

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 30 March 2021

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Chile Eboe-Osuji**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public redacted version of

Judgment

**on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of
Trial Chamber VI of 8 July 2019 entitled ‘Judgment’**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence

Mr Stéphane Bourgon
Ms Kate Gibson

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Amici Curiae

Mr Michael A. Newton
Mr Roger O'Keefe
Ms Yolanda Gamarra
ALMA - Association for the Promotion of
International Humanitarian Law
The Antiquities Coalition, Blue Shield
International and Genocide Watch
Mr Geoffrey S. Corn, Mr Richard Jackson,
Mr Chris Jenks, Mr Eric Talbot Jensen and
Mr James A. Schoettler, Jr.
Ms Polina Levina and Ms Kaveri Vaid
Ms Agnieszka Jachec-Neale
Mr Pearce Clancy and Mr Michael Kearney
of Al-Haq
Ms Peta-Louise Bagott
Public International Law & Policy Group
University of Pretoria

REGISTRY

Registrar

Mr Peter Lewis

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The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Bosco Ntaganda and the Prosecutor against the ‘Judgment’ of Trial Chamber VI of 8 July 2019 (ICC-01/04-02/06-2359),

After deliberation,

By majority, Judge Ibáñez Carranza and Judge Eboe-Osuji partially dissenting,

Delivers the following

JUDGMENT

The ‘Judgment’ of Trial Chamber VI is confirmed.

REASONS

I. KEY FINDINGS

1. The legal framework of the Court does not provide for any appeal against a decision taken by an absolute majority of the judges under article 40 of the Statute to the Appeals Chamber.
2. The judicial independence of judges is at the core of the Court’s legal framework to safeguard the general integrity of the proceedings before the Court. It is for this reason that the Statute provides for a specific mechanism in article 40 which focuses on this subject matter and sets out the procedure to follow should an issue about the independence of a judge arise.
3. While the issue of judicial independence is not appealable before the Appeals Chamber, an appellant may still raise on appeal matters affecting the fairness of the proceedings. In that regard, article 81(1)(b)(iv) of the Statute expressly provides the convicted person, or the Prosecutor on his or her behalf, with the possibility to raise a ground that ‘affects the fairness or reliability of the proceedings or decision’.
4. *Ex parte* submissions may be used only to the extent that they are strictly necessary. Whether *ex parte* proceedings are acceptable, and for how long *ex parte*

submissions can be withheld from the other party, will depend on the specific circumstances of the case and, in particular, the risk of prejudice to the fair trial of an ongoing case.

5. For the purposes of article 74(2) of the Statute, the charges must be described in such a way that the trial chamber as well as the parties and participants are able to determine with certainty which sets of historical events, in the course of which crimes under the jurisdiction of the Court are alleged to have been committed form part of the charges, and which do not. It is not necessarily the case that such determination is possible only where the charging documents list all criminal acts underlying each charge exhaustively. Depending on the circumstances of the case, the charges may be described in a less specific manner, for instance, by specifying a period of time during which and an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims. While in such a case the document containing the charges may also list or make reference to specific criminal acts, the scope of the case is not necessarily limited to them – other criminal acts not mentioned in the document containing the charges may still fall within the – broadly described – facts and circumstances of the charges. Whether such description of the charges is sufficient for purposes of article 74(2) of the Statute will depend, *inter alia*, on the scale of criminality and the mode of individual criminal responsibility alleged.

6. A single incident or operation in which multiple crimes are committed could amount to a crime against humanity provided that the relevant contextual elements are met, irrespective of the wider activities of the state or organisation concerned.

7. Article 7 of the Statute requires a finding that the attack was ‘directed against any civilian population’ and does not require a separate finding that the civilian population was the primary object of the attack. This means no more than that the attack targeted the civilian population; it is not required that the *main* aim or object of the relevant acts was to attack civilians. An attack directed against a civilian population may also serve other objectives or motives. The question of whether an attack was directed against a civilian population is essentially a factual issue.

