the unidentified "Kadogo"

58. CLR1 claims that size alone can be a sufficient basis for determining age, relying on the *Lubanga* Appeals Judgment.¹⁵⁸ In the cited passage, the Appeals Chamber held that size is a "determining factor," and even then, only "if considered in connection with their general appearance."¹⁵⁹ There is no other discernible general appearance in relation to the "unidentified kadogo" upon which the Trial Chamber could rely as an indicator – let alone as a decisive indicator – of age.

59. CLR1 tries to salvage the Trial Chamber's finding on the basis that "P-0010 also testified that [the unidentified *kadogo*] was younger than her."¹⁶⁰ The claim is perplexing, in light of the Trial Chamber's finding that P-0010 had misrepresented the truth in claiming that she was herself under 15 years of age.¹⁶¹ While characterizing the Defence's submissions as "outlandish," CLR1 accepts that "kadogo" was used to refer to people "not necessarily below the age of 15 years."¹⁶² As such, she accepts that a person could use the term "kadogo" without intending to mean that the person was under 15 years of age. P-0010's testimony, even taken at face value, cannot reasonably be relied upon to find that shadowy, distant figure pictured in a video jumping into the back of a pickup truck was under 15 years of age.

¹⁵⁴ See [Defence Appeal Brief – Part II](#), para.240 (emphasizing that no finding of age could be made beyond reasonable doubt "on the basis of these images" in respect of LAMAMA).

¹⁵⁵ [CLR1-Observations-2526](#), para.15.

¹⁵⁶ [Defence Appeal Brief – Part II](#), fn.647.

¹⁵⁷ [Lubanga-AJ-3121](#), para.226.

¹⁵⁸ [CLR1-Observations-2526](#), para.23.

¹⁵⁹ [Lubanga-AJ-3121](#), para.229.

¹⁶⁰ [CLR1-Observations-2526](#), para.25.

¹⁶¹ [TJ](#), para.98.

¹⁶² [CLR1-Observations-2526](#), paras.25,72.

C. The age assessment of Tipe

60. CLR1 asserts¹⁶³ that the absence of corroboration for P-0898's claim that "Tipe" was an escort of Mr. Ntaganda is so irrelevant that the Trial Chamber did not even need to address it, no matter how easily the fact should have been to corroborate.¹⁶⁴ Accepting such a proposition would profoundly impoverish the fact-finding process, reverse the burden of proof, and undermine the standard of reasonable doubt. The absence of a single reference in the voluminous trial record to anyone named "Tipe", let alone to a "Tipe" amongst Mr. Ntaganda's escorts, was undoubtedly a relevant consideration that had to be addressed by the Trial Chamber when raised by the Defence.¹⁶⁵ The Trial Chamber erred in failing to give such an explanation, and reached a conclusion that was manifestly unreasonable in the absence of that discussion.

61. In fact, CLR1 misconstrues Mr. Ntaganda's arguments on corroboration.¹⁶⁶ Mr. Ntaganda recognises that "there is no requirement of corroboration [at this Court] irrespective of the type of evidence or the fact to be established".¹⁶⁷ However, as noted by the Appeals Chamber, "[t]his is not to say that corroboration will never have a role to play when assessing a witness's credibility and the reliability of his or her testimony."¹⁶⁸ In this case and in relation to findings central to Mr. Ntaganda's conviction, corroboration played no role when, in order to discharge the duty to reasonably assess the evidence, it should. More specifically, the Trial Chamber's failure to utilise this tool was one of a series of failures which it made when concluding that Mr. Ntaganda had escorts who were under 15 years of age.

62. P-0898 alone testified that Mr. Ntaganda had an escort called "Tipe".¹⁶⁹ This was highly incriminatory testimony. Notwithstanding the lack of corroboration, the Trial Chamber accepted it without question. As already explained, this was not a situation where the lack of corroboration could be easily discounted because of the lack of witnesses.¹⁷⁰ Rather, the fact that only one out of at least 19 witnesses with knowledge of Mr. Ntaganda's escorts spoke

¹⁶³ [CLR1-Observations-2526](#), para.28.

¹⁶⁴ [Defence Appeal Brief – Part II](#), para.183 (responding to the argument that corroboration could have been sought from numerous witness during trial with the argument that "Ntaganda identifies no legal basis requiring the Prosecutor to put specific questions to witnesses").

¹⁶⁵ [Defence Appeal Brief – Part II](#), para.183.

¹⁶⁶ [CLR1-Observations-2526](#), paras.28-29.

¹⁶⁷ [Bemba-et-al-AJ-2275](#), para.1084.

