ANNEX A

JOINT DISSENTING OPINION OF JUDGE EKATERINA TRENDAFILOVA AND JUDGE CUNO TARFUSSER

1. We regret that we are unable to join the Majority of the Appeals Chamber (the "Majority") in confirming the "Judgment pursuant to article 74 of the Statute"[1] (the "Impugned Decision" or the "Acquittal Decision") rendered by Trial Chamber II (the "Trial Chamber" or the "Chamber") in the case against Mathieu Ngudjolo Chui ("Mr. Ngudjolo"). The Majority Judgment fails to properly address questions at issue in the current appeal which are of fundamental importance for the case at hand, as well as for the jurisprudence of the International Criminal Court (the "Court"). Given that the proper resolution of these questions ensuing from the three grounds of appeal shall affect the Court's operation for the years to come, we find ourselves judicially compelled to dissent from the Majority with respect to all grounds of appeal, save for a number of preliminary findings which we deem sound. Our Dissent (the "Dissent") does not aim at exploring every single disagreement with the Majority's views. Rather, it will focus only on the fundamental points of contention, which in our opinion are determinative and core to this appeal.

2. Starting with the preliminary issues, we concur with our colleagues' line of argumentation and conclusions laid down in paragraphs 33-35, 39, 41, and 246-248 of the Majority Judgment on the four preliminary issues which the Appeals Chamber was called upon to address.

3. However, for the reasons elaborated below, we strongly disagree with the Majority's conclusions on the three grounds of the present appeal. In light of the nature of the errors alleged by the Prosecutor and their impact on the Impugned Decision, the Dissent shall discuss the three grounds of appeal in a reverse order. First, we will address the third ground of appeal, which concerns the authority of the Trial Chamber to ensure the proper conduct of the proceedings in light of its duty to guarantee the fairness of the proceedings, as well as its responsibility to determine the truth. More specifically, the Dissent will analyse the impact on said judicial duties of the approach adopted by the Trial Chamber in regard of some of the evidence existing in the case before it. It is our belief that the issues underlying the third

[1] Trial Chamber II, "Judgment pursuant to article 74 of the Statute", ICC-01/04-02/12-3-tENG, 18 December 2012.

ground of appeal and the errors committed by the Trial Chamber in addressing those issues, as well as by the Majority in failing to grant this ground of appeal, touch upon the very heart of the judicial function. The exposal of such errors is therefore in our opinion vital, not least with a view to preventing that the judicial function be deprived of its very meaningfulness. Thereafter, we shall discuss the second ground of appeal, which concerns another fundamental factor for the proper judicial performance, namely the methodology applied by the Trial Chamber in its evaluation of the evidence. The last to be addressed is the first ground of appeal, regarding the application of the standard of "beyond reasonable doubt" by the Trial Chamber in its determination of the issues at hand.

A. THIRD GROUND

4. In her third ground of appeal, the Prosecutor alleges that the Trial Chamber: 1) prevented the Prosecutor from getting full access to Mr. Ngudjolo's recorded conversations; 2) rejected the Prosecutor's request to rely on the Registry reports which analysed the recorded conversations (the "Registry Reports") in the cross-examination of Mr. Ngudjolo and witness D03-88; and 3) prohibited the Prosecutor to obtain explanations from witness P-250 concerning inconsistencies in his testimony. Thus, the Prosecutor argues that the Trial Chamber committed a procedural error "by refusing the Prosecution's persistent requests [to be granted full access to the material sought] and by failing to exercise its own powers to ensure the fairness of the trial proceedings".[2] The Prosecutor submits that "this error violated [her] right to a fair trial under article 64(2) [of the Rome Statute]".[3]

5. While we agree with the Majority that the procedural errors alleged in this ground of appeal fall within the scope of article 81(1)(a)(i) of the Rome Statute (the "Statute"), we are in strong disaccord with the Majority's understanding that such errors do not fall within the scope of article 64(2) of the Statute concerning the right to a fair trial. We are of the view that the errors alleged by the Prosecutor, first, fall within the scope of article 64(2) of the Statute, governing the Trial Chamber's powers for the proper conduct of the proceedings and, secondly, affect its core judicial duty to establish the truth. It is our firm conviction that not only did the Trial Chamber prevent the Prosecutor from presenting her case on a par with the defence and from fulfilling her statutory obligations pursuant to article 54(1) of the Statute,

[2] "Second Public Redacted Version of 'Prosecution's Document in Support of Appeal against the *Jugement rendu en application de l'article 74 du Statut*', 19 March 2013, ICC-01/04-02/12-39-Conf", ICC-01/04-02/12-39-Red3, 15 October 2014, para. 142 ("Document in Support of the Appeal"); Majority Judgment, para. 249.
[3] Document in Support of the Appeal, para. 142; Majority Judgment, para. 249.

but even more significantly, the Trial Chamber infringed its primary responsibility to establish the truth as the ultimate objective of criminal proceedings. Said procedural errors are addressed in turn below.

Infringement of article 64(2) of the Statute

6. We do not agree with the Majority that the right to fair trial was not at issue under this ground of appeal. As correctly contended by the Prosecutor, the "right to a fair trial [which] is guaranteed under [a]rticle 64(2) [of the Statute] […] obliges the Court to ensure that neither party is put at a disadvantage when presenting its case".[4] Although the notion of fair trial is perceived predominantly with respect to the accused, fairness "also extends to other parties in proceedings such as the Prosecution".[5] This conclusion finds support not only in the jurisprudence of this Court, but also in the case-law of the *ad hoc* tribunals.[6] Thus, in line with the principle of fair trial, both the Prosecutor, acting in public interest, and the defence are entitled pursuant to article 69(3) of the Statute to submit evidence relevant to the case and to examine the existing evidence at trial. This principle – as endorsed *inter alia* by rule 140(2)(a) and (b) of the Rules of Procedure and Evidence – ensures that the parties are accorded by law equal opportunities to present their case including through the examination of relevant evidence provided by witnesses in the course of the trial. For the reasons that follow, we are of the view that this right was not guaranteed for the Prosecutor in the case at hand.

(i) Denial of full access to Mr. Ngudjolo's recorded conversations and relevant Registry Reports

7. Contrary to the findings of the Majority, the careful analysis of the Impugned Decision and of the relevant procedural history warrants the conclusion that the Trial Chamber failed to ensure fairness of the trial with respect to the Prosecutor. The Trial Chamber prevented the Prosecutor from conducting a proper and effective presentation of her

[4] Document in Support of the Appeal, para. 205.
[5] *Situation in Uganda*, Pre-Trial Chamber II, "Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", ICC-02/04-112, 19 December 2007, para. 27.
[6] The ICTY Appeals Chamber in *Tadić* acknowledged that "the right to a fair trial [...] covers the principle of equality of arms" which "means that the Prosecution and the Defence must be equal before the Trial Chamber"; ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić,* "Judgement", IT-94-1-A, 15 July 1999, paras 43, 44, 48 and 52.

case in order to meet her statutory obligation by denying the Prosecutor access to Mr. Ngudjolo's recorded conversations from the detention centre.

