Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-02/12**
Date: **28 October 2013**

THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Sang-Hyun Song
Judge Cuno Tarfusser
Judge Erkki Kourula
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. MATHIEU NGUDJOLO CHUI

Public Redacted Version

Response of the Defence for Mathieu Ngudjolo to the "Prosecution Reply to the Defence Response to the Prosecution's Appeal Brief"

(ICC-01/04-02/12-126-Conf)

Source: **Defence Team for Mathieu Ngudjolo**

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I. BACKGROUND

1. On 18 December 2012, Trial Chamber II of the International Criminal Court ("Trial Chamber II") acquitted Mathieu Ngudjolo Chui (the "Accused", "Acquitted Person", or "Respondent").[1]

2. On 20 December 2012, the Prosecutor (the "Prosecution" or "Appellant") filed a notice of appeal on the basis of articles 81(1)(a) and 83(2) of the Rome Statute (the "Statute"), rule 150 of the Rules of Procedure and Evidence (the "Rules") and regulation 157 of the Regulations of the Court.[2]

3. On 19 March 2013, the Prosecution filed the "Prosecution's Document in Support of Appeal against the *Jugement rendu en application de l'article 74 du Statut*" (the "Prosecution's Appeal Brief").[3]

4. On 18 June 2013, the Defence replied to the Prosecution's Appeal Brief.[4]

5. On 28 June 2013, the Prosecution sought leave from the Appeals Chamber to respond to the Defence's reply to its Appeal Brief.[5]

6. On 2 July 2013, the Appeals Chamber instructed the Defence to respond to the Prosecution's Request (the "Order")[6] by 8 July 2003.

7. On that date, the Defence filed its response, in which it stated that it did not object to the Prosecution's request to reply insofar as the reply was confined to the matters which allegedly arose *ex improviso* from the Defence Response, set out in paragraph 9 of the

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[1] *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, 18 December 2012.
[2] *The Prosecutor v. Mathieu Ngudjolo Chui,* "Prosecution's Appeal against Trial Chamber II's *Jugement rendu en application de l'article 74 du Statut*", ICC-01/04-02/12-10 A, 20 December 2012.
[3] *The Prosecutor v. Mathieu Ngudjolo Chui,* "Prosecution's Document in Support of Appeal against the *Jugement rendu en application de l'article 74 du Statut*", ICC-01/04-02/12-39-Conf, 19 March 2013.
[4] "Corrigendum to the Defence for Mathieu Ngudjolo's brief in response to the 'Prosecution's Document in support of appeal against the *Jugement rendu en application de l'article 74 du Statut'*" (ICC-01/04-02/12-39-Conf-Exp), ICC-01/04-02/12-90-Conf-Corr-tENG.
[5] *The Prosecutor v. Mathieu Ngudjolo Chui,* "Prosecution Request for Leave to Reply to the Defence Response to the Prosecution's Appeal Brief", ICC-01/04-02/12-119-Conf.
[6] *Order on the filing of a response to the Prosecutor's request for leave to reply*, ICC-01/04-02/12-120-Conf, 2 July 2013.

Request, and insofar as the Appeals Chamber, pursuant to the general principle applicable to all criminal proceedings, granted the opportunity to the Accused and his counsel to speak last.[7]

8. On 12 July 2003, the Chamber granted leave for the filing of the Prosecution's reply by 29 July 2013 and the filing of the Defence response by 12 August 2003.[8]

9. On 29 July 2013, the Prosecution filed its reply.[9]

10. In accordance with the Appeals Chamber's Order, the Defence files this response.

II. DEFENCE RESPONSE

11. The Respondent considers that it must adhere herein to the same structure as the reply, responding point by point.

Introduction

In the first point of its introduction, the Appellant states that the fact that it "does not address most arguments included in the Response should not be understood to mean that the Appellant agrees with them". In the Respondent's view, this demonstrates a significant difference in the understanding as to the very notion of an appeal. As a review mechanism, an appeal must identify the flaw in the proceedings, that is, the error of fact and/or of law, which it considers as tainting the impugned Judgment. Similarly, with regard to the parties, the responding party must identify and challenge all of the arguments that it disputes so as to allow the opposing side the possibility to reply. Neither the opposing party nor the Chamber hearing the case can guess the Appellant's criticisms of the submissions and the Judgment.

A. Preliminary issue

12. The Respondent has no trepidation at the prospect of the establishment of truth in the case pitting him against the Appellant. It is for this reason that Mr Ngudjolo raised no objections

[7] *The Prosecutor v. Mathieu Ngudjolo Chui*, "*Réponse de l'Équipe de la Défense de Mathieu Ngudjolo à la demande du Procureur* 'Prosecution Request for Leave to Reply to the Defence Response to the Prosecution's Appeal Brief (ICC-01/04-02/12-119-Conf)'".
[8] *The Prosecutor v. Mathieu Ngudjolo Chui, Order on the filing of a reply under regulation 60 of the Regulations of the Court*, ICC-01/04-02/12-123-Conf, 12 July 2013.
[9] *The Prosecutor v. Mathieu Ngudjolo Chui*, "Prosecution Reply to the Defence Response to the Prosecution's Appeal Brief", ICC-01/04-02/12-126-Conf, 29 July 2013.

when the Appellant sought leave from the Appeals Chamber to reply; pursuant to article 67 of the Statute, he wished "[t]o be informed […] in detail of the nature, cause and content of the charge […]" against him.

13. However, the Appellant's reply instead creates confusion and reinforces the Respondent's impression that he is being subjected to the Appellant's intemperate judicial pursuit. The difficulty is that the confusion and the dogged pursuit jeopardise all that the Respondent holds most dear. As a result, for 58 months he has been deprived of his liberty, lost both his career and reputation and been separated from his family, not to mention the other material, mental and emotional discomforts he has suffered.

14. It is, of course, the Appellant's right to appeal. Nonetheless, this right, as with all others, must remain within the limits of the objective norms which regulate it, and be in the Appellant's interests. This means that the Appellant should not invent its own rules in order to establish the power that it exercises on behalf of the international community, nor should it present the facts truncately or inaccurately in order to mislead the Chamber. The interests of the international community, which justify the Appellant's action before the Appeals Chamber, consist in ensuring that the persons actually responsible for the tragedy in Bogoro are prosecuted and punished and not in ensuring that the Respondent is found guilty at any price. The Appellant should not view Ngudjolo's conviction as a challenge it must undertake: it not carrying out a personal action, but an action on behalf of the international community.