¹⁶⁸ [Bemba-et-al-AJ-2275](#), para.1084.

¹⁶⁹ [TJ](#), para.388.

¹⁷⁰ [Defence Appeal Brief – Part II](#), para.247, citing to [ICTR-Mpambara-TJ](#), para.124.

about “Tipe” should have given the Trial Chamber serious pause. Instead, P-0898’s testimony was accepted as the sole evidential basis for a key finding without caution and without explanation.

63. In supporting the Trial Chamber’s approach, CLR1’s reliance on *Lubanga* is inapposite.¹⁷¹ In this case, the challenge is not to the Prosecution and its failure to put questions to witnesses about the existence of “Tipe” or to identify his image. Rather, the challenge is to the Trial Chamber and its flawed approach to assessing evidence as described above.¹⁷²

64. Similarly, CLR1’s contention that “[b]y arguing that the Chamber ‘erred in giving any weight to estimates of age by witnesses in the absence of any basis on which [it] could assess the accuracy of those estimates’, the Defence effectively seeks to introduce an additional requirement of corroboration of witness’ testimonies concerning age”, misses the point.¹⁷³ The evidence challenged by the Defence is extremely weak. It suffers from the series of significant evidential shortcomings detailed in the brief.¹⁷⁴ As the Appeals Chamber at this Court has held, the fact that corroboration is not required as a matter of law at this Court “does not mean that *any* piece of evidence provides a sufficient evidentiary basis for a factual finding.”¹⁷⁵ Nothing in the jurisprudence relied on by CLR1 in paragraph 29 of the Observations detracts from this sound statement of principle. However, rather than seek to address the weaknesses identified by the Defence in the evidence, CLR1 simply advocates for its uncritical acceptance. This approach repeats the error made by the Trial Chamber and must be rejected.

III. No reasonable trier of fact would have found that child soldiers were raped and sexually enslaved, or that Mr. Ntaganda was aware of it

65. As a preliminary remark, the text underlying Ground 10 in the Notice of Appeal was sufficiently explicit to give ample prior notice of the content to be expected in this section. Even assuming that CLR1 is correct that the Defence should have sought to vary Ground 10, the Defence submits that: (i) it would not be in the interests of justice to disregard a well-

¹⁷¹ [CLR1-Observations-2526](#), para.28, citing to [Lubanga-AJ-3121](#), para.209.

¹⁷² [Defence Appeal Brief – Part II](#), para.247.

¹⁷³ [CLR1-Observations-2526](#), para.29 (footnotes omitted).

¹⁷⁴ [Defence Appeal Brief – Part II](#), para.248.

¹⁷⁵ [Lubanga-AJ-3121](#), para. 218 (emphasis in original).

substantiated ground of appeal; and (ii) CLR1 have suffered no prejudice from any defective notice, as is demonstrated by the detail of their response.¹⁷⁶

66. Then, CLR1's misunderstanding of Mr. Ntaganda's arguments on corroboration continue in relation to the submissions made in respect of Ground 11.¹⁷⁷ Three short points need only be made.

67. *First*, as already stated, the Defence accepts that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted in evidence.¹⁷⁸ It is without question that this statement of principle extends to the testimony of a victim of sexual violence. However, the fact that a witness testifies about sexual violence does not mean that their evidence must be automatically accepted. These witnesses are subject to the same credibility and reliability assessments to which all witnesses are properly and fairly subject. It is in the context of the Trial Chamber's repeated failure to properly and reasonably assess the evidence that the lack of corroboration as "a recurring theme" is raised.¹⁷⁹

68. *Second*, CLR1's submissions on the testimony of victims of sexual violence in the context of Ground 11 are of limited relevance. Only one alleged child soldier victim of sexual violence, P-0883, testified before the Court. The evidence about "Nadège" and "Mave" was provided second hand. However, the unifying factor in relation to all the sources of evidence on which the Trial Chamber relied to find that child soldiers were raped and sexually enslaved is that they were subject to serious credibility and reliability challenges none of which were properly addressed in the Judgment.

69. *Third*, the fact that the findings concerning the three individuals were "in line with abundant" other generalised evidence is no answer to Mr. Ntaganda's specific criticism about the lack of corroboration regarding the testimony about "Nadège" and P-0883.¹⁸⁰ Other than P-0758 in relation to "Nadège" and P-0883 in relation to her own experiences, no other source of evidence identifies these individuals as being victims of sexual violence. That is the short but critical point. Given the challenges to the testimony of P-0758 and P-0883 set out in the

¹⁷⁶ See e.g. [ICTY-Šainović-AJ](#), para.84 ("taking into account that, in its response, the Prosecution addresses the substance of Pavković's submission and would therefore suffer no material prejudice if the arguments are addressed in this Judgement, the Appeals Chamber will exercise its discretion and consider the merits of this submission in the interests of justice, notwithstanding Pavković's failure to comply with the Rules.")