8. It is clear from the procedural history that, as of 14 January 2009, the Registrar reported to the Trial Chamber the existence of a reasonable suspicion of attempts to influence witnesses' testimonies on the part of Mr. Ngudjolo or to disclose confidential information to third parties.[7] The Registrar also issued various reports analysing the recorded conversations of Mr. Ngudjolo, which alerted the Trial Chamber of "possible witness intimidation and disclosure of confidential information [regarding] witnesses by Mr Ngudjolo [through] outside contacts".[8] Some of these reports reveal that on more than one occasion the Trial Chamber was alerted of witnesses' inducement or intimidation,[9] or that third parties had tried to "prepare" defence witnesses.[10] On the basis of extracts from the available recorded conversations it also became clear that Mr. Ngudjolo arranged for witnesses to be prepared before his defence team arrived in the field, in order to prevent any potential contradictions.[11] Even with the limited information made available to the Prosecutor through the redacted versions of the various Registry Reports, it is undeniable that the Trial Chamber was amply put on notice as to many of the elements substantiating these suspicions. In particular, it was quite clear to the Trial Chamber that Mr. Ngudjolo switched languages to discuss witnesses' related issues,[12] or used coded messages.[13]

9. The Prosecutor explicitly argued before the Trial Chamber that obtaining the requested conversations might "substantially bear on the willingness of […] Prosecution

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[7] "Report of the Registrar pursuant to the Chamber's Order of 18 December 2008", ICC-01/04-01/07-829-Red, 14 January 2009, para. 26; Majority Judgment, para. 232.
[8] Majority Judgment, para. 259.
[9] "Redacted version of Second report of the Registrar on the monitoring of Mathieu Ngudjolo Chui's non-privileged communications further to the Registrar's decision of 12 February 2009", ICC-01/04-01/07-1299-tENG-Red, 14 July 2009, p. 1; "Redacted version of Third Report of the Registrar on the monitoring of Mathieu Ngudjolo Chui's non-privileged communications further to the Registrar's decision of 12 February 2009", ICC-01/04-01/07-1312-tENG-Red, 17 July 2009, p. 4 ("Third Report"); "Quatrième rapport du Greffier sur l'écoute des communications non couvertes par le secret professionnel de M. Mathieu Ngudjolo", ICC-01/04-01/07-1627-Anx1-Red, 19 October 2009, paras 4 and 5.
[10] Third Report, p. 5; "Deuxième et dernier rapport du Greffier sur L'écoute de certaines des conversations de Mathieu Ngudjolo tenues en Kilendu ou dans une langue non identitée suite à la décision de la Chambre du 10 juin 2010", ICC-01/04-01/07-3075-Red2, 29 August 2011, paras 2 and 19; see also Document in Support of the Appeal, paras 184-185.
[11] "Rapport du Greffier sur l'écoute de certaines des conversations de Mathieu Ngudjolo tenues en Kilendu ou dans une langue non identifiée suite à la décision de la Chambre du 10 juin 2010", ICC-01/04-01/07-2761-Red2, 29 August 2011, paras 6, 8, 12-15; and Document in Support of the Appeal, paras 177-180.
[12] Third Report, p. 4 and fn. 14; see also Document in Support of the Appeal, para. 168.
[13] "Rapport du Greffier sur l'écoute de certaines des conversations de Mathieu Ngudjolo suite à la décision de surveillance du Greffier en date du 22 janvier 2010", ICC-01/04-01/07-1890-Red, 19 February 2010, paras 2-8.

witnesses to testify and the substance of their evidence".[14] The Prosecutor also highlighted that it was important in the circumstances to receive full access to all the relevant information, given the "increasing frequency of reports that [her] witnesses [were] threatened and the inescapable facts that witnesses [were] suddenly balking at testifying or providing different versions inconsistent with their prior statements".[15]

10. The Trial Chamber rejected the Prosecutor's repeated requests to obtain full access to the recorded conversations. Quite astonishingly, the Chamber sustained this procedural strategy even after having been directed by the Appeals Chamber on one occasion (when deciding on the only appeal granted on the issue at stake by the Trial Chamber) to reassess the Prosecutor's request by applying a balancing approach between the rights of the accused and the Prosecutor's responsibility under article 54(1) of the Statute.[16] The Trial Chamber, acting pursuant to the Appeals Chamber judgment, nevertheless rejected the Prosecutor's second request, made on 11 March 2010, and observed that:

> [The Prosecutor] *did not argue that a lack of access to such information would, in this instance, deprive him of any possibility of achieving the objective prescribed by article 54(1) of the Statute*. In the view of the Chamber, the mere fact that one or more transcripts could *potentially* provide information of interest or, as the case may be, evidence necessary to the determination of the truth does not, *per se*, render their disclosure indispensable or, in any event, necessitate an interference with the rights of the Accused […]. [T]he exercise of balancing the rights of the Accused (article 67 of the Statute) and prosecutorial duties (article 54(1)(a) of the Statute) which the Appeals Chamber directed the Chamber to perform has led the Chamber to favour the rights of Mathieu Ngudjolo *in this instance*, since, moreover, the security of witnesses who must also be protected (article 68 of the Statute) is not at risk.[17]

11. The Majority concurs with these findings, noting that the Trial Chamber did not "act[] unreasonably when it refused to grant the Prosecutor *full* access to the recorded conversations".[18] We, however, firmly disagree. Quite to the contrary, the Prosecutor's disclosure request and the Trial Chamber's response warrant the conclusion that in this

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[14] "Public Redacted version of 'Prosecution's Request for Access to Material in Addition to the Registry's Reports on Ngudjolo's Non-Privileged Communications, pursuant to the Appeals Chamber Judgment of 9 December 2009 [ICC-01/04-01/07-1718-Conf-Exp]', 11 March 2010, ICC-01/04-01/07-1959-Conf-Exp", ICC-01/04-01/07-1959-Red, 11 March 2010, para. 10 ("Prosecutor's Second Disclosure Request").
[15] Prosecutor's Second Disclosure Request, para. 10.
[16] Appeals Chamber, "Judgment on the Appeal of the Prosecutor against the 'Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre'", ICC-01/04-01/07-1718, 9 December 2009, para. 52.
[17] Trial Chamber II, "Decision further to the Appeals Chamber judgment of 9 December 2009 and responding to request 1959-Conf-Exp of the Office of the Prosecutor", ICC-01/04-01/07-2187-tENG-Red, 10 June 2010, paras 61 and 71 (emphasis added) ("Decision of 10 June 2010").
[18] Majority Judgment, para. 270 (emphasis in the original).

instance the Trial Chamber misconstrued its duty to ensure a fair trial *vis-à-vis* both parties, and also failed to appropriately discern between the rights provided for and safeguarded by law and an *abuse* of such rights.