15. The Defence notes that the Appellant has become gradually more prone to countering its arguments, even at the expense of impartiality and accuracy, than producing evidence of the Respondent's guilt. It has repeatedly altered its line of argument to the point that the Defence is no longer certain of what is now alleged against the Respondent.

16. In the preliminary section of its reply, the Appellant raises the issue of its theory on indirect co-perpetration, advancing that it has never renounced it since, it claims, the evidence in the case file establishes "the guilt of Germain Katanga also pursuant to the mode of liability of Article 25(3)(d)(ii) […] Accordingly, the Chamber may still convict Mr Katanga as an indirect co-perpetrator pursuant to Article 25(3)(a)".[10]

[10] *The Prosecutor v. Mathieu Ngudjolo Chui*, "Prosecution Reply to the Defence Response to the Prosecution's Appeal Brief", ICC-01/04-02/12-126-Conf, 29 July 2013, para. 3.

17. Assuming that the Appellant was indeed keen for the two Accused to be prosecuted at least on the basis of article 25(3)(a), why did it support the severance of proceedings effected by Decision 3319[11] and contest the request filed by Katanga's Defence? The role of the Appellant, as a prosecuting body, consists in describing the facts and stating the specific legal characterisation that should be given to those facts. However, can Katanga legally be prosecuted both as perpetrator and accessory in regard to the same facts? These are alternative characterisations. Either he is prosecuted as a direct or indirect perpetrator, or he is prosecuted as an accessory. He cannot be prosecuted under both article 25(3)(a) and article 25(3)(d). If, logically, the charges against Katanga suggest that he acted as a perpetrator, either individually or jointly with another person, or through another person, in the case of the Respondent, the Appellant should have adhered to the mode of liability defined at article 25(3)(a) and challenged Decision 3319; if, however, the facts suggest that Katanga instead contributed in any other way to the crimes with which he is charged, the Appellant should have supported Decision 3319. The Appellant chose the latter option. Therefore, the clarification the Appellant believes it has provided on this point in no wise undermines the Defence arguments set out in paragraphs 10 to 26 of its Response. Furthermore, the Respondent would seize this opportunity to underscore the validity of all of these arguments and to repeat them in full.

18. The Appellant also alleges that, "Neither the Judgment nor the Prosecution's Appeal deal with the issue whether there is sufficient evidence to establish the existence of a common plan between Mr Katanga and the Respondent".[12] However, the issue of evidence concerning the common plan is crucial. In the view of the Pre-Trial Chamber, such evidence constitutes "the first objective requirement of co-perpetration based on joint control over the crime",[13] which was the mode of liability under which the Accused were charged.

19. The Appellant made submissions before the Pre-Trial Chamber, and the Pre-Trial Chamber held that, "[t]here is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui agreed on a common plan to 'wipe out' Bogoro". During the reading of the extract of the charges at the opening hearing, the

[11] Trial Chamber II, *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 November 2012, ICC-01/04-01/07-3319-tENG ("Decision 3319").
[12] [*Idem*] Prosecution Reply, para. 3.
[13] *The Prosecutor v. Mathieu Ngudjolo Chui, Decision on the confirmation of charges*, ICC-01/04-01/07-716-Conf 26-09-2008, p. 190, para. 522.

Registrar stated that, "From August 2002 to May 2003, Germain Katanga and Mathieu Ngudjolo Chui were aware of the existence of a nexus between the common plan to 'wipe out' the Bogoro village and the armed conflict taking place in Ituri".[14] The Appellant itself asseverated during the hearing that, "[TRANSLATION] [a]ll of these crimes were the result of a common plan devised by the two Accused and other commanders with the ultimate aim of wiping out Bogoro. The Prosecution will demonstrate that Germain Katanga and Mathieu Ngudjolo both developed the plan to attack Bogoro, and their respective militias were entrusted with implementing it jointly. The Accused coordinated their efforts and played an essential role in carrying out the plan."[15] The Appellant continued, "[TRANSLATION] [A]ccordingly, the crimes committed by each of the militias can be imputed to their respective commanders. Furthermore, in accordance with the principles of the mutual attribution of liability for crimes, amongst co-perpetrators, it is of little importance determining which militia committed which crime, because their actions can be attributed equally to both Accused, insofar as all these crimes were committed as part of a common plan".[16]

20. The Appellant now states that neither the Judgment nor the Prosecution's Appeal Brief has dealt with the issue of whether there is sufficient evidence to establish the existence of a common plan between Mr Katanga and the Respondent. What has become of the theory of the common plan? The Appellant must state whether this theory has vanished or whether it is still extant; if it has disappeared, if it has been discarded, or if it has automatically become obsolete, the Appellant must state so clearly; furthermore, in the event that it has been discarded, the Appellant must state when and by what means. If the theory has simply become obsolete, the Appellant must say when it became so and when notice thereof was provided. Conversely, in the event that the theory remains in effect, the Appellant must state why it would be exempted from providing sufficient evidence to establish that a common plan existed and why its Appeal Brief does not deal with the issue of evidence that Mr Katanga and the Respondent devised a common plan.

[14] ICC-01/04-01/07-T-80-FRA CT WT 24-11-2009, p. 11, lines 16-18.
[15] *Ibidem*, p. 33, lines 25 – p. 34, lines 1-5.
[16] *Ibidem*, p. 34, lines 15-19.

First Ground of Appeal

Witness P-317

21. The Appellant's main argument is P-317's testimony and Trial Chamber II's acknowledgment of this witness's credibility, criticising Trial Chamber II for not taking into account the inferences to be drawn from this testimony in relation to standards of proof and the appropriate fact-finding procedures.