8. The requirement that the acts form part of a ‘course of conduct’ indicates that Article 7 is meant to cover a series or overall flow of events, as opposed to a mere

aggregate of random or isolated acts. However, this does not mean that a trial chamber must have regard to the totality of the activities and military operations of a state or organisation for the purposes of establishing that there was a course of conduct involving the multiple commission of acts referred to in article 7(1) or that the attack *targeted a civilian population*. These determinations can be made through an examination of the circumstances and manner in which the criminal acts were carried out. It is not necessary for this purpose to have regard to other military operations or the wider activities of the state or organisation in question, including activities that did not involve the commission of crimes.

9. The difficulty in distinguishing combatants from civilians may be a relevant consideration when determining whether the civilian population as such was the object of the attack. At the same time, such difficulties cannot justify the targeting of an entire ethnic group without distinction between civilians and combatants. The relevance of this consideration must be assessed on a case-by-case basis.

10. Regarding the crime of ordering the displacement of the civilian population in the context of a non-international armed conflict under article 8(2)(e)(viii) of the Statute, there is no requirement that the perpetrator must be in occupation of, or exercise territorial control over, the relevant area.

11. Whether a person is in a position to give effect to an order to displace the civilian population is a question of fact that depends primarily on the position occupied by the accused person and his or her duties and responsibilities, including his or her ability to ensure compliance with his or her orders.

12. The burden of proof is on the Prosecutor and any suggestion that the accused would have to present more convincing evidence than the Prosecutor, or indeed any evidence at all, to prove their innocence would represent an impermissible reversal of that burden. Nonetheless, it is clear that, if the Prosecutor presents evidence meeting the 'beyond reasonable doubt' standard of proof, the accused may be convicted if he or she does not present evidence capable of raising reasonable doubt regarding the Prosecutor's case.

13. If the accused person chooses to present evidence, the credibility, reliability and weight of that evidence falls to be assessed in the same manner as evidence presented by the Prosecutor.

14. The question of how the timing of the accused's testimony should be considered forms part of a trial chamber's discretion in evaluating the evidence.

15. There is no legal impediment to prior recorded testimony admitted pursuant to rule 68(2) of the Rules being relied upon to establish individual criminal acts in circumstances in which they are not the direct acts of the accused. However, reliance on such evidence should not be prejudicial to or inconsistent with the rights of the accused.

16. A conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. Therefore, prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such. Other instances of similar criminal acts must be established on the basis of oral testimony such that the right of the accused to challenge the evidence grounding his conviction for that crime is not prejudiced.

17. If a witness is involved in the criminal events under consideration, a trial chamber must provide sufficient reasoning for its reliance on the witness's evidence, and must consider any motives or incentives that he or she may have had to implicate the accused in light of challenges to the witness's credibility raised at trial.

18. Trial chambers enjoy broad discretion in assessing inconsistencies within the evidence and in deciding whether corroboration is necessary. Different testimonies do not need to be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. Accordingly, while testimonies need not be identical in all aspects, they must confirm, even if in different ways, the same fact.

19. There is no requirement for the trial chamber to establish the existence of a common plan on the basis of 'the subsequent concerted action of the co-perpetrators'.

Such subsequent concerted action may be a relevant consideration in determining whether the co-perpetrators acted with a common purpose. Indeed, the fact that co-perpetrators act in unison will often be a strong indicator that, by so acting, they may be implementing a common plan to which they agreed. However, even in the absence of direct evidence of the agreement between the co-perpetrators, subsequent concerted action is not the only basis on which the trial chamber may infer the existence of a common plan. Therefore, there is no legal impediment to inferring the common plan from the wider circumstances, including the events on the ground.

20. Consistent with the principle of causation, which requires a causal link between the conduct of an accused and the crime, an accused's essential contribution must be to the crime for which he or she is responsible. However, the contribution of a co-perpetrator which, on its face, is not directly to a specific crime, but to the implementation of the common plan more generally may still suffice.

21. For indirect co-perpetration, the 'knowledge' component of *mens rea* includes an awareness on the part of the co-perpetrator of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise control over the crime.

22. For co-perpetration, the decisive consideration is whether the contributions as a whole amounted to an essential contribution to the crimes within the framework of the common plan, such that without it, 'the crime could not have been committed or would have been committed in a significantly different way'.