12. It is our strong conviction that the judicial duty to ensure fairness of the trial, as enjoined by virtue of article 64(2) of the Statute, encompasses the obligation of the Trial Chamber to safeguard the rights of the accused and *equally* the procedural rights of the Prosecutor, acting in public interest. It is further the responsibility of the Trial Chamber to prevent both a disruptive procedural conduct by either of the parties and the abuse of their statutory rights.

13. In the current case, although the Trial Chamber was well aware of the illicit behaviour of Mr. Ngudjolo from the detention centre,[19] the Chamber, and the Majority likewise, failed to discern the vital distinction between Mr. Ngudjolo's rights as provided for by law[20] and the clear *abuse of rights* on the part of Mr. Ngudjolo. Thus, by unduly favouring Mr. Ngudjolo's right to determine his defence strategy[21] over the Prosecutor's right to access evidence necessary for the determination of the truth, and in disregard of Mr. Ngudjolo's abusive conduct, the Trial Chamber disrupted the procedural balance between the parties to the detriment of the Prosecutor.

14. More specifically, by denying the Prosecutor access to the evidence at hand, the Trial Chamber deprived the Prosecutor of "the genuine opportunity to […] tender evidence free of any external and/or undue influence and to question witnesses comprehensively".[22] In addition, this procedural error had an adverse impact on the fulfilment of the Prosecutor's duty pursuant to article 54(1) of the Statute. It is bluntly clear from the language employed by the Prosecutor that receiving the requested information was essential for fulfilling the obligation to establish the truth imposed on her Office pursuant to article 54(1) of the Statute. As the Prosecutor rightly contended, "[a]ccess to these transcripts of the conversations *will enable the Prosecution to better assess the situation*"[23] with the aim of seeking the truth.

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[19] Notably, the Majority is also well aware of this fact. As observed in the Majority Judgment, the Trial Chamber took measures to protect witnesses who were facing potential risk and it prohibited, "on a provisional basis, all contact between Mr Ngudjolo and the outside and seperat[ed] him from other detained persons"; Majority Judgment, para. 259.
[20] Article 67 of the Statute.
[21] Decision of 10 June 2010, para. 61; Majority Judgment, para. 277.
[22] Document in Support of the Appeal, paras 205-206.
[23] Prosecutor's Second Disclosure Request, para. 10 (emphasis added).

15. It follows from the above that the Trial Chamber failed to properly weigh the procedural rights of the Prosecutor and those of the defence. As such, the Chamber abused its discretion by committing what the *ad hoc* tribunals define as "discernible error".[24] Accordingly, it is impossible to join the Majority in finding no error in the way the Trial Chamber managed the proceedings of the case. It is our belief that turning a blind eye to such a discernible error would send the wrong message that the Appeals Chamber is contributing to such practices in flagrant detriment of one of the parties at trial and with irreparable prejudice to the establishment of the truth.

(ii) Denial of the possibility to use the Registry Reports in examining and challenging relevant evidence (Mr. Ngudjolo, witness D03-88 and witness P-250)

16. Contrary to the Majority's view, we discern a similar material error on the part of the Trial Chamber in rejecting the Prosecutor's requests *re* the examination of evidence, namely to use the Registry Reports to cross-examine Mr. Ngudjolo and witness D03-88, and to examine witness P-250 regarding inconsistencies in his testimony. We consider that depriving the Prosecutor of the possibility to exercise her prosecutorial duties through examining and challenging the evidence at hand amounts, in these specific instances, to a material error.

17. More specifically, the Prosecutor was prevented from cross-examining Mr. Ngudjolo about his efforts "to locate protected Prosecution witnesses and family members in order to pressure them to recant or refuse to cooperate [or] […] to ensure that Defence witnesses presented a consistent and approved line when testifying on his behalf"".[25] This concern was reasonably raised by the Prosecutor, who further argued that she was prohibited from demonstrating that witness D03-88 lied when he testified that he had only spoken to Mr. Ngudjolo once when the latter was in the detention centre.[26]

[24] ICTY, Appeals Chamber, *Prosecutor v. Radovan Karadžić*, "Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir", IT-95-5/18-AR73.11, 13 November 2013, para. 29; *Prosecutor v. Ante Gotovina et al.*, "Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia", IT-06-90-AR73.5, 14 February 2011, para. 14; *Prosecutor v. Ramush Haradinaj et al.*, "Decision on Haradinaj's Appeal on Scope of Partial Retrial", IT-04-84bis-AR73.1, 31 May 2011, para. 8.
[25] Document in Support of the Appeal, para. 224.
[26] Document in Support of the Appeal, paras 221-222, and 224.

18. As explained by the Trial Chamber, and also noted by the Majority, the reason for denying the Prosecutor's request was that the intended use of the reports was to "test Mr Ngudjolo's credibility".[27] According to the Trial Chamber, "having analysed the relevant passages of the reports and in light of how the Prosecutor specifically intends to use them in cross-examination, [it] considers that such information does not […] seem 'of great importance' to the determination of the truth".[28] This led the Trial Chamber to conclude that "the use of these excerpts for that sole purpose does not […] justify the breach it would entail of the exercise of [Mr. Ngudjolo's] right to mount his defence and freely define [his] strategy".[29]

19. Similarly, in relation to witness D03-88, the Trial Chamber stated that the "material concerned is not factual information 'related to the case at hand'", which motivated the Chamber to rule that "while the Prosecutor's intended use of such material may actually be essential to the assessment of the witness's credibility, recourse to such excerpts for this sole purpose does not justify the ensuing breach of the Accused's exercise of his right to mount a defence".[30]

20. We strongly disagree with said propositions and deem the approach of the Trial Chamber, as endorsed by the Majority, to be seriously flawed. To start with, the Trial Chamber again failed to differentiate between, on the one hand, legitimate means, and, on the other hand, abusive means employed by Mr. Ngudjolo to mount his defence and to define his strategy. In the latter instance, the Chamber is duty bound to discipline an abusive conduct in pursuit of illicit objectives. This error should have been detected and accordingly reproved by the Majority.

21. Similarly, another critical defect of the Trial Chamber's assessment of the evidence should also not have been overlooked by the Majority. The determination of the truth is contingent on the examination of: (i) evidence that directly relates to the subject-matter of the case, and (ii) evidence conducive to ascertaining the trustworthiness of the former. This is self-evident, since the truth may be established solely on the basis of evidentiary material that is credible and reliable. Therefore, contrary to the Trial Chamber's considerations, it is our

[27] Majority Judgment, para. 273.
[28] Trial Chamber II, "Decision on Prosecution requests 2787 and 3066 (monitoring of Mathieu Ngudjolo's non-privileged communications)", ICC-01/04-01/07-3120-tENG-Red, 19 August 2011, para. 27 ("Decision of 19 August 2011").
[29] Decision of 19 August 2011, para. 28.
[30] Decision of 19 August 2011, para 32.

firm understanding that evidence concerning the credibility or the reliability of evidence on the subject-matter of the case is likewise indispensable for a trial chamber's final determination in accordance with article 74(2) of the Statute and for the establishment of the truth.

22. We are thus of the view that by depriving the Prosecutor of the possibility to access and rely on information relevant to the credibility of witnesses' testimony the Trial Chamber has inimically affected the search for the truth – an error which should have been condemned by the Majority.