22. Such criticism does not reflect reality. Trial Chamber II analysed P-317's testimony methodically and, in its final assessment, properly determined the weight it should accord to the testimony, in accordance with the required standard of proof set out in article 66(3) of the Statute. In its analysis, Trial Chamber II raised both the merits and shortcomings of the witness's testimony. Firstly, the merits: "[T]estimony seemed very consistent. She [the witness] expressed herself with authority and demonstrated much aplomb and ease[17] […] The Chamber has no reason to doubt the objectivity and the sincerity of the witness" as an outsider to the conflict.[18] Secondly, the shortcomings: "[C]onducting an investigation into human rights violations is not subject to the same rules as those for a criminal investigation. Reports are prepared in a non-adversarial manner; they are essentially based on oral testimony, sometimes derived from hearsay, and the identity of sources is always redacted";[19] "[S]tatements […] too general ultimately to determine the Accused's precise status and role in Bedu-Ezekere *groupement*";[20] "[I]s too imprecise to determine his [Mathieu Ngujolo's] exact role at the time";[21] weighed against another statement made by Mathieu Ngudjolo to the Congolese Public Prosecutor, "[A] certain inconsistency between these two items of evidence".[22] Thirdly a cursory, very marginal, explanation concerning the evidence in the case file: "[I]n this regard, and although the argument must be treated with caution, it cannot be ruled out that Mathieu Ngudjolo, akin to others in Ituri at the time, had wanted to claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army".[23] Trial Chamber II did not invent this

[17] *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, p. 122, para. 289.
[18] *Ibidem*, para. 291.
[19] *Ibidem*, p. 123, para. 294.
[20] *Ibidem*, p. 179, para. 434.
[21] *Ibidem*. p. 185, para. 451.
[22] *Ibidem*, p. 204, para. 497.
[23] *Ibidem*, p. 179, para. 434.

explanation; it originates from statements made by the Respondent himself during his testimony.[24] It therefore stems from evidence contained in the case file which the Chamber has interpreted. Lastly, a conclusion: "Hence, whilst not impugning the credibility of P-317 or the reliability of the document provided by the Congolese authorities, the Chamber is compelled to treat such revelations with circumspection".[25] In sum, Trial Chamber II made two findings which are not mutually exclusive. The first is that Witness P-317 is credible, but, pursuant to the second finding, the information relating directly to the attack on Bogoro is too slight and can only be used if it is corroborated by other sources.[26] However, such credible sources are lacking!

23. A gentle reminder is needed. What in fact does P-317's testimony hold against the Respondent? The summary contained in the Judgment reads as follows:

> "P-317 mentioned that, on 4 April 2003, she had approached Mathieu Ngudjolo at the end of a meeting of the Pacification Commission, which had been held behind the Centre Hellenique in Bunia. At Mathieu Ngudjolo's request, they met in another area of town at around 7 p.m. During the discussion which allegedly ensued, Mathieu Ngudjolo confirmed to the witness that he had organised the attacks on Bogoro and Mandro".[27]

24. P-317's testimony therefore does not establish that the Respondent organised the attack on Bogoro, but rather that the Respondent allegedly admitted to the witness that he had organised the attack on Bogoro. Thus, when Trial Chamber II says that it finds no reason to doubt the sincerity of P-317's testimony, it means that it does not doubt that Mathieu Ngudjolo admitted to the said witness that he had organised the attack on Bogoro. <u>This in no wise means that the Chamber is certain that Mathieu Ngudjolo organised the attack on Bogoro.</u>[28] There is a gap between the admission alleged by the witness and the commission of a criminal act, which must be filled by the party that bears the burden of proof: the Prosecution. The Prosecution had a legal obligation to verify this purported admission.[29]

25. The Appellant's approach demonstrates a problem of good faith, which is tellingly illustrative of the way in which the investigation and prosecution have been conducted. When Trial Chamber II states that Witness P-317 is credible, the Appellant agrees and clings to this statement. However, when the Chamber states that the information provided by the

[24] ICC-01/04-01/07-T-328-Red-FRA, CT2, 28-10-2011, p. 44, line 19 - p. 49, line 21.
[25] *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, p. 204, para. 497.
[26] *Ibidem*, see paras. 294 and 296.
[27] *Ibidem*, p. 121, para. 288.
[28] Emphasis added by the Defence.
[29] In particular, under regulation 62 of the Regulations of the Office of the Prosecutor.

witness is too general and vague to persuade the Court of the Accused's liability, the Appellant disputes the Chamber's finding.

Witness D02-176

26. The Appellant describes as clear and unambiguous D02-176's statements against the Respondent. Once again, this is an untruth. This witness's words were wrested from him after insistent questioning and using a formulation which had become customary, but which sits ill with the duties of the Prosecution under article 54(1) of the Statute: to the question: "[TRANSLATION] Is it not true that during the attack of 24 February 2003, Mathieu Ngudjolo was the most senior commander in Zumbe?"[30] the witness replied, "[TRANSLATION] I am not in a position to know".[31] Did such a clear and lucid response call for a follow-up question to be put by the organ charged with investigating both incriminating and exonerating circumstances? And, in the instant case, there was not even an attempt to follow up; instead, the witness was pressed persistently to change his mind. To repeat a question that it had just asked in open court, the Appellant's representative did not need to request that the Court go into closed session. Once this was obtained, the question was formulated as follows:

> "[TRANSLATION] Mr Witness, you testify that you are…you were an officer in the UPC, based in Bogoro, which was subject to several attacks from the Lendu in Zumbe, but you did not know who Mathieu Ngudjolo was; is that what you testify today?"

It is an old cross-examination technique, which consists in conveying the following message to the witness: "The event about which, or the person about whom you are being questioned, is too well-known for you not to know about. If, in light of what you claim to be, you cannot respond to the question, then you are not credible". This is why the witness replied in the affirmative, even stating later, inevitably, that, "[TRANSLATION] Everyone knew this was true",[32] eagerly adding: "Mathieu Ngudjolo was the Chief of Staff of the FNI".[33] Except that this additional statement is the straw that breaks the camel's back: on the day of the attack on Bogoro, the FNI had not yet arrived in Djugu Territory. It should be stated that the witness had only previously spoken about Ngudjolo at the Defence's prompting, to correct a slip of the tongue that had occurred when the witness named the Acquitted Person instead of another individual, whose names sounds similar.

[30] ICC-01/04-01/07-T-256-CONF-FRA-ET-09-05-2011, p. 24, lines 4-5.
[31] *Ibidem*, p. 24, line 7.
[32] ICC-01/04-01/07-T-257-CONF-FRA-ET-10-05-2011, p. 6, lines 10-11.
[33] *Ibidem*, p. 7, lines 11-12.