¹⁷⁷ [CLR1-Observations-2526](#), paras.50-51.

¹⁷⁸ See above para.64.

¹⁷⁹ [CLR1-Observations-2526](#), para.50.

¹⁸⁰ [CLR1-Observations-2526](#), para.51.

brief,¹⁸¹ this was one of the occasions when corroboration should have played (but did not) a role in assessing credibility and reliability.¹⁸² Further, the Trial Chamber should have explained (but did not) why corroboration played no role.

A. The Trial Chamber erred by relying on the testimony of P-0883

70. CLR1 suggests that the Trial Chamber’s reasoning reflects nothing more than that her testimony was unreliable, requiring no further assessment of whether she was lying.¹⁸³ Yet the Trial Chamber accepted that P-0883’s first recorded accounts after the events “consistently refer to the APC [as her abductor] instead of the UPC in four separate instances.”¹⁸⁴ Two directly incompatible accounts of this nature reflect either conscious lying or mistake. The significance of the event itself, combined with the witness’s repeated prior contrary statements, is strongly suggestive of not just mistake, but deception. It was legal error to not even address such a key credibility issue once raised by the Defence.¹⁸⁵

71. CLR1 is wrong that the Trial Chamber “explained in detail why”¹⁸⁶ P-0883’s testimony about her abduction had no impact on her general credibility. The Trial Chamber simply announces its conclusion,¹⁸⁷ without any discussion of whether P-0883’s testimony concerning her abduction could reasonably be assessed as having been the result of error, rather than lying. This was a clear instance where the Trial Chamber failed to provide a reasoned opinion about a witness credibility.

72. CLR1 acknowledges that it could not be a coincidence that the birthdate given for P-0883 on the tampered document corresponds to the date given by P-0883 during her testimony.¹⁸⁸ However, CLR1 hypothesizes that someone else tampered with the document – a good Samaritan “with knowledge of P-0883’s situation and her actual date of birth, possibly with a view to correcting the inaccurate date reflected in register.”¹⁸⁹ Whoever this “someone” might be, they would have had to have access to the document, and been informed of the date that P-0883 would try to give in court as her own date of birth. The notion that some intervening busybody would tamper with the document without P-0883’s knowledge is

¹⁸¹ [Defence Appeal Brief – Part II](#), paras.259,260,262-268.

¹⁸² [Bemba-et-al-AJ-2275](#), para.1084.

¹⁸³ [CLR1-Observations-2526](#), paras.35-36.

¹⁸⁴ [TJ](#), para.185.

¹⁸⁵ [DCB](#), para.1195.

¹⁸⁶ [CLR1-Observations-2526](#), para.37.

¹⁸⁷ [TJ](#), para.188.

¹⁸⁸ [CLR1-Observations-2526](#), para.40.

¹⁸⁹ [CLR1-Observations-2526](#), para.40.

fanciful. The Trial Chamber failed to acknowledge the strong indications that P-0883 must have been involved and, consequently, failed to address a fact that should have been fundamental to any evaluation of P-0883's credibility.

73. The Trial Chamber's findings in respect of the sexual enslavement of P-0883 are unsound for the same reasons that they are unsound in respect of the finding that she was a child soldier.

74. CLR1 is simply wrong in asserting that the evidence concerning the three purported victims of sexual enslavement was corroborated by "abundant"¹⁹⁰ other findings. Footnote 1161 of the Trial Judgment, cited by CLR1, states only that the Trial Chamber "heard" other evidence, without indicating that it was accepted. The testimony cited at that footnote in no case involves direct knowledge of any sexual violence against someone under 15¹⁹¹ and was often equivocal.¹⁹² CLR1's only other citation, to paragraph 1196 of the Judgment, refers back to paragraphs 408 to 411 of the Judgment – the paragraphs referring to P-0883, "Nadège" and "Mave." This is no corroboration.

B. The Trial Chamber erred when finding that "Mave" was under the age of 15

75. The Defence acknowledges that P-0901 was referring to a different "Mave" in giving an age estimate of "[REDACTED]"¹⁹³ and corrects its submissions accordingly.¹⁹⁴ However, the fact remains that only P-0907 indicated that "Mave" (who was with Kisémbu) was under 15; that P-0887 did not give a specific age estimate;¹⁹⁵ and that P-0901, who knew the "Mave" (who was with Kisémbu), was not even asked by the Prosecution to give an age estimate. This is yet another example of the Prosecution having the opportunity to corroborate a material fact and yet refraining – apparently quite deliberately – from doing so.¹⁹⁶ On this basis, the argument tendered by CLR1 is inapposite.¹⁹⁷

¹⁹⁰ [CLR1-Observations-2526](#), para.51.