23. Interestingly, a similar conclusion is reached by the Majority, when it states that "by denying the Prosecutor the opportunity to use the Registry Reports in the trial to cross-examine Mr Ngudjolo and witness D03-88, the Trial Chamber placed undue weight on the need to protect Mr Ngudjolo's rights as opposed to the need to establish the truth".[31] Hence, the Majority also acknowledges that the Prosecutor's request was for the purpose of establishing the truth, which truth, in turn, was uncertain. As the Majority seems to place great weight on the determination of the truth as being "a central aspect of any criminal trial",[32] its conclusion that the detected errors appear "not to have had any impact on the Trial Chamber's finding[s]"[33] regarding Mr. Ngudjolo's criminal responsibility sounds highly surprising and incoherent, if not incomprehensible.

24. It is our resolute conviction that, had the Trial Chamber granted the Prosecutor said evidentiary requests, the Impugned Decision would have been *substantially* different.

Infringement of the judicial duty to request the submission of evidence and to establish the truth under articles 64(6)(d) and 69(3) of the Statute

25. Not only did the Trial Chamber impede the Prosecutor from performing her duties in establishing the truth by denying her evidentiary requests as discussed hitherto, but it also fell short of assuming its *own* judicial duty to ascertain the truth enjoined by virtue of articles 64(6)(d) and 69(3) of the Statute – an error which the Majority entirely fails to acknowledge. We are of the view that this failure on the part of the Trial Chamber affected the

[31] Majority Judgment, para. 276.
[32] Majority Judgment, para. 275.
[33] Majority Judgment, para. 289.

comprehensive search for the truth and, ultimately, adversely impacted the basis of the Trial Chamber's final determination.

26. Undoubtedly, as evidenced by the first sentence of article 69(3) of the Statute, the main contribution to the collection and the discussion of the evidence on which a trial chamber bases its decision pursuant to article 74(2) of the Statute pertains to the parties. By preventing the Prosecutor from accessing and examining the evidence at issue, the Trial Chamber also missed the opportunity to benefit from relevant and potentially useful contribution on the part of the Prosecutor for the purposes of a further elucidation of the evidence at hand. In particular, the Trial Chamber deprived itself of an additional contribution to its task of determining the trustworthiness of the evidence that forms the basis of its final decision under article 74 of the Statute. Therefore, it is our firm view that by taking this course of action the Trial Chamber indeed not only affected the Prosecutor's obligation under article 54(1) of the Statute and infringed the Prosecutor's right to a fair trial as enshrined in article 64(2) of the Statute, but at the same time breached its *own* judicial duty to determine the truth as article 69(3) of the Statute dictates.

27. We deem it also necessary to emphasise that, even assuming *arguendo* that the Prosecutor had not made evidentiary requests to this effect, the Court's statutory documents require the Trial Chamber to play a proactive role in the truth-finding process. In particular, this is apparent in articles 64(6)(d) and 69(3), second sentence, of the Statute. In this respect, we agree with the Majority's observation to the effect that the duty to "actively contribute" to the establishment of the truth is imposed not only on the Prosecutor but also on the Trial Chamber.[34] Indeed, such a duty is even "heightened in circumstances where the Chamber is aware of possible efforts to distort witness testimony or the truth finding process".[35]

28. In the present case, the Trial Chamber was cognizant of the existence of serious doubts about the credibility of witnesses who might have been influenced or induced by Mr. Ngudjolo. It is worth recalling that the Trial Chamber was alerted by several reports of the Registrar in that respect.[36] The Trial Chamber was made aware in terms which could have hardly been more explicit and which we deem appropriate to reproduce here in full: "[i]n view of the information revealed by the monitoring of communications, it would appear", the

[34] Majority Judgment, paras 256 and 275.
[35] Majority Judgment, para. 275.
[36] Majority Judgment, para. 259.

Registrar said, "that Mathieu Ngudjolo has sought to have testimonies changed, which might affect the veracity thereof and lead to questions about the attitude of Mathieu Ngudjolo regarding the orders of the Chamber and which might possibly constitute contempt of the Court"[37]. The Registrar went so far as to call upon the Chamber's exercise of its own responsibilities by stating that "it is not for the Registrar to determine whether or not there has been contempt of the Court and it is for the Chamber to assess and take the measures it deems necessary".[38] However, the Trial Chamber chose to abdicate its leading role as a trier of fact and authority in charge of the proceedings. Not only did it refuse the contribution of the Prosecutor in elucidating the issue at stake, but remained itself passive, thereby relinquishing its responsibility over the matter. The only step taken by the Trial Chamber was to defer to the Registrar the assessment of the intercepted telephone conversations and the selection in terms of quantity and quality of the information to be disclosed to the Prosecutor. Although carrying out these intercepts falls within the mandate of the Registry, the fact that the Trial Chamber delegated the entire responsibility to assess the intercepted conversations to the Registrar, when there was a need of exercising a more active role on its part, amounts to a failure to act in accordance with its judicial responsibilities.

29. The Trial Chamber further refrained to rule on questions posed by the Registrar concerning the random monitoring of Mr. Ngudjolo's recorded telephone conversations, asserting that it was beyond its responsibility. In view of the information provided about witness intimidation, as reflected in different reports and telephone conversations provided by the Registrar, the Trial Chamber should instead have exercised its powers under article 64(6)(d) together with article 69(3) of the Statute, namely to assume a proactive role in the evidentiary proceedings critical for the establishment of the truth by requesting the submission of the relevant evidence.

30. Regrettably, and contrary to its own acknowledgment of the active role that a trial chamber is destined to play, the Majority accepts the passive position adopted by the Trial Chamber in this case. By so doing, the Majority endorses the material errors of the Trial Chamber and commits itself a serious error. The seriousness of this error cannot certainly be mitigated by the Majority's statement that "an appellant is obliged not only to set out the

[37] "Registrar's initial report on the monitoring of Mathieu Ngudjolo Chui's non- privileged communications further to the Registrar's decision of 12 February 2009", ICC-01/04-01/07-1195-tENG-Corr-Red, 9 June 2009, para. 27 ("First Report").
[38] First Report, para. 27.

alleged error, but also to indicate with sufficient precision, how this error would have materially affected the impugned decision".[39] In this regard, we believe it is compelling to underline that when an alleged error consists in a trial chamber's *failure* to adopt a course of action, an appellant will by definition never be in a position to indicate, with any precision, how this error would have materially affected the impugned decision. Accordingly, the demonstration of the erroneous nature of the inaction must be considered sufficient to substantiate the ground of appeal based on it. To hold otherwise, as the Majority does, is tantamount to require something impossible from the appellant, namely a *probatio diabolica*. Indeed, if the required material was not available to the appellant, how can it be expected to prove that the identified error "materially affected the Impugned Decision" and that, as the Majority asserts, the Trial Chamber "would have rendered a decision that is substantially different".[40] The Majority thus requires that the appellant meet an impossible standard, one which can never be satisfied given the facts of this case.