27. The Defence rejects the Appellant's buttressing of the witness's explanation in relation to his contradictions. The question put by the representative of the Office of the Prosecutor was most specific in relation to the identity of the person concerned: Mathieu Ngudjolo; the position about which clarification was sought: the most senior commander in Zumbe; where the events took place: Bogoro; and the date on which they took place: 24 February 2003. Could the question: "[TRANSLATION] Is it not true that during the attack of 24 February 2003, Mathieu Ngudjolo was the most senior commander in Zumbe?" cause confusion?

28. Furthermore, the Defence questions the importance of this issue given that it was for Trial Chamber II, and Trial Chamber II alone, to decide how much weight should be accorded to this testimony. The Chamber's view was as follows:

> "Nonetheless, this assertion, founded on anonymous hearsay, was made by an individual who did not live in Zumbe, and who, to boot, provided no further details on Mathieu Ngudjolo's status within that locality. Further still, having examined his statement, the Chamber cannot 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".[34]

The Appellant submits that Trial Chamber II erred in its finding 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". How can the Appellant make such a criticism of the Bench when it has control over its own evidence? Trial Chamber II has not invented anything. It was the witness himself who, challenged by the Appellant's representative, spoke of Ngudjolo as Chief of Staff of the FNI during the attack on Bogoro.

29. Moreover, this testimony completely contradicts the testimony of Katanga, which the Defence referred to extensively in its Brief in Response to the Prosecution's Appeal Brief. Even if Trial Chamber II did not rule explicitly on the weight and value of this testimony, legal practitioners know that this testimony is credible. Otherwise, it would not have led Trial Chamber II to make the decision – endorsed by the Prosecution, as it happens – to sever the charges against the two Accused.

Attack on Bunia

30. The attack on Bunia took place on 6 March 2003, ten or eleven days after the attack on Bogoro. What inference can Trial Chamber II draw from an event which took place after the relevant events, bringing into conflict disparate protagonists, for different reasons? In the

[34] *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, p. 178, para. 433.

extremely changeable context of Ituri, ten or eleven days were ample for upheaval. The Appellant cannot rationally rely on the Respondent's participation in the attack on Bunia of 6 March 2003 to prove the Respondent's participation in the attack on Bogoro of 24 February 2003. The Respondent admitted to Bunia's Public Prosecutor *in tempore non suspecto* that he had participated only in the attack on Bunia of 6 March 2003, not having at the time any idea that the matter would one day be referred to the ICC.

31. In conclusion, the Appellant appears to have forgotten its duty as a prosecutor, which is to prove the Respondent's guilt beyond reasonable doubt; to show, clearly, from all of the evidence, beyond simple probabilities and speculation, that the Respondent is guilty of the crimes of which he is accused and to convince the Bench of such. However, the evidence presented by the Appellant is both inadequate and inconsistent. The latter has incorrectly applied and poorly interpreted the general principles of the Canadian Judicial Council, point 9.3[2] of which states:

> [2] A reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells you but also on what that evidence does not tell you.[35]

32. The Appellant considers that it suffices to present evidence that is sparse, contradictory and disconnected from the relevant facts; and that it suffices, without presenting evidence, to submit that, "*The absence of evidence does not interrupt that chain of logical reasoning; rather, it corroborates it*"[36] to secure the Accused's conviction. It does not realise that where it has contented itself with the absence of its evidence, the Defence has provided its own. It has responded to all the allegations. And Trial Chamber II was not passive. It requested further evidence where it considered that further evidence was required, which explains the various investigative measures taken, the judicial site visit and the Chamber's questions to each party and participant even after the closing arguments.

[35] Available at: http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_pmf_generalprinciples_en.asp.
[36] Prosecution's Reply, para. 9.

Second ground of appeal

A. Incorrect representation of evidence and facts

First stage of the decision-making process: assessment of documentary evidence and Prosecution witnesses

a) Assessment of the authenticity of the "Soap Letter" and its stamp (Response, paras. 136-156; Appeal, paras. 87-98, and 107)

(i) Testimony of P-279, P-219, P-12, P-28, D03-100 and D02-300

33. By way of introduction to the development of its second ground, the Appellant accuses the Respondent of "fail[ing] to cite all relevant aspects of a witness's testimony or the factual context, or [making] factually inaccurate assertions".[37] The Appellant begins by disputing the discrepancy noted by the Respondent between Witness P-279's testimony and Witness P-250's testimony, on the particular point of Katanga's journey to Zumbe. The Respondent is not going to waste the Appeals Chamber's time with a sterile terminological debate. Discrepancy is a term. The Respondent replicates below the statements of the two witnesses that they were in the militia in Zumbe, and leaves it to the Appeals Chamber to decide whether or not a discrepancy exists:

P-279:

> "[TRANSLATION] When we were in Zumbe camp, we spent one week there. We were already used to living in that camp and they started…started deploying us. We were sent to provide security on a road. And a few weeks later, on that road that we were guarding, Mr Germain Katanga and his group passed by. They went to our camp in Zumbe and they met with Ngudjolo there. They talked. They even slaughtered a cow and feasted while talking about the Bogoro battle. They were planning the war and we were at our positions".[38]

P-250:

> [TRANSLATION] Before the attack on Bogoro, [Germain Katanga and his group] knew nothing about Zumbe. They did not know how to get to Zumbe (interpreter clarifies).[39]

34. Still in relation to the journey made by the Zumbe delegation to Aveba, in order to lend credibility to its "Soap Letter", the Appellant criticises the Respondent for failing "to mention that P-219 had also stated that he was not always based in Aveba and had a habit of coming and going, and so he was not in a position to know about all who came from Zumbe

[37] Prosecution's Reply, para. 10.
[38] ICC-01/04-01/07-T-144-CONF-FRA-ET-20-05-2010, p. 49, lines 19-25, p. 50, line 1.
[39] ICC-01/04-01/07-T-103-CONF-FRA-ET-16-02-2010, p. 68, lines 14-15.

to Aveba". Once again, and without comment, the Respondent replicates the relevant passages from the testimony below and leaves the Appeals Chamber, as the adjudicating body, to decide which party, the Appellant or the Respondent, is distorting the truth and attempting to mislead it.