¹⁹¹ The testimony of P-0031, P-0046 and P-0017 involved hearsay.

¹⁹² See e.g. [P-0046:T-101](#), 69:13-20 ("I believe some of them were below 15 [...] as far as I can remember [...] I cannot remember precisely.")

¹⁹³ [P-0907:T-29](#), 57:5-6.

¹⁹⁴ Cf. [Defence Appeal Brief – Part II](#), para.261.

¹⁹⁵ [P-0887:T-93](#), 40:2-3.

¹⁹⁶ At [T-29](#), 57:5-6, [REDACTED] [T-29](#), 59:15-16. Instead of then asking the obvious question "And how old was she?" the Prosecution moves to a different subject.

¹⁹⁷ [CLR1-Observations-2526](#), paras.63-64.

76. CLR1 misrepresents the Defence's argument concerning the required *mens rea* and the common plan to be convicted for the crimes of rape and sexual enslavement on the basis of his knowledge.¹⁹⁸ However, this argument will be expanded in Ground 13.

C. The Trial Chamber erred by relying on the testimony of P-0758 to assess "Nadège"'s age

77. The Trial Chamber placed exclusive reliance on P-0758's estimate of "Nadège"'s age, even though it rejected her testimony as to (i) her **own** date of birth; and (ii) the year of her **own** abduction. CLR1 argues that the Trial Chamber did not need to reconcile or even discuss this incongruity, because its findings concerning P-0758's age was just a run-of-the-mill application of the standard of proof beyond reasonable doubt, with no implications for P-0758's truthfulness.¹⁹⁹ The Trial Chamber could have rejected these elements of her testimony only if it believed that there was a reasonable possibility that she was either: (i) mistaken; or (ii) telling a deliberate lie. Given P-0758's intimate familiarity with both facts, both of which were major parts of her life, and in respect of both of which she had given numerous statements, it beggars belief that the Trial Chamber's reasonable doubt arose from the possibility of mistake rather than deception. The Trial Chamber was required, but failed, to acknowledge the impact of this finding on her overall credibility, but also failed to apply caution and to acknowledge or address that the reliability of her claims about the ages of other persons should have been impacted by her willingness to deceive about her own age.

78. In addition, the Trial Chamber's finding about P-0758 and the occurrence of rapes in Camp Lingo is rendered unsafe²⁰⁰ by its inability to confirm that Camp Lingo existed in 2002.²⁰¹

D. The Trial Chamber erred by relying on the testimony of P-0898

79. Whether the Defence put forward argument as to P-0898's age or date of birth is irrelevant to the error raised on appeal.²⁰² P-0898's age was not the issue at stake, but rather the fact that he was never in the UPC.²⁰³ No reasonable trier of fact would have relied on the testimony of a witness who fabricated evidence on such a fundamental and pivotal issue.

¹⁹⁸ [CLR1-Observations-2526](#), para.64.

¹⁹⁹ [CLR1-Observations-2526](#), para.59.

²⁰⁰ [TJ](#), para 970. *See also* para.156.

²⁰¹ [TJ](#), para.156.

²⁰² [CLR1-Observations-2526](#), para.41.

²⁰³ [Defence Appeal Brief – Part II](#), paras.253-256.

80. D-0201 and P-0898's testimony is mutually exclusive.²⁰⁴ P-0898's account was squarely put to D-0201, who denied that it happened, or could have happened.²⁰⁵ The Trial Chamber's cursory dismissal of this inconsistency on the basis that P-0898's testimony was "plausible" was, in this context, inadequate. The Trial Chamber's dismissal of D-0201's without reasons was an error,²⁰⁶ as was its failure to engage with evidence submitted by the Defence with regard to P-0898's school records.²⁰⁷

81. Thus, CLR1 fails to rebut Defence arguments with regards to Grounds 9-12 and must accordingly be rejected.

RESPONSE TO GROUND 13 – CLR1,²⁰⁸ CLR2²⁰⁹

I. Mr. Ntaganda was found liable on the basis of a common plan for which he was not charged

82. Mr. Ntaganda agrees with CLR2 as to the scope of the common plan **charged** in this case, and that the Trial Chamber correctly stated it at the beginning of its discussion on indirect co-perpetration.²¹⁰ Rather than omitting part of the Trial Chamber reasoning,²¹¹ Mr. Ntaganda's arguments related to the **later** finding that the co-perpetrators meant the "destruction and disintegration of the Lendu community."²¹² CLR2 does not engage with the error raised; whether the finding that the co-perpetrators intended to destroy an ethnic group impermissibly exceeded the case as charged. Of course, it did.