B. SECOND GROUND

31. We have argued above that the Trial Chamber erred by remaining unduly passive throughout the evidence-gathering process, contrary to its duty prescribed by articles 64(6)(d) and 69(3) of the Statute. Equally detrimental to the establishment of the truth was the methodology adopted by the Trial Chamber towards the evidence submitted and discussed at trial. The Chamber assessed in isolation individual items of evidence and failed to properly consider the evidence in its entirety. As a result of this approach, the Trial Chamber disregarded trustworthy, coherent and vital evidence which, when pieced together with other relevant and credible evidence, would have provided a solid basis for the determination of the truth. Therefore, we strongly disagree with the Majority's finding that the Trial Chamber did not err in its assessment of the evidence.

32. The Majority fails to discern the flawed piecemeal methodology applied by the Trial Chamber in the evaluation of evidence. In confirming the Impugned Decision, the Majority, in effect, clearly contradicts its own jurisprudence, as well as principles enunciated in the present Majority Judgment.

[39] Majority Judgment, para. 284.
[40] Majority Judgment, paras 20-21.

33. In the recent "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (the "*Lubanga* A5 Judgment"),[41] the Appeals Chamber set out the principled approach that should guide trial chambers in assessing the evidence in order to reach a finding under article 66(3) of the Statute. By reference to the ICTY Appeals Judgment in the *Mrkšić and Šljivančanin* case, the Appeals Chamber ruled that:

> [I]n making a determination about the innocence or guilt of the accused, the Trial Chamber is called upon to determine "in respect of each of the counts charged […] whether it was satisfied beyond reasonable doubt, on the basis of the *totality* of the evidence, that every element of the crime in question charged […], including each form of liability, has been established".[42]

34. Two interrelated principles follow from the above that were affirmed by the Appeals Chamber in the *Lubanga* A5 Judgment. First, "when determining whether [the standard of beyond reasonable doubt] has been met, the Trial Chamber is required to carry out a holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue".[43] Second, the "beyond reasonable doubt" standard must not be applied to each and every fact established by the different pieces of evidence, but to the facts on which the elements of the crime and mode of liability eventually rest.[44] This is equally acknowledged by the Majority in its present Judgment, when it finds that "the Trial Chamber was correct" in stating that "the standard of proof 'must be applied to establish the facts forming the elements of the crime or the mode of liability alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction'".[45] It follows, *a contrario*, that individual pieces of evidence should not be subject on their own to the "beyond reasonable doubt" standard.[46]

35. The rationale behind this principled approach to the assessment of evidence is readily apparent. Only when the evidence at trial is evaluated in its entirety can the accurate determination of the subject-matter of the case and, accordingly, the truth be achieved. This holistic approach, whereby individual pieces of evidence are assessed in light of the totality of the evidence, enables a trial chamber to verify the reliability and the credibility of the

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[41] Appeals Chamber, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", ICC-01/04-01/06-3121-Red, 1 December 2014.
[42] *Lubanga* A5 Judgment, para. 22, citing ICTY, Appeals Chamber, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, "Judgement", IT-95-13/1-A, 5 May 2009 (emphasis in the original).
[43] *Lubanga* A5 Judgment, para. 22 (emphasis in the original).
[44] *Lubanga* A5 Judgment, para. 22.
[45] Majority Judgment, paras 124-125.
[46] *Lubanga* A5 Judgment, para. 57.

material that will form the basis of its final determination pursuant to article 74(2) of the Statute.

36. As noted by the ICTR Appeals Chamber in *Ntagerura et al.*:

> [E]ven if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows that evidence to lack credibility.[47]

37. Thus, eventually, the determination of whether an individual item of evidence is credible and reliable depends on the extent to which it is corroborated, if at all, by other pieces of evidence. Indeed, when an individual item of evidence is evaluated in light of the entire body of material adduced in the case, said piece of evidence may gain strength or be complemented by other evidence.[48]

38. In *Limaj et al.* the ICTY Appeals Chamber stated:

> The ultimate weight to be attached to each relevant piece of evidence […] is not to be determined in isolation. Even though […] each […] relevant piece of evidence, viewed in isolation, may not be sufficient to satisfy the obligation of proof on the Prosecution, it is the cumulative effect on the evidence, i.e. the totality of the evidence […] which must be weighed to determine whether the Prosecution has proved [its case] beyond reasonable doubt […].[49]

39. Consequently, a trial chamber should adopt a holistic approach, whereby all relevant pieces of evidence are considered together as an entire body, *i.e.* as a system of evidence, and not merely on their own. Only when the trial chamber does not confine its assessment to each individual piece of evidence in isolation will the trier of fact be in a position to make an accurate determination on the merits of the case.

40. Further, as part of the fact-finding process, "[a] Trial Chamber […] has the main responsibility to resolve any inconsistencies that may arise within and/or among witnesses'

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[47] ICTR, Appeals Chamber, *Prosecutor v. André Ntagerura et al*., "Judgment", ICTR-99-46-A, 7 July 2006, para. 174.
[48] ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadić*, "Judgment on allegations of Contempt against Prior Counsel, Milan Vujin", IT-94-1-A-R77, 31 January 2000, para. 92.
[49] ICTY, Appeals Chamber, *Prosecutor v. Fatmir Limaj et al.*, "Judgement", IT-03-66-A, 27 September 2007, para. 153, citing ICTY, Trial Chamber, *Prosecutor v. Fatmir Limaj et al.*, "Judgement", IT-03-66-T, 30 November 2005, para. 20.

testimonies".[50] This was duly noted by the Appeals Chamber in the *Lubanga* A5 Judgment, by reference to the jurisprudence of the *ad hoc* tribunals. Undoubtedly, in resolving such inconsistencies the methodology applied by the Trial Chamber to the assessment of evidence is vital. The finder of fact has to assess each piece of evidence in light of all evidence bearing on the element of the crime or the mode of liability in question, and give preference to the item which best fits into the system established by that evidence. It is our categorical understanding that only by conducting a holistic evaluation of the evidence can a trial chamber ensure that potential inconsistencies arising within or among individual items of evidence are overcome, if and to the extent possible. It would be inconceivable for a trial chamber to simply reject all items of evidence that come in contradiction; it would be equally wrong to reject a piece of evidence in its entirety because it is credible and/or reliable in some parts, but not in others. The latter point is acknowledged by the Majority in its Judgment.[51]

41. We are also firmly of the view that it would be wrong for a finder of fact to reject outright a piece of evidence that does not provide comprehensive information to establish in and of itself an element of the crime or mode of liability charged. Doing so would mean to subject individual pieces of evidence, on their own, to the "beyond reasonable doubt" standard – an approach which, as pointed out above, was critically dissected in the jurisprudence of the *ad hoc* tribunals and the recent case-law of this Appeals Chamber.[52] As the Impugned Decision clearly illustrates, when individual items of evidence are evaluated on their own, in isolation, it will often be impossible for a trial chamber to determine on which piece of evidence to rely and to what extent. The examples below warrant the conclusion that, by adopting a fragmentary approach, the Trial Chamber excluded from the basis of its final determination evidence that, although deemed credible and reliable by the Trial Chamber, did not provide a comprehensive account of *all* the facts and circumstances under consideration. Similarly, such erroneous methodology towards the assessment of evidence prevented the Trial Chamber from resolving contradictions or inconsistencies between different items of evidence and, accordingly, to avail itself of said pieces of evidence.