P-219:

> [TRANSLATION] I do not have any knowledge about soldiers or commanders in Zumbe who participated in meetings or Lendu representatives who went to the Ngiti to prepare the attack on Bogoro. I know because I was there.[40]

35. As to Witness P-219's constant travelling, as alleged by the Appellant, it is true that the latter stated that he was often based in Aveba. Without entering, once again, into discussions about the term "often" which Appellant relies upon to say that the Witness had a habit of coming and going, the Respondent would replicate the words of the witness himself, for sound evaluation by the Appeals Chamber:

> Q: [TRANSLATION] How many times did you carry out this journey during those six months?[41] [Between August 2002 and March 2003 (material time).]
> P-219: [TRANSLATION] If it is… I estimate four days, four days, maximum.[42]

36. Thus, if this witness only travelled for a maximum of four days in six months, is it possible to say that he "[TRANSLATION] had a habit of coming and going"? In particular, is it possible to state that he was not in a position to know about all those who came from Zumbe to Aveba, when another star Prosecution witness, P-250, stated that the Zumbe delegation, of which he was a member, stayed in Aveba "[TRANSLATION] for one month, one week and four days"?[43] Does the Respondent not have the right to raise flagrant contradictions between the Prosecution's key witnesses on a specific point? No sensible person could simply state that these versions are consistent with each other. If we assume even that the alleged delegation arrived while he was away, this witness would have known about it and seen it because he stayed at least one month and one week with the delegation in Aveba.

37. Additionally, because the Respondent quoted Prosecution Witness P-12, who said: "[TRANSLATION] The FNI and the FRPI did not know each other before 18 March 2003", the Appellant accuses the Respondent either of misrepresentation or failing to take into account

[40] ICC-01/04-01/07-T-208-CONF-FRA-ET-21-10-2010, p. 39, lines 7-12. Emphasis added by the Defence.
[41] ICC-01/04-01/07-T-207-CONF-FRA-ET-20-10-2010, p. 56, line 21
[42] *Ibidem*, line 22.
[43] ICC-01/04-01/07-T-92-CONF-FRA-ET-28-01-2010, p. 67, lines 19-21; ICC-01/04-01/07-T-93-CONF-FRA-ET-29-01-2010, p. 18, line 25.

all the evidence. In the interests of clarity, the Respondent again refers *verbatim* to the words of the witness:

P-12:

> "[TRANSLATION] I think that even the FRPI did not know the FNI. The FRPI had come into contact with the FNI only during Ituri Pacification Commission meetings. That is when the political group that had been created in Kampala had to return in order to sign the…ceasefire. That is when, for the first time, the…they understood that a political party existed - the FNI. This must have been around March…around late March, because the commission started its work on 18 March 2003 […]".[44]

38. The Appellant adds that it is clear that, when he spoke of the "FNI", P-12 was not referring to Ngudjolo's military group, since P-12 was referring to a different political party, the FNI, led by Floribert Ndjabu Ngabu; he says that, by this time, the Respondent did not introduce himself as belonging to the "FNI", but indeed as a commander of the FRPI.

39. Firstly, insofar as the Respondent was prosecuted "[TRANSLATION] in his capacity as the most senior commander of the FNI," as he has been called by the Appellant, how could the Defence not be able to raise this point, which challenges the very basis on which the Appellant instituted proceedings against the Respondent. Secondly, to cut short the endless mutual accusations of "[TRANSLATION] inaccurate statements or statements which do not take into account all the evidence in the case file", the Respondent simply submits the witness's words, out of the same concern and following the previous approach. The Appeals Chamber will assess who is attempting to mislead it.

> Q: "[TRANSLATION] My question is as follows: before the arrival of Dr Adirodo, had there ever been any suggestion… could you clarify this matter for us, had there…had there ever been any suggestion that the FRPI was part of the FNI, before even the arrival of Dr Adirodo, which you seem to say took place on the day after 6 March 2003?
> P-12:
> Before the arrival of Dr Adirodo, we did not know the FRPI. We had never discussed the FRPI. It was when he arrived that he clarified this matter, but we had never discussed it before.[45]

40. We can see clearly that the Appellant substituted its own, contrary interpretation for the witness's unambiguous statement. If, according to P-12's statement as incorrectly interpreted by the Appellant, the Respondent "[TRANSLATION] introduced himself as an FRPI commander", he could not have done so before 6 March 2003, because the witness stated that he had never heard of the FRPI before this date. Furthermore, he (P-12) states clearly:

[44] ICC-01/04-01/07-T-195-CONF-FRA-ET-29-09-2010, p. 18, lines 5-11.
[45] *Ibidem*, p.3, lines 12-18, emphasis added by the Defence.

> "[TRANSLATION] Before the FNI, the FRPI seemed to bring together Lendu, particularly the Southern Lendu. When the FNI emerged in March, after March therefore, we met; now, the FNI seemed united with the FRPI. It is at this time that we were introduced and…Colonel Ngudjolo, at that time, as the Chief of Staff of the FRPI […]".[46]

Therefore, according to the witness, and also according to the Respondent, as his Defence team wished to highlight, before 6 March 2003,[47] the Respondent was not a member of the FNI, nor was he a member of the FRPI and the two groups did not know of each other. The Respondent joined neither the FNI nor the FRPI, but the short-lived FNI-FRPI alliance formed after 22 March 2003, of which the FRPI was responsible for the armed wing.[48]

41. With regard to the contradictions in the testimonies of Witnesses P-28 and D03-100, the Respondent admits firstly that an error occurred in his statement as transcribed. He meant P-280 and not P-28. However, he stands by his statements concerning D03-100 and intends to demonstrate why. D03-100 could not comment on any delegation from Zumbe which allegedly travelled to Aveba, in which P-250 participated because as P-250's [REDACTED], he knows that [REDACTED] did not have the gift of ubiquity. P-250 could not have been both in Walendu-Bindi, studying and doing agricultural work to pay for his studies, and at the same time in Zumbe, fighting in the militia and travelling to Aveba in Walendu-Bindi. He replied to the Defence's questions as follows:

> [TRANSLATION]
> Q. Yes, so, Mr Witness, we are in open court. We are going to continue; we still have approximately 30 minutes left for today. You have just told us where Baudouin was and what he was doing during the period between August 2000 until the end of February 2000…2003. My question is as follows, Mr Witness; during that period, apart from his studies, did Baudouin do anything else?
> D03-100: No, other than his studies and his agricultural work, which helped him to fund his studies, he did not do anything else.
> Q. During this period, Mr Witness, was Baudouin a militia member or a combatant?
> D03-100: No, Baudouin was not a combatant.