23. In order to find an accused criminally responsible as a co-perpetrator for specific criminal acts of murder or rape that took place on particular dates and in particular locations, it need not be established that he or she was aware of the details of these events, including whether and which specific acts had been committed. Rather, what must be established is that the person possessed the requisite *mens rea* with respect to the crimes as such in the sense of murder, rape, persecution, pillage *et cetera*, committed in implementation of the common plan.

24. A co-perpetrator can make an essential contribution to the common plan at any stage, including the execution stage, the planning and preparation stage, and the stage when the common plan is conceived.

25. Establishing the whereabouts of an accused at the time that the alleged crimes – that he or she is said to have co-perpetrated through another person – took place may be relevant in establishing his or her control over the crimes in question. This, however, does not mean that for an accused to be held responsible he or she must be present when the crimes are taking place. Nevertheless, when, in cases such as the present one, it is alleged that the accused is controlling the crimes indirectly through, *inter alia*, the monitoring of the operations in the course of which crimes are being committed, the whereabouts of the person may be an important consideration.

26. Depending on the circumstances, the conduct of an accused after the commission of a crime may provide information or evidence that may be of relevance to the assessment of his or her intent at the time of the offence.

II. INTRODUCTION

27. This case concerns Mr Bosco Ntaganda's alleged conduct, as a high level member of the *Union des Patriotes Congolais* and its military wing, the *Forces Patriotiques pour la Libération du Congo*, in the events that took place in Ituri district of the DRC from on or about 6 August 2002 to on or about 31 December 2003.¹

28. On 8 July 2019, the Trial Chamber rendered the Conviction Decision, in which it found Mr Ntaganda guilty of five counts of crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation) and thirteen counts of war crimes (murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, pillage, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary's property).²

29. The Trial Chamber found that Mr Ntaganda was guilty as an indirect co-perpetrator for all crimes charged and as a direct perpetrator for one act of murder,

¹ [Conviction Decision](#), paras 1, 32.

² [Conviction Decision](#), para. 1199, pp. 526-530, 535-538.

constituting a crime against humanity and a war crime, as well as an underlying act of persecution as a crime against humanity.³

30. Both Mr Ntaganda and the Prosecutor filed appeals against the Conviction Decision.⁴ In his appeal brief, Mr Ntaganda raises fifteen grounds of appeal challenging the fairness of the proceedings and arguing that the Trial Chamber committed several errors of law, fact and procedure.⁵ In her appeal brief, the Prosecutor raises two grounds of appeal challenging the Trial Chamber's interpretation of the term 'attack' in article 8(2)(e)(iv) of the Statute (intentionally directing attacks against protected objects).⁶ In relation to some of his challenges, Mr Ntaganda requests that the Appeals Chamber order a new trial or a permanent stay of the proceedings and in relation to others that it reverse his conviction.⁷ The Prosecutor asks the Appeals Chamber to 'enter additional and limited findings of fact' and to convict Mr Ntaganda for two additional incidents.⁸

31. On 12, 13 and 14 October 2020, the Appeals Chamber held an oral hearing, on a partially virtual basis, where it received submissions from parties, and observations from participants and *amici curiae*.⁹

32. For the reasons elaborated in this judgment, the Appeals Chamber confirms, by majority, the Conviction Decision and rejects Mr Ntaganda's and the Prosecutor's appeals.

33. Separate opinions are set out as annexes to this judgment.

34. In addition, a comprehensive procedural history of the proceedings is set out in annex A to this judgment. Annex B contains a list of designations used and materials cited in this judgment.

³ [Conviction Decision](#), pp. 535-538.

⁴ [Prosecutor's Notice of Appeal](#); [Mr Ntaganda's Notice of Appeal](#).

⁵ See e.g. [Mr Ntaganda's Appeal Brief – Part I](#), paras 1, 16, 18, 23; [Mr Ntaganda's Appeal Brief – Part II](#), paras 4-5, 41, 56-58, 74, 90, 103, 128-129, 133, 141, 150, 166, 177, 184, 230, 232, 249, 257, 268, 271, 282, 300, 309, 322, 339, 347, 359, 364, 411; T-270, p. 95, lines 13-15; T-271, p. 20, lines 9-11.

⁶ [Prosecutor Appeal Brief](#), paras 2, 6, 9, 11-13, 153. See also [T-270](#), p. 7, lines 15-25.