[50] *Lubanga* A5 Judgment, para. 23, citing ICTY, Appeals Chamber, *Prosecutor v. Zoran Kupreškić et al.*, "Judgement", IT-95-16-A, 23 October 2001, para. 31.
[51] Majority Judgment, para. 168.
[52] *Lubanga* A5 Judgment, para. 22.

Specific examples of the fragmentary approach of the Trial Chamber to the evaluation of evidence

42. A number of key findings in the Acquittal Decision illustrate the Trial Chamber's fragmentary approach to the evidence and its disregard for a global and holistic evaluation of the evidence which regrettably in our view is not reproached by the Majority.

(i) The Trial Chamber's assessment of witness P-317's testimony

43. An apposite illustration of the erroneous methodology adopted by the Trial Chamber appears at paragraph 434 of the Acquittal Decision. This paragraph exemplifies the assessment carried out by the Trial Chamber of the evidence provided by witness P-317. The witness testified that Mr. Ngudjolo had told her that he had organized the attack on Bogoro. The Trial Chamber held, *inter alia*, that P-317's statement was indicative of Mr. Ngudjolo's possible involvement in the Bogoro attack, but it "appear[ed] too general ultimately to determine the Accused's *precise status* and *role* in the Bedu-Ezekere *groupement*".[53]

44. A careful examination of the Trial Chamber's findings reveals that it assessed the above mentioned evidence in isolation. Although the testimony of witness P-317 did not contain information about the role and status of Mr. Ngudjolo in the Bedu-Ezekere *groupement*, the witness presented her recollections of her meeting with Mr. Ngudjolo and, in compliance with the oath given in court, she gave information relevant to the facts and circumstances of the case to the best of her knowledge. The witness did not provide fabrications or speculations about facts unknown to her. The Trial Chamber should not have contemplated this item of evidence in isolation "as if it existed in a hermetically sealed compartment".[54] Instead, the Trial Chamber should have considered "the accumulation of all the evidence in the case".[55]

45. Furthermore, the Trial Chamber was not called upon to make a final determination on the overall merits of the case, or on Mr. Ngudjolo's status within the Lendu militia, based exclusively on the testimony of this witness. The opposite understanding entails that the Prosecutor would be required to present only such pieces of evidence that would in and of

[53] Acquittal Decision, para. 434 (emphasis added).
[54] ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadić*, "Judgment on allegations of Contempt against Prior Counsel, Milan Vujin", IT-94-1-A-R77, 31 January 2000, para. 92.
[55] ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadić*, "Judgment on allegations of Contempt against Prior Counsel, Milan Vujin", IT-94-1-A-R77, 31 January 2000, para. 92.

themselves cover all the elements of a crime or mode of liability charged. The determination of the merits of the case – known to be a very delicate process, to which a judge's appreciation skills are critical – would become to a great extent an automatic exercise. As ideal as it may be to have such comprehensive pieces of evidence, this could hardly be considered a realistic scenario in any criminal jurisdiction, be it international or domestic. If said approach were to be followed, there would scarcely be any evidence available to trial chambers to reach a final determination. Such an approach is clearly unreasonable, all the more so in cases as complex as those before this Court. It is regrettable that the Majority does not discern this error in the Trial Chamber's evaluation of evidence and is satisfied, based on its deferential standard of review, that the Trial Chamber's approach was not unreasonable.[56]

(ii) The Trial Chamber's assessment of witness D02-176's testimony

46. The methodological error of the Trial Chamber towards the evidence is demonstrated also in its assessment of witness D02-176's testimony. The witness stated that Mr. Ngudjolo was commander of operations during the 24 February 2003 attack on Bogoro. The Trial Chamber found that the witness was particularly well-placed to state which military commanders were at enemy positions, considering that he was a UPC captain and company commander in Bogoro. However, the Trial Chamber took issue with the fact that the witness "provided no further details on Mathieu Ngudjolo's status".[57] In so doing, the Trial Chamber effectively dismissed relevant evidence that, if relied upon *together* with other evidence in the record, might have sufficed for the Trial Chamber to establish Mr. Ngudjolo's control over the Lendu militia of the Bedu-Ezekere *groupement* at the relevant time.

(iii) The Trial Chamber's assessment of contradictory and hearsay evidence

47. The Trial Chamber's fragmentary approach also affected its ability to resolve issues arising from apparently contradictory evidence. For instance, in its overall conclusion, the Trial Chamber noted that the admission made by Mr. Ngudjolo to witness P-317 that he organised the attack on Bogoro was inconsistent with the statement made by Mr. Ngudjolo to the Congolese Prosecutor, according to which he had led only the operation that took place on 6 March 2003 in Bunia. Eventually, the Trial Chamber felt compelled to treat these two

[56] Majority Judgment, paras 59 and 199.
[57] Acquittal Decision, para. 433.

pieces of evidence with circumspection.[58] The Majority unfortunately does not find an error in the Trial Chamber's approach.[59]

48. Notably, a trial chamber has the responsibility to solve inconsistencies that may arise within or among different pieces of evidence. If a trial chamber were to treat with circumspection every two items of evidence that come in contradiction, it would be impossible to ever make a decision. One should be mindful of the conflicting interests of the parties in criminal proceedings and of the ensuing inevitability of contradicting evidence presented in such proceedings. This however does not mean that trial chambers can simply disregard such evidence and abandon not only their judicial obligation to analyse each piece of evidence but also the synchronized system of evidence adduced as the basis for the final determination on the merits of the case.

49. The Trial Chamber committed a similar mistake when it analysed the evidence of witnesses P-12 and P-160. Both witnesses testified that Germain Katanga ("Mr. Katanga") confided to them that Mr. Ngudjolo had helped him during the attack on Bogoro.[60] However, the Trial Chamber noted that Mr. Katanga denied having made such statements to the witnesses, and once again, in isolation and without consideration of said evidence against the backdrop of the entire body of evidence in the case, decided to treat the two testimonies with circumspection.[61] It is regrettable that the Majority again does not discern an error.[62] As a consequence, the Majority fails to give proper guidance in the case at hand, and most importantly for the future jurisprudence of this Court, as to how a finder of fact should resolve, rather than set aside, inconsistencies within or among different pieces of evidence.

50. In application of this fragmentary methodology, the Trial Chamber also effectively excluded relevant evidence of several witnesses on the ground that it was hearsay (D02-176, D03-340, D02-161, V-2 and V-4).[63] We do not contest that hearsay evidence generally has a lower probative value. However, such evidence is not to be automatically excluded. The Trial Chamber should have assessed whether and how this hearsay evidence corroborated or was corroborated by other evidence in the record.