II. The Chamber erred in finding a common plan in the absence of direct evidence and having failed to exclude other reasonable inferences.

83. CLR2 states that it is "erroneous for the Defence to allege that a common plan can only be established on the basis of direct evidence of the agreement".²¹³ Mr. Ntaganda said the opposite; that a common plan "need not be explicit" and "can be inferred from the

²⁰⁴ [CLR1-Observations-2526](#), para.42-44.

²⁰⁵ [DCB](#), para.1237; [D-0201:T-246](#),90:25-91:1.

²⁰⁶ [TJ](#), para.206.

²⁰⁷ [DCB](#), paras.1237,1239. The Trial Chamber did not take those Defence challenges into consideration.

²⁰⁸ [CLR1-Observations-2526](#), paras.76-87.

²⁰⁹ [CLR2-Observations-2525](#), paras.83-93.

²¹⁰ [CLR2-Observations-2525](#), para.85.

²¹¹ [CLR2-Observations-2525](#), para.84.

²¹² [Defence Appeal Brief – Part II](#), paras.278-282, citing [TJ](#), paras.808-809. *See also* [TJ](#), paras.805-806: "their objective to destroy the Lendu community" and "the aim of destruction"; [SJ](#), para.116.

²¹³ [CLR2-Observations-2525](#), para.87.

subsequent concerted action of the co-perpetrators”.²¹⁴ CLR2’s later retraction of his mischaracterisation²¹⁵ serves to retroactively undermine much of his argument under this Ground, which is dedicated to rebutting a proposition that was never advanced.²¹⁶

84. CLR2 is wrong that the Trial Chamber “was not obliged to take into account subsequent concerted action by the co-perpetrators”.²¹⁷ The standard set in *Lubanga*, followed in *Katanga & Ngudjolo*; *Ruto, Kosgey & Sang*; *Abu Garda*; and *Banda & Gerbo*, is that “the agreement need not be explicit and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.”²¹⁸ In none of these decisions did the Chamber go on to say “but, if there is no evidence of subsequent concerted action of the co-perpetrators, the Trial Chamber can simply look to, for example, any evidence of an overall picture of the systematic nature of crimes or their manner of implementation”.²¹⁹

85. This is because the Trial Chamber is assessing whether an accused can be held criminally liable for potentially thousands of crimes, of which he was not the direct perpetrator, on the basis of a common plan, of which there is **no direct evidence**. In these circumstances, it is the concerted action of the co-perpetrators that can give rise to an inference that these individuals were acting pursuant to a plan to which they had all agreed. Evidence of the crimes themselves or the manner in which they were committed is not a substitute. The standard is clear.

86. CLR2 then criticises the Defence for failing “to demonstrate that the conclusions drawn were such that no reasonable trier of fact could have made such findings”.²²⁰ The error identified was a different one.²²¹ The Trial Chamber relied on circumstantial evidence to infer

²¹⁴ [Defence Appeal Brief – Part II](#), para.287.

²¹⁵ [CLR2-Observations-2525](#), para.88: “Although the Defence, in paragraph 287 of its Appeal, acknowledges that the existence of a common plan may be inferred [...]”.

²¹⁶ [CLR2-Observations-2525](#), paras.86-88, 91-92.

²¹⁷ [CLR2-Observations-2525](#), para.89.

²¹⁸ [Lubanga-Confirmation-Decision-803](#), para.345: “the agreement need not be explicit and that its existence can be inferred from the subsequent concerted action of the coperpetrators.”; [Katanga-Confirmation-Decision-717](#), para.523: “the agreement need not be explicit, and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.”; [Abu-Garda-Confirmation-Decision-243](#), para.180: “the existence of an agreement or common plan needs not to be explicit and ‘can be inferred from the subsequent concerted action of the co-perpetrators’”; [Banda-Jerbo-Confirmation-Decision-121](#), para.129: “Such a plan does not need to be explicit as its existence can be inferred from the subsequent concerted action of the co-perpetrators.”; [Ruto-Kosgey-Sang-Confirmation-Decision-373](#), para.301: “The agreement or plan does not necessarily need to be explicit. Rather, its existence may be inferred from the ‘concerted action’ of the indirect co-perpetrators.”

²¹⁹ [CLR2-Observations-2525](#), para.89.