Hence P-250 was not in a militia in Zumbe. His statements concerning the journey to Aveba are pure invention. How then could D03-100 have spoken of a delegation which did not even exist?

42. Succumbing to the urge to speculate, the Appellant states that Katanga had a personal interest in denying that any delegation existed. However, the Appellant does not explain what the interest might be nor, quite simply, why it would be in Katanga's interests to exonerate Ngudjolo and incriminate himself.

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[46] *Ibidem*, p. 11, line 27-p. 12, line 3.
[47] Emphasis added by the Defence.
[48] ICC-01/04-01/07-T-328-Red-FRA-CT2- 28-10-2011, p. 28, lines 12-14.

(ii) P-250's testimony on the Soap Letter

43. The Respondent considers the debate over Witness P-250 and the "Soap Letter" to be irrelevant. Firstly, both in Decision ICC-01/04-01/07-3319 – which is now *res judicata* – and in Judgment ICC-01/04-02/12-3, the judges held that the statements of this witness, whom they had found not to be credible, could not be relied on. Secondly, they did not rely on the letter in the aforementioned Judgment. As for P-250's lie [REDACTED], the Appellant has resorted to repeating P-250's fallacious argument. It is false to state that [REDACTED]. Notwithstanding that the available evidence is immaterial to this cause, the Appellant is well aware that the witness began his account to investigators with the spontaneous assertion that he had joined the [REDACTED].[49]

(iii) Organised nature of the Bedu-Ezekere militia group

44. Under the bombastic heading "Organised nature of the Bedu-Ezekere militia group" the Appellant merely retracts its admission that the Respondent did not possess a satellite phone. The Appellant denies having made any such admission, asserting that it "did not object to documents being admitted into evidence for the '*very specific and restricted context*' of records indicating that the Respondent did not have a contract in his name for a satellite phone with the Kampala-based satellite phone operator (Thuraya)". The Respondent fails to see the relevance of this nuance. It would appear to imply that the Appellant had tendered into the record evidence of the existence of several satellite phone operators based in different locations. Yet the Appeals Chamber will note that in respect of satellite telephones only a single operator and a single make of phone are mentioned in the record. This is why in his defence the Respondent wished to provide evidence that he had no connection with this operator and did not possess this make of satellite phone. As for the "alliance between the FNI political party led by Floribert Ndjabu Ngabu, with the military groups separately led by the Respondent and Germain Katanga, until after 22 March 2003",[50] the Appellant claims that "it has consistently maintained that there was an alliance between the co-accused's militia groups to carry out the Bogoro attack". This fallacy is met in the corresponding arguments advanced by the Defence in its closing brief.[51] The arrest warrant under which the Respondent was brought before the ICC portrays him as the highest-ranking

[49] DRC-OTP-1013-0002, para. 8.
[50] Prosecutor's Reply, para. 16.
[51] ICC-01/04-04/07-3265-Corr2, paras. 376-394.

FNI commander, as do the *Decision on the confirmation of charges* and the document containing the charges. The document summarising the charges, meanwhile, calls him the FNI commander in Zumbe. When the Defence presented evidence showing that the FNI did not exist in Djugu territory at the material time, the Appellant fell back on the term "Zumbe militia" in its closing brief and concocted the theory that the abbreviations FNI and FRPI were used retrospectively.

b) Assessment of P-250's credibility (Response, paras. 158-167; Appeal paras. 102-118)

(i) School records

45. To the Respondent's admonishment that the Appellant failed to contest the authenticity of the school records tendered to show that P-250 was a student and not a militia member, the Appellant responds that it objected to their admission and that P-250 did not properly authenticate them. The Respondent wonders whether the mere fact that a party to the proceedings objects to the admission of an exhibit casts doubt over its authenticity as a matter of principle. To recall, the Respondent obtained school records from P-250's parents showing that he had been attending school normally in a locality far from where he claimed to have been. During cross-examination, the Respondent properly presented those records. P-250, the person directly concerned, acknowledged that they were his, stating, "[TRANSLATION] These are documents that come from my school file." The Respondent tendered these documents into the record as exonerating evidence, whereupon the Appellant objected on the grounds that they were too clean to be from the Congo, where dust is ubiquitous.[52] The Appellant did not ask the witness a single question about these documents during re-examination. On the basis of this lack of interest, and also of the fact that the Appellant did not request an expert examination and P-250's parents were going to testify to shed light on these records, Trial Chamber II directed that they be registered in the record. Since 23 February 2010, when the records were admitted into the record, the Appellant has conducted no investigations to identify any grounds on which to challenge them, whereas in other situations it has not hesitated to do so with all haste. For instance, it investigated the school identity card of P-279's sister[53] only four days – two, if the weekend is discounted – after the close of P-279's testimony, and disclosed a report from the competent school

[52] ICC-01/04-01/07-T-105-CONF-FRA-ET-22-02-2010, p. 24, lines 8-9.
[53] EVD-D02-00033.

authorities on the circumstances in which the document was obtained.[54] Moreover, Witness D03-100, who had furnished the Respondent with these documents, was called to testify, but the Appellant, who had sought to challenge the authenticity of these records and therefore had an interest in doing so, failed to question the witness. Its criticism of the Chamber is without merit.