⁷ [Mr Ntaganda's Appeal Brief – Part I](#), paras 16, 23; [Mr Ntaganda's Appeal Brief – Part II](#), paras 41, 47, 57, 74, 103, 128-129, 133, 135, 141, 147, 150, 166, 177-179, 184-185, 208, 210, 225, 230, 232, 266, 271, 282, 305, 316-317, 322, 339, 347, 359, 398.

⁸ [Prosecutor Appeal Brief](#), paras 13, 106, 154-156. See also [T-270](#), p. 20, lines 3-4.

⁹ [T-270](#), [T-271](#), [T-272](#).

III. STANDARD OF REVIEW

35. Article 81(1)(a) and (b) of the Statute provides that the Prosecutor or the convicted person, or the Prosecutor on that person's behalf, may appeal on grounds of a procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings or decision. According to article 83(2) of the Statute, the Appeals Chamber may intervene only if it 'finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error'. In the view of the Appeals Chamber, this results in the following standard of review.

A. Errors of law

36. Regarding errors of law, the Appeals Chamber has previously found that:

[it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.¹⁰

B. Errors of fact

37. At the outset, the Appeals Chamber recalls that by the terms of article 66(3) of the Statute an accused may only be convicted if a trial chamber is convinced of the guilt of the accused beyond reasonable doubt. Consequently, a trial chamber is required to enter findings to the standard of proof of 'beyond reasonable doubt' in relation to those findings that underpin the charges and upon which a conviction depends. In reviewing factual findings by the trial chamber, the Appeals Chamber will apply the standard of reasonableness as explained below.

38. In the appellate process, it is the role of the Appeals Chamber to review the conviction or acquittal and to ensure that, in arriving at its conclusion, the trial chamber correctly appreciated and applied the standard of beyond reasonable doubt. The Appeals Chamber must ensure that, when making factual findings, the trial chamber carried out a holistic evaluation of the evidence. This is in the sense of

¹⁰ [Lubanga Appeal Judgment](#), paras 17-18; [Ngudjolo Appeal Judgment](#), para. 20; [Bemba Appeal Judgment](#), para. 36; [Bemba et al. Appeal Judgment](#), para. 99.

assessing in a connected way and weighing of all the relevant evidence taken together, in relation to the fact at issue; rather than evaluating items of evidence without regard to other related evidence. Furthermore, the Appeals Chamber must be satisfied that the trial chamber assessed all factual findings in deciding, pursuant to the applicable law, that the accused person's guilt was established beyond reasonable doubt or that he or she should be acquitted.

39. With these principles in mind, when a factual error is alleged, the Appeals Chamber will determine whether a trial chamber's factual findings were reasonable in the particular circumstances of the case. In assessing the reasonableness of factual findings, the Appeals Chamber will consider whether the trial chamber's evaluation was consistent with logic, common sense, scientific knowledge and experience,¹¹ and whether the trial chamber took into account all relevant and connected evidence, and was mindful of the pertinent principles of law (including, as applicable, the standard of proof beyond reasonable doubt). Beyond the foregoing considerations, the Appeals