²²⁰ [CLR2-Observations-2525](#), para.90.

²²¹ [Defence Appeal Brief – Part II](#), paras.295,300, citing *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.

the existence of a common plan. In these circumstances, according to the Appeals Chamber, the inference must be “the only reasonable conclusion that could be drawn from the evidence.”²²² The Trial Chamber’s reasoning does not refer to this standard, let alone meet it. This undermines the subsequent finding.²²³ The Trial Chamber assessed the evidence against the wrong legal test.

87. This is a fatal flaw. It is impossible to rectify. Genocide convictions have been quashed on appeal because the Trial Chamber failed to explain how their conclusion was “the only reasonable conclusion that could be drawn from the evidence.”²²⁴ Indeed, “the accused’s rights are protected by requiring that findings at trial based on circumstantial evidence must be the only reasonable conclusions available from that evidence.”²²⁵

88. This error undermines the finding that there was a common plan. It also undermines the finding that the co-perpetrators possessed the requisite intent for the crimes said to be encompassed by the common plan, which was also inferred from circumstantial evidence.²²⁶ In relation to the latter, CLR2 alleges that the Defence “avers that the Trial Chamber erred in relying on inferences”.²²⁷ Again, this misstates the error identified. The Trial Chamber is entitled to draw inferences on the basis of circumstantial evidence. However, it can only do so in specific and limited circumstances.²²⁸

III. The Chamber erred in finding that the co-perpetrators foresaw rape and sexual slavery as a virtually certain consequence of the implementation of the common plan

89. Mr. Ntaganda agrees with CLR1 that the Chamber “did refer to the standard of ‘*virtual certainty*’”.²²⁹ The error identified was that the Trial Chamber failed to engage with this standard; to assess the factual findings as against this standard and to explain why it was met.²³⁰ Including the legal standard under “Applicable Law” is not a substitute for applying law to the facts of the case. This was not done. The reasoning is not only deficient, it is missing.

²²² [Bemba-et-al-AJ-2275](#), para.868.

²²³ [TJ](#), paras.808-811.

²²⁴ See, e.g. [ICTR-Renzaho-AJ](#), paras.319-321; [ICTR-Mugenzi-AJ](#), paras.91,138-141.

²²⁵ [ICTY-Galić-AJ](#), para.218. See also [ICTY-Mucić-AJ](#), para.458; [ICTR-Ntagerura-AJ](#), paras.304-306.

²²⁶ [Defence Appeal Brief – Part II](#), paras.295,300,304.

²²⁷ [CLR2-Observations-2525](#), para.91.

²²⁸ [Bemba-et-al-AJ-2275](#), para.868.

²²⁹ [CLR1-Observations-2526](#), para.83 (emphasis in original).

²³⁰ [Defence Appeal Brief – Part II](#), para.309.

90. The Trial Chamber bases its finding that Mr. Ntaganda was virtually certain that the recruitment and use of child soldiers, and their rape and sexual slavery would occur, on nothing more than “the circumstances prevailing in Ituri at the time”.²³¹ Even if this is indeed “shorthand” for other findings elsewhere in the Judgment,²³² Mr. Ntaganda is still left with no idea which findings were relied upon or, more importantly, why they demonstrate beyond a reasonable doubt that he was virtually certain that these specific crimes, including the sexual slavery of children, would occur. Contrast this “shorthand” with the section of the *Lubanga* Judgment where the findings relevant to mental state of the accused were not only drawn together, but assessed as against the legal standard.²³³ In Mr. Ntaganda’s Judgment, this step is missing.

91. A properly reasoned Judgment does not consist of a series of factual findings, and then a series of legal conclusions, with no link between the two. It is the Trial Chamber’s reasoning and analysis that transforms factual findings into legal conclusions giving rise to criminal culpability; that acts as a bridge between the two. It is not for the Legal Representative of Victims, or any party, to retroactively speculate which findings the Trial Judges had in mind when they wrote their “shorthand”.²³⁴ Nor does this “shorthand” allow the Appeals Chamber to meaningfully review whether the findings were sufficient to meet the legal standard.

92. Where the accused is left to speculate about which factual findings support a legal conclusion, this is impossible to reconcile with the requirement of article 74(5) that a Trial Judgment give a “full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.” The Trial Chamber’s reasoning in support of its finding that Mr. Ntaganda is liable as an incorrect co-perpetrator is fundamentally flawed. The convictions must be reversed.

RESPONSE TO GROUND 15 – CLR2²³⁵

93. CLR2’s submissions regarding Mr. Ntaganda’s *mens rea* for the crimes committed during the Second Operation rest on an incorrect legal premise. Without providing any authority in support thereof, CLR2 erroneously argues that “[...] Mr Ntaganda was convicted

²³¹ [TJ](#), para.811.