[58] Acquittal Decision, para. 497.
[59] Majority Judgment, paras 102-103.
[60] Acquittal Decision, para. 441.
[61] Acquittal Decision, para. 441.
[62] Majority Judgment, paras 206-207.
[63] Acquittal Decision, paras 433, 435, 437-440, and 496.

51. These examples demonstrate the Trial Chamber's erroneous methodology throughout the whole Impugned Decision in evaluating the evidence in a fragmentary manner and assessing the probative value of individual pieces of evidence in isolation. Key evidence and facts were affected by this error, including the Trial Chamber's assessment of the evidence relating to Mr. Ngudjolo's role in the Bogoro attack, as illustrated above. It follows that, due to its flawed methodology, the Trial Chamber pronounced itself unable to make a finding beyond reasonable doubt that Mr. Ngudjolo had control over the Lendu combatants who took part in the Bogoro attack. Considering that the approach to the evaluation of evidence is essential for a chamber to be able to take a well-versed decision on the merits of a case, we cannot but conclude that the error materially affected the Acquittal Decision.

C. FIRST GROUND

52. As stated above, the evaluation of the evidence is determinative for any trial chamber to make an accurate decision on the merits. By the same token, it is equally vital that a trial chamber should not engage in speculations and misinterpretation of the standard of proof under article 74(2) of the Statute in its assessment of the evidence. This, as elaborated below, leads to our disagreement with the Majority to reject the first ground of appeal.

53. We consider that the Trial Chamber committed errors of fact in its application of the standard of proof "beyond reasonable doubt". A number of findings in the Acquittal Decision reveal that the Trial Chamber made key determinations based on speculation and a hypothetical reading of the evidence, as well as on an erroneous application of the standard of proof. In particular, the Trial Chamber required proof of facts with almost absolute certainty. The Majority tolerates such practice.[64]

54. The Majority emphasizes the most essential aspect of the "reasonable doubt" standard and endorses the pronouncement of the ICTR Appeals Chamber in *Rutaganda*:

> The reasonable doubt standard in criminal law cannot consist in *imaginary or frivolous doubt* based on empathy or prejudice. It must be based on logic and common sense, and have a *rational link to the evidence, lack of evidence or inconsistencies in the evidence*.[65]

[64] Majority Judgment, para. 126.
[65] Majority Judgment, para. 109 (emphasis added), citing ICTR, Appeals Chamber, *Prosecutor v. Georges Rutaganda*, "Judgment", ICTR-96-3-A, 26 May 2003, para. 488.

55. We agree with the Majority on this point, and we are of the view that a clear distinction must be drawn between the standard of proof "beyond reasonable doubt" to be applied by a trial chamber and proof beyond *any* doubt.

56. The "beyond reasonable doubt" standard is the manifestation of two fundamental principles of criminal law. The first principle proclaims that everyone shall be presumed innocent until proven guilty. According to the second, equally important principle, a verdict should be based on the evidence in the record. These principles find expression in articles 66 and 74(2) of the Statute. The latter determines the distinction between the standard of "beyond reasonable doubt" and proof beyond *any* doubt. The "reasonable doubt" standard does not leave room for imaginary doubts or speculative observations on the guilt or innocence of the accused that cannot be reasonably derived from the evidence. Indeed, if a trial chamber were to consider such forced doubts it would be virtually impossible to ever enter a conviction.

57. As ICTY Appeals Chamber stated in *Mrkšić and Šljivančanin*:

> The test for establishing proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be *derived from the evidence*, except that of guilt".[66]

58. Despite its correct articulation of the standard of proof "beyond reasonable doubt", the Majority fails to apply it accordingly in its evaluation of the Acquittal Decision. As a consequence, it confirms findings of the Trial Chamber which appear instead to be based on speculation and unreasonable doubt. The Trial Chamber, on its part, erred as discussed below.

59. To start with, at paragraph 434 of the Acquittal Decision, the Trial Chamber considered the evidence of witness P-317, who, as referenced above, testified that Mr. Ngudjolo had told her that he had organized the attack on Bogoro. The Trial Chamber stated, *inter alia*, that:

> Although […] there is no reason to doubt the credibility of this witness's statements, it cannot be presupposed that the Accused actually assumed those military responsibilities imputed by the Prosecution. […] [I]t cannot be ruled out that akin to others in Ituri at the time, [Mr. Ngudjolo] had wanted to claim responsibility for an

[66] ICTY, Appeals Chamber, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, "Judgement", IT-95-13/1-A, 5 May 2009, para. 220 (emphasis added).

attack so that he would be given a higher rank if integrated into the regular Congolese army.[67]

60. With due respect, we disagree with the Majority that the Trial Chamber's findings were not speculative, but "based on similar evidence on the record".[68] In its reasoning, the Majority refers to two pieces of evidence, the first of which merits a special consideration. This is Mr. Ngudjolo's testimony that he had lied to the Congolese Prosecutor about having organized the 6 March 2003 attack on Bunia in order to justify his rise to the key position of FNI-FRPI Chief of Staff. We note however that the Trial Chamber made no such reference to Mr. Ngudjolo's testimony, which is also acknowledged by the Majority.[69] The reference of the Majority to this piece of evidence in its reasoning is therefore confusing. To suggest that the Trial Chamber *may have relied* on said piece of evidence, absent any mention of it in the Chamber's finding, would mean to speculate on how the Trial Chamber reached its conclusions. This, in turn, may leave the impression that the Appeals Chamber is merely seeking to remedy this error in the Acquittal Decision.

61. The second piece of evidence to which the Majority refers is the testimony of witness D03-11. We are of the view that this, in fact, is the only evidence on which the Trial Chamber clearly relied.[70] This item of evidence leads the Majority to consider that "the Trial Chamber provided some evidentiary foundation for the possibility that Mr Ngudjolo may have wanted to 'claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army'".[71] On this point we respectfully disagree with the Majority. Witness D03-11's testimony regarding his own acts, statements and motivations cannot reasonably form the basis for a finding that *someone else* – namely Mr. Ngudjolo – may have himself similarly claimed false responsibility for the attack on Bogoro. Accordingly, we fail to see how this testimony could serve as a basis for the Trial Chamber's determination. In light of the above, we can only conclude that the Trial Chamber's finding was entirely speculative and had no basis in the evidence.