¹¹ The obligation of a trier of fact in this regard finds expression in the law and jurisprudence of various national legal systems. **Argentina:** article 398 of the Argentinean Penal Procedural Code: 'The court will pass sentence by majority vote, assessing the evidence received and the acts of the debate in accordance with the rules of *sana crítica*' ('*El tribunal dictará sentencia por mayoría de votos, valorando las pruebas recibidas y los actos del debate conforme a las reglas de la sana crítica*'); National Chamber of Criminal Cassation (Argentina), 10 May 2018: 'The system of *sana crítica* requires the foundation of the decision, that is, the expression of the reasons why it is decided in one way or another. It also requires that the critical evaluation of the evidence be carried out in accordance with the rules of logic, experience and scientific knowledge'; **Peru:** article 393 of the Peruvian Penal Procedural Code: 'The evidentiary evaluation will respect the rules of *sana crítica*, especially in accordance with the principles of logic, the maxims of experience and scientific knowledge' ('*La valoración probatoria respetará las reglas de la sana crítica, especialmente conforme a los principios de la lógica, las máximas de la experiencia y los conocimientos científicos*'); **Poland:** article 7 of the Polish Code of Criminal Procedure provides that the organs in charge of the proceedings shall form their view on the basis of all evidence led, assessed freely taking into account the principles of sound reasoning and indications of knowledge and life experience; **Canada:** *R. v. François*, [1994] 2 S.C.R. 827 (S.C.C.), para. 23: It was open to the jury, with the knowledge of human nature that it is presumed to possess, to determine on the basis of common sense and experience whether they believed the complainant's story of repressed and recovered memory, and whether the recollection she experienced in 1990 was the truth. To do so cannot be characterized as unreasonable.; **Spain:** Susana Polo Garcia, 12 April 2018, STSJ M 3980/2018, 44/2018, p. 4: In relation to the review of convictions based on circumstantial evidence, the Criminal Chamber of the Superior Court of Justice of Madrid has held that these could be sustained if: (i) the facts or the basic facts are fully proven; (ii) the facts constituting the offence are deduced precisely from the proven basic facts; and (iii) the reasonableness of the inference can be checked in the sense that the first instance chamber has identified the findings of fact or evidence and explained the reasoning or logical link between the basic facts and the inferred facts; and (iv) that this reasoning is based on the rules of human judgment or common experience or on a reasonable understanding of the reality normally lived and appreciated in accordance with the collective criteria in force.

Chamber will not disturb a trial chamber's factual finding only because it would have come to a different conclusion.¹²

40. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of the trial chamber. Such deference is justified by certain considerations that inescapably result from the construction of the Statute. The first consideration is that the Statute has vested the trial chamber with the specific function of conducting the trial. As part of that function and in light of the principle of immediacy, the trial chamber has the primary responsibility to determine the reliability and credibility of the evidence received in the course of the trial and then comprehensively assess the weight of the evidence.¹³ In turn, this entails that the trial chamber has the primary responsibility to evaluate the connections and fairly resolve any inconsistencies between the items of evidence received at trial. The trial chamber's function of conducting the trial warrants the presumption that this function has been properly performed, unless and until the contrary is shown. The second consideration is that the Statute requires the appellant to raise specific errors on appeal and the Appeals Chamber reviews the trial chamber's decision through the lens of the errors raised. Nothing in the Statute suggests that an appeal under article 81 in which an error of fact is alleged should contemplate a trial *de novo* in the Appeals Chamber, in total disregard of the trial conducted by the trial chamber.

41. Nevertheless, the Appeals Chamber's deference to the factual findings of the trial chamber is not without qualification. The Appeals Chamber may interfere with a trial chamber's factual finding if it is shown to be attended by errors including the following: insufficient support by evidence; reliance on irrelevant evidence; failure to take into account relevant evidentiary considerations and facts; failure properly to appreciate the significance of the evidence on record; or failure to evaluate and weigh properly the relevant evidence and facts. The Appeals Chamber may interfere where it is unable to discern objectively how the trial chamber's conclusion could have reasonably been reached from the evidence on the record.

¹² [Lubanga Appeal Judgment](#), para. 21.

¹³ The principle of immediacy recognises the primary role of the trial chamber in the context of the unfolding dynamics of any given trial.

42. The Appeals Chamber will consider the validity of the challenged factual finding *vis-à-vis* other relevant factual findings in a holistic manner. However, this does not mean that the Appeals Chamber will review the entirety of the evidentiary record. The Appeals Chamber will have regard not only to the arguments put forward by the appellant, but also to the evidence relied upon by the trial chamber and the arguments of all other parties and participants on the point in issue. In assessing the correctness of a factual finding, the trial chamber's reasoning in support thereof is of great significance. In particular, if the supporting evidence appears weak, or if there are significant contradictions in the evidence, deficiencies in the trial chamber's reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was unreasonable.

43. Where an error of fact is established, the material effect of this error on the trial chamber's decision will have to be assessed, pursuant to article 83(2) of the Statute. Importantly, an error and its materiality must not be assessed in isolation; rather the Appeals Chamber must consider the impact of the error in light of the other relevant factual findings relied upon by the trial chamber for its decision on conviction or acquittal. A trial chamber's decision is materially affected by a factual error if the Appeals Chamber is persuaded that the trial chamber, had it not so erred, would have convicted rather than acquitted the person or *vice versa* in whole or in part.