(ii) D03-100's testimony

46. This prevarication and, consequently, the Appellant's dogged pursuit of the Respondent reach their paroxysm in the Appellant's assertion that "it is not surprising that D03-100 would try to falsely maintain that [REDACTED] was not with the militia at the relevant time" because D03-100 claims to have been afraid as a result of the conflict between his family and that of the Respondent following [REDACTED] statement. Suppositions such as these and interpretative contortions are the means by which the Appellant is seeking to discharge its obligation to provide proof beyond reasonable doubt. It is not true that the question answered by P-250 related to the relevant time. The question was "[TRANSLATION] Witness, did you perform military service, yes or no?"[55] And the reply: "[TRANSLATION] When you met [REDACTED], so the information he gave – you should take that into account."[56]

(iii) Threats against P-250's family

47. The Respondent repeats that P-250 left the protection programme voluntarily to return to his locality and suffered no consequences from the Respondent. P-250 did not return to protect his family; quite the contrary. Upon his arrival he made death threats against his parents. They informed the Respondent's counsel, who alerted the Registry and Trial Chamber II at an *ex parte* hearing.[57] According to those who associated with him, P-250 was prone to drug and alcohol abuse. This is the reason why [REDACTED], D03-100, stated that [REDACTED] was mentally unwell. It has nothing to do with the threats from the Respondent or his family, but is rather a result of the actions of the Appellant, who removed this young man from his parents' authority and showered him with money, with which he was able to obtain drugs and liquor. This is why D03-100 made his pathetic plea to Trial Chamber II as [REDACTED]: "[TRANSLATION] You have to know that the white people who went after

[54] DRC-OTP-1056-0076; ICC-01/04-01/07-T-290-CONF-FRA-ET-12-07-2011, p. 2, line 21, to p. 12, line 13.
[55] ICC-01/04-04/07-T-105-CONF-FRA-ET, 22-02-2010, p. 44, lines 15-16.
[56] *Ibidem*, lines 18-19.
[57] ICC-01/04-01/07-T-214-CONF-EXP-FRA, 04-11-2010.

[REDACTED] ruined his life. What they said isn't true. I don't know whether they cheated him, whether they gave him money or anything else."[58]

(iv) Comparison between P-159 and P-250

48. The Respondent's comparison between P-250 and P-159 was prompted by the assertions of the Appellant, who was satisfied to equate the number of details provided by P-250 with credibility. Eschewing this approach, the Respondent employed the following comparison to demonstrate that the provision of a great number of details by a witness does not equate with credibility.

c) Assessment of credibility of P-279 and P-280

49. It is a gross untruth to state that when shown a photo of P-280, P-279 replied that he did not recognise him well or did not know him very well. This is what the transcript says:

> [TRANSLATION]
> Q: So, here is the photograph. Do you recognise this person?
> A: I do not know this person.[59]

When reminded that he was speaking under oath, P-279 modified his answer to the following:

> [TRANSLATION] A: I do not know this person very well.[60]

Second stage of the decision-making process: assessment of the facts

a) The Respondent's admissions regarding the Bogoro attack and killing of Hema

50. The Respondent never attributed the statements to P-12 which the Appellant claims. This is the Respondent's own analysis in light of the various facts and testimonies, including the fact that no so-called Zumbe commander was seen in Bogoro immediately after the attack as well as Dark's testimony that he was under Katanga's command. The authority imputed to the Respondent by the Appellant is theoretical and *ex post facto* the attack, and it results from the organisation arising from the short-lived alliance between the FNI and the FRPI, which the Respondent joined after 18 March 2003.

[58] ICC-01/04-04/07-T-310-CONF-FRA-ET, 13-09-2011, p. 54, lines 13-16.
[59] ICC-01/04-04/07-T-152-CONF-FRA-ET, 09-06-2010, p. 44, lines 1.
[60] *Ibidem*, p. 45, lines 9.

51. Regarding the Respondent's alleged admission to P-12, suffice it to say that this witness made allegations pertaining to a specific period of time. He stated that the Respondent confessed at a particular time and in specific circumstances before witnesses. The Appellant took no action, either during or after testimony, or even when Trial Chamber II inquired of the parties and participants whether they intended to present additional evidence. Given this degree of precision and, particularly, the subsequent silence, the Respondent has demonstrated the falseness of this allegation, proving that he was in detention. It is nonsense to present new information after the closure of evidence, just as it is to challenge the Respondent with this new information outside the trial proceedings.

B. Incorrect statements of the law

52. The Respondent is conflating nothing. He has not conditioned establishment of the credibility and reliability of the documentary evidence solely on the criteria quoted: signature, seal, certification, etc. He is well aware that documents exist which do not bear these but which can be declared to be authentic whilst others containing all of them are false. This is something to be assessed on a case-by-case basis. The issue of the much-vaunted "Soap Letter" is therefore quite specific. The letter bears two different seals, from which it may be supposed that they were added at different times. What is more, the author of this letter claimed not to have placed any seal at all upon it. The Respondent drew attention to the letter's suspect nature and supported Trial Chamber II's entirely sensible reasoning. The Appellant has not provided any coherent explanation for the existence of two distinct seals. Moreover, in the words of the Trial Chamber of the ICTR in *Musema*, "Authenticity must be established through reference to all relevant factors".[61] This means that, *a contrario*, it can be rejected absent relevant factors. Trial Chamber II considers this letter to be irrelevant in substance and suspect in form. The Appellant itself agrees that the Chamber has evaluated it freely. Why, then, contest this evaluation?

53. Regarding the admission of documentary evidence, the Appellant refutes the Respondent's assertion and advances that "the correct approach is that burden rests with the party seeking to introduce documentary evidence […] and that no distinction between the burden of the Prosecution and the burden of the Defence in that respect is made".[62] The Appellant substantiates its argument by adverting to paragraphs 25 to 30 of ICC-01/04-

[61] *Musema* Judgment, para. 72.
[62] Prosecution's Reply, para. 28.

01/06-1399. First of all, that filing says no such thing. Secondly, this "correct approach" presented by the Appellant is, of course, wrong. The principle enshrined in criminal law is that the burden of proving the Accused's guilt falls to the Prosecutor. This can be seen from article 66(2) of the Statute. This principle is the corollary of another universal principle expressed in the following paragraph: the presumption of innocence. Thus, it is for the Prosecution to demonstrate the guilt of the Accused by proving the existence of all of the constituent elements of the charges. Rome Statute crimes may not be presumed. The Prosecution must provide relevant testimonial and documentary evidence. The accused, on the other hand, has the right simply to defend himself by, amongst other things, challenging unfavourable assumptions and seeking to persuade the judges of his innocence. Clearly, the Accused has the right to challenge documentary evidence presented by the Prosecution by presenting evidence to the contrary. However, contrary to the Appellant's submission, the Prosecution and the Accused are not equal, since the latter has no obligation to prove his innocence. In light of the foregoing, the Appellant would have served its cause by presenting evidence demonstrating that P-250's records were false. This it would have been unable to do, in any event, given that these records are authentic. The Prosecution's failure to do is undoubtedly explained by the fact that they are patently authentic.