62. Similarly, at paragraphs 431 – 433 of the Acquittal Decision, the Trial Chamber examined the evidence of witness D02-176. The witness testified that Mr. Ngudjolo was "the

[67] Acquittal Decision, para. 434 (footnotes omitted).
[68] Majority Judgment, para. 60.
[69] Majority Judgment, para. 60.
[70] Acquittal Decision, para. 434.
[71] Majority Judgment, para. 60.

number one and commander of operations during the attack on Bogoro".[72] The Trial Chamber found that D02-176 was "particularly well placed to state which military commanders were at enemy positions", given that he was a UPC captain and company commander in Bogoro.[73] However, without providing any legal and/or factual reasoning, the Trial Chamber simply speculated that "*[it could not] rule out* that the witness had associated Mathieu Ngudjolo's status in the FNI with the position which he considered him to have held prior to the attack on Bogoro".[74] This holding was reiterated in the overall conclusions of the Acquittal Decision.[75] The Majority acknowledges the absence of reasoning on the part of the Trial Chamber,[76] but still does not consider the Trial Chamber's finding erroneous.[77] Instead, the Majority proceeds to examine the transcripts of witness D02-176's testimony itself and finds that they "provide some evidentiary basis for [the Trial Chamber's inference]".[78]

63. Once again we cannot join the Majority in this approach. In the absence of any justification on the part of the Trial Chamber or any reference to a specific, relevant part of witness D02-176's testimony, it is not the role of the Appeals Chamber to compensate for such lack of reasoning and engage itself in an examination of the witness's testimony. Such an approach may leave the impression that the Majority is attempting to remedy the Trial Chamber's error. Be that as it may, although it is not for the Appeals Chamber to study the trial record for the purpose of justifying how a trial chamber arrived at a certain conclusion (what actually the Majority does), a review of witness D02-176's testimony in the relevant part shows that the witness gave an unambiguous account of Mr. Ngudjolo's involvement in the attack on Bogoro. According to the witness, "Ngudjolo was the commander who supervised operations at Bogoro on the 24th of February".[79] As correctly argued by the Prosecutor, such testimony does not indicate that the witness might have been confused as to Mr. Ngudjolo's position of command.[80] We are thus of the view that the Trial Chamber's holding is the result of a forced doubt and not a reasonable doubt arising from the evidence in the record.

[72] Acquittal Decision, para. 431.
[73] Acquittal Decision, para. 432.
[74] Acquittal Decision, para. 433(emphasis added).
[75] Acquittal Decision, para. 496.
[76] Majority Judgment, para. 87.
[77] Majority Judgment, para. 88.
[78] Majority Judgment, para. 87.
[79] Transcript of 10 May 2011, ICC-01/04-01/07-T-257-Red-ENG, p. 7, lines 5-6.
[80] See Document in Support of the Appeal, para. 60.

64. A further example of the Trial Chamber's speculative approach is its evaluation of Mr. Ngudjolo's admission to the Congolese Prosecutor that he had directed the 6 March 2003 attack on Bunia.[81] The Trial Chamber observed that Mr. Ngudjolo failed to indicate which troops he led in Bunia at the time. For this reason, it found that Mr. Ngudjolo appeared to claim leadership of the entire operation. However, in the view of the Chamber, everything indicated that the Bunia offensive was led by the UPDF (the armed forces of the State of Uganda) and Lendu combatants.[82] Consequently, the Chamber stated that, although *it could not rule out the possibility* that Mr. Ngudjolo had led the Lendu combatants from Bedu-Ezekere during the Bunia operation, it found itself unable to determine that beyond reasonable doubt.[83] The Majority finds that the assessment made by the Trial Chamber was not unreasonable.[84]

65. We, however, disagree with the above finding. As rightly pointed out by the Prosecutor, it was unreasonable for the Trial Chamber to expect Mr. Ngudjolo to specify in his admission to the Congolese Prosecutor which troops he had led during the 6 March 2003 Bunia operation.[85] We recall the Trial Chamber's finding that "at the end of 2002 Mathieu Ngudjolo was a man of some standing within Bedu-Ezekere *groupement*".[86] The Trial Chamber further found that in March 2003, and thus before Mr. Ngudjolo had given his statement to the Congolese Prosecutor, he had come to hold "a very senior position within the FNI/FRPI alliance".[87] Considering his position in the Bedu-Ezekere *groupement* and later on in the FNI-FRPI alliance, it cannot be expected that Mr. Ngudjolo would specify or had to specify to the Congolese Prosecutor which group he led during the Bunia operation. In our opinion, the Trial Chamber once again relied on a forced doubt. When Mr. Ngudjolo's statement is read in context, it becomes clear that the Trial Chamber's doubt was unreasonable.

66. Based on the above and in sheer contrast to the finding of the Majority, it is our strong conviction that the Trial Chamber erred in making determinations based on speculation and forced doubt and misapplied the standard of proof "beyond reasonable doubt". This error

[81] Acquittal Decision, para. 455.
[82] Acquittal Decision, para. 456.
[83] Acquittal Decision, para. 456.
[84] Majority Judgment, paras 99-104.
[85] See Document in Support of the Appeal, para. 60.
[86] Acquittal Decision, para. 491.
[87] Acquittal Decision, para. 500.

affected the Trial Chamber's analysis of the evidence relating to Mr. Ngudjolo's control over the Lendu militia at the relevant time and its decision on the merits.[88] Considering that this evidence was key to the subject matter of the case, we are of the opinion that the error materially affected the Acquittal Decision.

67. Moreover, in our view, it is imperative that such approaches based on speculations and forced doubts are avoided by any court of law in order not to create the impression of a pre-determined verdict.

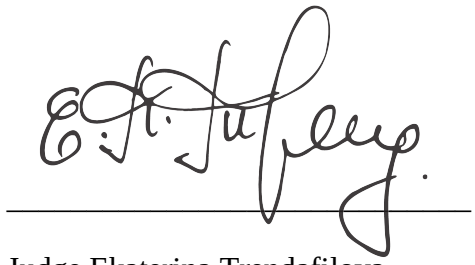
D. CONCLUSION

68. On the basis of the reasoning developed above, we conclude that the Trial Chamber committed the purported errors raised by the Prosecutor. Instead of reversing the Acquittal Decision, the Majority turns a blind eye to these errors. Moreover, when acknowledging certain mistakes committed by the Trial Chamber, the Majority deems them mere errors that, in its opinion, did not materially affect the Acquittal Decision, without providing proper reasoning for its findings.

69. The issues at stake in this appeal and discussed herein are crucial to the proper conduct of any trial proceedings and are fundamental for the future cases before this Court. A trial chamber should not abdicate its paramount responsibility to properly manage the conduct of trial proceedings and ensure their fairness. In particular, a trial chamber should not deprive the parties and itself of crucial evidence impacting on the credibility of the witnesses. Furthermore, a fragmentary approach towards the evaluation of evidence and speculations on its substance create highly alarming precedents in international criminal law, capable of compromising the integrity of the whole proceedings and undermine the perception of the victims and the public that justice is being delivered.

70. That said, we are of the view that the Impugned Decision was affected by material errors and, accordingly, the Appeals Chamber should have amended or reversed said decision and ordered a new trial before a different trial chamber, pursuant to article 83(2) of the Statute.

[88] Acquittal Decision, paras 496 and 503.



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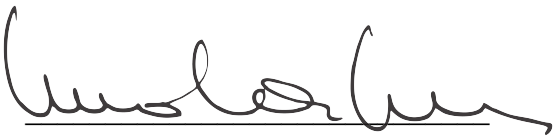

Judge Cuno Tarfusser

Dated this 27th day of February 2015

At The Hague, The Netherlands