C. Procedural errors

44. Regarding procedural errors, the Appeals Chamber has found that:

an allegation of a procedural error may be based on events which occurred during the trial proceedings and pre-trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a [...] decision if it is materially affected by the procedural error.¹⁴

45. Having previously found that procedural errors 'often relate to alleged errors in a Trial Chamber's exercise of its discretion',¹⁵ the Appeals Chamber has established that:

¹⁴ [Lubanga Appeal Judgment](#), para. 20. See also [Ngudjolo Appeal Judgment](#), para. 21; [Bemba Appeal Judgment](#), para. 47; [Bemba et al. Appeal Judgment](#), para. 99.

¹⁵ [Ngudjolo Appeal Judgment](#), para. 21. See also [Bemba Appeal Judgment](#), para. 48; [Bemba et al. Appeal Judgment](#), para. 100.

[...] it will not interfere with the Chamber’s exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber’s discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.¹⁶

46. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law or an alleged incorrect conclusion of fact, the Appeals Chamber will apply the standard of review with respect to errors of law and errors of fact as set out above.¹⁷ Where a discretionary decision allegedly amounts to an abuse of discretion, the Appeals Chamber has stated the following:

Even if an error [...] has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to “force the conclusion that the Chamber failed to exercise its discretion judiciously”. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.¹⁸

D. Substantiation of arguments

47. Regulation 58(2) of the Regulations of the Court requires the appellant to refer to ‘the relevant part of the record or any other document or source of information as regards any factual issue’ and ‘to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof’ as regards any legal issue. It also stipulates that the appellant must, where applicable, identify the finding or

¹⁶ [Bemba Appeal Judgment](#), para. 48 (footnotes omitted). See also [Bemba et al. Appeal Judgment](#), para 100; [Ngudjolo Appeal Judgment](#), para. 21; [Kenyatta OA5 Judgment](#), para. 22; [Lubanga Sentencing Judgment](#), para. 41; [Ruto and Sang OA Judgment](#), paras 89-90; [Kony OA3 Judgment](#), paras 79-80.

¹⁷ [Kenyatta OA5 Judgment](#), paras 23-24, [Bemba et al. Appeal Judgment](#), para. 101.

¹⁸ [Kenyatta OA5 Judgment](#), para. 25 (footnotes omitted). See also [Bemba et al. Appeal Judgment](#), para. 101.

ruling challenged in the decision with specific reference to the page and paragraph number.

48. In addition to these formal requirements, an appellant is obliged to present cogent arguments that set out the alleged error and explain how the trial chamber erred.¹⁹ In alleging that a factual finding is unreasonable, an appellant must explain why this is the case, for example, by showing that it was contrary to logic, common sense, scientific knowledge and experience. In their submissions on appeal, it will be for the parties and participants to draw the attention of the Appeals Chamber to all the relevant aspects of the record or evidence in support of their respective submissions relating to the impugned factual finding. Furthermore, in light of article 83(2) of the Statute an appellant is required to demonstrate how the error materially affected the impugned decision. Whether an error or the material effect of that error has been sufficiently substantiated will be determined on a case by case basis.²⁰

49. When raising an appeal on the ground of unfairness under article 81(1)(b)(iv) of the Statute, the appellant is required to set out not only how it was that the proceedings were unfair, but also how this affected the reliability of the conviction decision. If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance.²¹

IV. MR NTAGANDA'S APPEAL

A. First ground of appeal: Judge Kuniko Ozaki's judicial independence

50. Under the first ground of appeal, Mr Ntaganda challenges Judge Kuniko Ozaki's judicial independence under article 40(2) of the Statute.²²

1. Background

51. On 7 January 2019, Judge Ozaki requested to change her status as a full-time judge to a non-full-time judge within the meaning of article 35(3) of the Statute, which the Presidency, after consultation with all the judges, granted.²³

¹⁹ [Lubanga Appeal Judgment](#), para. 30; [Kony OA3 Judgment](#), para. 48.

²⁰ [Lubanga Appeal Judgment](#), para. 31.

²¹ [Bemba Dissenting Opinion to Appeal Judgment](#), para. 386 (footnote omitted).

²² [Mr Ntaganda's Appeal Brief – Part I](#), paras 1, 16.