54. The two sets of exhibits – the school records, on the one hand, and the "Soap Letter", on the other – are not comparable. The school records establish irrefutably that P-250 was attending school in Walendu-Bindi *collectivité* at the material time and that he could not at the same time have been a member of the militia in Bedu-Ezekere *collectivité*. As for the "Soap Letter", what does it establish? The Appellant argues that it "is not obliged to indicate to the Chamber every item of evidence the Chamber should rely upon".[63] The response to this is that Trial Chamber II stated in its 18 December 2012 Judgment that in its evaluation it had considered the entirety of the evidence; the Appellant challenges this, accusing the Chamber of failing to consider all of the evidence. If this is the case, it must specify which evidence Trial Chamber II did not consider, so that the Respondent might respond and the Appeals Chamber evaluate it.

Third ground of appeal

55. The Respondent argues that the Appellant's third ground of appeal was improperly raised under article 81(1)(a) in that the Appellant is not authorised to lodge an appeal on the basis

[63] Reply, para. 31.

of the violation of the right to a fair trial. The Appellant considers the Respondent's argument to be "without merit" and accuses him of confusing *res judicata* with the purpose and characteristics of the appeal proceedings against a final judgment.

56. The Respondent would counter by wondering whether it might not in fact be considered that the merit is to be found in article 81(1)(a) and the principle that criminal law provisions must be interpreted strictly. Firstly, article 81(1)(a) restricts the Prosecutor's grounds of appeal against a judgment pursuant to article 74 to three causes: a procedural error, an error of fact or an error of law. Article 81(1)(b) of this article adds a fourth possibility, available to the convicted person: any other ground that affects the fairness or reliability of the proceedings or decision. If the States Parties had wanted the Prosecutor to be able to appeal on the basis of the fairness or reliability of the proceedings or decision, they would not have separated points (a) and (b) of article 81(1) to exclude the Prosecutor from using this ground whilst making it available to the convicted person. The principle of legality requires that criminal law provisions be interpreted strictly. Then on what basis is the Appellant challenging this interpretation?

57. As is its wont, and supported by its allies within the prosecutorial collective, the Appellant performs a sleight of hand, effecting a redefinition. It claims that violation of article 64(2) constitutes a procedural error that falls within the scope of article 81(1)(a). Firstly, article 81(1)(a) does not apply to article 64, or vice versa, and article 81, read as a whole, leaves no room for conflating fairness and procedural error. If the two grounds could be treated as identical, the Statute would not have made separate provisions for them. Since Procedural error exists as a ground, why does the Appellant feel the need to invoke violation of the fairness of the proceedings in order to claim a procedural error? Secondly, what is the procedural error claimed by the Appellant? In the issue of the monitoring of telephone calls, Trial Chamber II made a number of rulings. The Appellant exercised its right to seek leave to appeal in accordance with rule 55(1) of the Rules of Procedure and Evidence. Trial Chamber II, exercising the powers with which it is invested, notified decisions to all of the parties and participants granting or denying leave as appropriate. What procedure did Trial Chamber II breach? What provision or principle obliges the Chamber unfailingly to grant the Prosecution leave to appeal?

58. The Appellant accuses Trial Chamber II of passivity. How can such a charge be laid against a Chamber which since its constitution has rendered 387 written decisions and orders

and 168 oral decisions? The additional ground of appeal set out in article 81(1)(b)(iv) is not a "catch-all" provision but, rather, a reflection of the evolution in the respect for the fundamental rights of the person, including before judicial authorities. The reason why the Prosecution cannot invoke the right to a fair trial is that, firstly, this is a fundamental right, that is to say one that is in essence directed against State authorities; secondly, the Prosecution possesses enormous judicial, human and other resources in comparison to the accused; and, thirdly, the Prosecution is not by definition the accused's adversary and its role is not solely that of obtaining a conviction but is, rather, to ascertain the truth.

59. The Appellant accuses the Respondent of confusing *res judicata* with the nature and purpose of appeal proceedings because the Respondent argued that the issue of the monitoring of telephone calls was resolved prior to the Judgment. The Appellant argues that *res judicata* applies to a final decision. Nothing is farther from the truth. The authority or, more properly, the force of *res judicata* applies to all final decisions, which should not be confused with judgments. The International Criminal Court system, as other national and international systems, makes provision for remedies against chambers' decisions whilst proceedings are ongoing. Once these remedies have been used, or when they have not been taken advantage of within the prescribed time limits, such decisions become irrefragable and *res judicata*. The unsuccessful party cannot raise them again. It can only raise non-appealable decisions. This is the logical, joint application of the principle of the right of appeal and *non bis in idem*. For instance, the Court of Justice of the European Union ruled in *Commission v. France* and *Nachi Europe* that "[TRANSLATION] if the person addressed by a decision (or the person who is directly and personally affected) does not lodge an appeal within the time limit stipulated by article 230, paragraph 5, EC [Art. 263(6), TFEU], he or she is not entitled to challenge its legality".[64]

60. In the final analysis, the Appellant should have challenged Decision 3319, which found certain of these witnesses not to be credible, within the time limit and accepted the Judgment acquitting Ngudjolo, which was perfectly coherent, properly reasoned and ensues naturally from not only Decision 3319 but also all the decisions rendered by Trial Chamber II throughout the trial proceedings against Ngudjolo.

[64] ECJ, Case 52/83, *Commission v. France*, 15 November 1983; C-188/92, *TWD*, 9 March 1994; and C-239/99, *Nachi Europe*, 15 February 2001

61. In conclusion, the Defence hereby prays the Appeals Chamber to dismiss the Prosecution appeal on all grounds and confirm the Judgment acquitting Mathieu Ngudjolo in its entirety.

RESPECTFULLY SUBMITTED.

[signed]

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Mr Jean-Pierre Kilenda Kakengi Basila
Lead Counsel for Mr Mathieu Ngudjolo Chui

Dated this 28 August 2013, at Brussels