²³² [CLR1-Observations-2526](#), para.84.

²³³ [Lubanga-TJ-2842](#), paras.1273-1348.

²³⁴ [CLR1-Observations-2526](#), para.84.

²³⁵ [CLR2-Observations-2525](#), paras.99-107.

on the basis of a common plan and his prominent position and contribution to the plan; the Trial Chamber did not have to find *mens rea* for each specific crime committed as a result of the intended implementation of the common plan”.²³⁶

94. In this way, CLR2’s submissions on indirect co-perpetration rely on and refer to principles relevant to the JCE mode of responsibility. However, JCE is built around the shared intent element, the crucial criterion being the accused’s mental disposition towards the collective crime rather than the intensity of his particular contribution to the crime.²³⁷ In contrast, Mr. Ntaganda is charged with being an indirect co-perpetrator, which is based on the joint control theory, where the focus is placed on the essential contribution of the co-perpetrator and his power to frustrate the commission of the collective crime.²³⁸

95. Pursuant to article 25(3)(a), the subjective elements, which must be proved for indirect co-perpetration are: (i) the accused must be aware of the factual circumstances, which allow him to exert control over the crime; and (ii) the accused must possess the mental requirements prescribed by article 30 of the Statute.²³⁹ On the second criteria alone, the Trial Chamber was required to assess Mr. Ntaganda possessed the required *mens rea* pursuant to article 30 of the Statute for each crime.

96. CLR2 then posits, citing an ICTR case based on JCE,²⁴⁰ that “the Trial Chamber was not required to find that Mr Ntaganda contributed to each criminal act”. This is incorrect. It fails to take into consideration that the contribution of the indirect co-perpetrator is the link between the subjective and objective elements pursuant to article 25(3)(a). Indeed, in order to establish whether an alleged co-perpetrator was aware of the factual circumstances allowing him to exert control over the crime, it is necessary to establish as a first step, whether the alleged perpetrator did exert control over the crime. This in turn, requires an assessment as to whether the co-perpetrator made, within the framework of the common plan, an essential contribution with the resulting power to frustrate the crime.²⁴¹ Contrary to CLR2’s submissions, this necessarily entails an analysis of the evidence of the co-perpetrator’s actions in relation to the crimes committed by members of the ‘organisation’, through which the crimes were committed.

²³⁶ [CLR2-Observations-2525](#), para.101.

²³⁷ [CLR2-Observations-2525](#), paras.101-102.

²³⁸ [Yanev](#), p.696.

²³⁹ [Katanga-TJ-3436](#), paras.1399,1414,1415.

²⁴⁰ [CLR2-Observations-2525](#), para.102.

²⁴¹ [Lubanga-AJ-3121](#), para.469.

97. In this case, it is noteworthy that the Trial Chamber did not make a finding as to whether Mr. Ntaganda was aware of the factual circumstances, which allowed him to exert control over the crimes, such that he had the power to frustrate their commission.

98. More importantly, contrary to CLR2's submissions, over and above the differences highlighted by the Trial Chamber between the First and the Second Operation, the Trial Chamber was required to analyse Mr. Ntaganda's *mens rea* for the crimes committed in the First and the Second Operations separately because: (i) Mr. Ntaganda's involvement and the role assigned to him, within the framework of the apparent common plan, differed between operations; (ii) Mr. Ntaganda's interactions with the alleged co-perpetrators and the planning of the military operations were different in both operations; and (iii) Mr. Ntaganda's actions in relation to the 'organisation' through which the crimes were committed, differed between operations.

99. Consequently, the Defence correctly separated the Trial Chamber's analysis of Mr. Ntaganda's *mens rea* for the First Operation from his *mens rea* for the Second Operation.²⁴² The Trial Chamber erred in not making such a distinction. Indeed, as discussed in the Defence Appeal Brief – Part II, the appropriate test otherwise would have been to determine, as a preliminary step, whether Mr. Ntaganda's contribution to the First Operation gave him control over the crimes committed in the Second Operation.²⁴³ For the above mentioned reasons, this was not possible in the circumstances of this case.

100. Contrary to CLR2's submissions,²⁴⁴ the Trial Chamber's findings related to the involvement of Mr. Ntaganda in the events leading up to and during the Second Operation – including (i) the role assigned to him within the framework of the common plan; (ii) his interactions with the alleged co-perpetrators and his contribution to the planning of military operations; and (iii) his actions related to UPC/FPLC members involved in the Second Operation – evince that he did not make an essential contribution, and that neither had control over the crimes committed nor the power to frustrate them. Mr. Ntaganda's lack of control stems from much more than his physical remoteness from the crimes. The fact that Kisembo,

²⁴² [Prosecution Response – Part II](#), para.278.

²⁴³ [Defence Appeal Brief – Part II](#), para.363.

²⁴⁴ [CLR2-Observations-2525](#), para.104.

Mr. Ntaganda's superior, both actually planned the Second Operation²⁴⁵ and was in command of it, also contributed to Mr. Ntaganda's lack of control over the crimes.

101. Significantly, the Trial Chamber's failure to engage in any analysis of the evidence with a view to determining Mr. Ntaganda's location when the crimes were committed during the Second Operation, or what he was doing at the time reinforces the conclusion that he did not exert control over the crimes committed, let alone have knowledge of the factual circumstances allowing him to exercise the necessary control resulting in the power to frustrate the crimes.²⁴⁶

102. Mr. Ntaganda's knowledge of the situation or lack thereof during the Second Operation is another significant indicator that he did not possess the required *mens rea*. The evidence related to Mr. Ntaganda's *de minimis* contribution before leaving Bunia demonstrates that Mr. Ntaganda was not aware of the planning of any crime. No evidence establishes that Mr. Ntaganda obtained any information regarding the commission of crimes when he was not in Bunia.

103. In the last section of his submissions,²⁴⁷ CLR2 addresses Mr. Ntaganda's arguments concerning the testimony of P-0055, which was relied upon by the Trial Chamber to find that that Mr. Ntaganda was informed of the Kobu massacre shortly after it occurred, and that he reacted in a way that showed "he approved of the behaviour of the troops in this context".²⁴⁸ CLR2 confuses admissibility with weight. Mr. Ntaganda did not challenge the admissibility of P-0055's testimony but rather the Trial Chamber's improper reliance on it to impute *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*. The sentence that follows CLR2's citation from *Milošević* reads as follows: "(p)rovided that such evidence has some probative value, the remoteness of those words or conduct to the time of the crime charge goes to the weight to be afforded to the evidence".²⁴⁹

²⁴⁵ [Defence Appeal Brief – Part II](#), para.374.

²⁴⁶ [Defence Appeal Brief – Part II](#), paras.384-386; [DCB](#), paras.1057,1072-1074,1078-1083,1086-1089; **D-0300**: [T-220](#),68:10-70:10,81:15-82:10 ;[T-221](#), 3:6-11,4:4-5:25,6:23-7:19,8:10-12,22:7-23:16.

²⁴⁷ [CLR2-Observations-2525](#), paras.105-106.

²⁴⁸ [TJ](#), para.1033.

²⁴⁹ [ICTY-Milosević-Reasons](#), para.31.

104. At trial, the Defence repeatedly challenged the evidence of P-0055.²⁵⁰ P-0055 is the insider/accomplice witness who refused to testify unless the Trial Chamber agreed to meet with him *ex parte*.²⁵¹ The evidence of P-0055 relied on by the Trial Chamber was (i) uncorroborated; (ii) directly contradicted by witness P-0317; (iii) contradicted by Mr. Ntaganda; and (iv) undermined during cross-examination.²⁵² Consequently, the Trial Chamber was required to provide a reasoned opinion as to why it was nonetheless considered capable of reliance. The Trial Chamber's error in failing to do so is compounded by its failure to consider the many challenges made to P-0055's testimony in the Defence Closing Brief and Defence Reply to the Prosecution Closing Brief.²⁵³

105. CLR2's observations fail to rebut Mr. Ntaganda's arguments in support of Ground 15 and must be rejected. The Trial Chamber erred in finding that Mr. Ntaganda possessed the required *mens rea* pursuant to article 25(3)(a) for the crimes committed during the Second Operation.

RESPECTFULLY SUBMITTED THIS 25th DAY OF MARCH 2021



Me Stéphane Bourgon, *Ad.E* Counsel representing Bosco Ntaganda

The Hague, The Netherlands

²⁵⁰ [DCB](#), paras.492,494,512,574,581,630,821,1069,1116,1124,1126,1508,1132-1145; [Defence-Reply-Brief-2307](#), paras.209-234.

²⁵¹ [Defence Appeal Brief – Part II](#), paras.15-20; [T-41](#), 11:21-13:3.

²⁵² [P-0055:T-74](#), 73:2-8.

²⁵³ [DCB](#), paras.492,494,512,574,581,630,1025,1084,1096,1116,1124,1126,1508; [Defence-Reply-Brief-2307](#), paras.223.