52. In a memorandum sent to the Presidency and all the judges on 18 February 2019, Judge Ozaki indicated that she had been appointed as the Japanese Ambassador to the Republic of Estonia and that her duties would commence on 3 April 2019.²⁴

53. On 4 March 2019, the judges, by an absolute majority, ‘decided in a plenary that the assumption by Judge Ozaki of the role of Ambassador of Japan to Estonia while she continues to serve as a non-full-time judge of the Court does not violate any aspect of article 40 of the Statute’.²⁵ A minority of three judges disagreed with that conclusion.²⁶

54. The majority considered that:

whilst it is also possible to read article 40(2) in the abstract manner, the language of article 40 calls for application in its concrete acceptance. Whilst the overriding general principle is stated in paragraph 1, it is evident in paragraphs 2 and 3 that the provision is concerned with assessing specific activities and occupations which may be performed by judges. Further, paragraph 4 creates a procedure for dealing with questions arising in respect of a specific individual judge. The concern of the provision is thus with the concrete question of whether functions actually being performed by a specific judge could affect judicial independence. The need for a concrete application is also supported by the evident contrast between article 40 of the Rome Statute and equivalent provisions of some other international courts or tribunals. For example, article 16(1) of the Statute of the International Court of Justice provides that ‘No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature’. Article 40 eschews such broad references to abstract categories of prohibited functions and demonstrates a closer concern with analysing the actual activities or occupations proposed by a judge. Accordingly, the majority considered it necessary that the issue must be approached on a case-by-case basis, emphasising the actual activities to be performed by Judge Ozaki and their compatibility with her status as a non-full-time judge of the Court.²⁷

55. With respect to whether Judge Ozaki’s appointment as Ambassador of Japan to Estonia would interfere with her judicial functions, the majority recalled that ‘Judge Ozaki had already, due to her own exceptional request, moved to a non-full-time

²³ [Annex 1 to Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute](#), 22 March 2019, ICC-01/04-02/06-2326-Anx1 (the ‘[Decision on Independence](#)’), para. 4.

²⁴ [Decision on Independence](#), para. 5.

²⁵ [Decision on Independence](#), paras 7, 16. *See also* para. 8.

²⁶ [Decision on Independence](#), para. 8. Judge Ibáñez Carranza was part of the minority. *See* [Decision on Independence](#), para. 8.

²⁷ [Decision on Independence](#), para. 10.

status and her judicial functions were confined to her remaining duties in the *Ntaganda* case'.²⁸ The majority noted Judge Ozaki's commitment 'to making herself available as necessary for her judicial duties, including, if necessary, during any sentencing stage'.²⁹ The majority was therefore satisfied that there was 'minimal risk of her activities as Ambassador from 3 April 2019 interfering with her judicial functions as a non-full-time judge of the Court, much less any likelihood thereof'.³⁰

56. Furthermore, the majority considered that Judge Ozaki's activities of Ambassador of Japan to Estonia would not likely affect confidence in her judicial independence.³¹ In reaching this conclusion, the majority noted that 'Judge Ozaki's activities as Ambassador would be entirely confined to the bilateral relationship between Japan and Estonia' and that 'neither Japan nor Estonia was connected to any case before the Court'.³² The majority further observed that 'Judge Ozaki's statement that she could refrain from executing responsibilities if any arose which could impact upon her judicial duties, which were confined to the *Ntaganda* case'.³³ The Judge further indicated that 'when returning to the Court to discharge her judicial duties at the seat of the Court she would not act in any way as the Japanese Ambassador to Estonia'.³⁴ In these circumstances, the majority was satisfied that 'Judge Ozaki's independence would not be undermined by assuming the role of Ambassador of Japan to Estonia'.³⁵

57. The minority disagreed with the majority's conclusion. It considered that 'the performance of an executive or political function for a State Party by an individual who remained a Judge of the Court was entirely likely to affect public confidence in judicial independence'.³⁶ The minority added that contrary to other precedents before other international courts and tribunals, Judge Ozaki did not undertake that she would 'not [...] assume *any* functions or duties of her political office prior to the completion

²⁸ [Decision on Independence](#), para. 12.

²⁹ [Decision on Independence](#), para. 12.

³⁰ [Decision on Independence](#), para. 12.

³¹ [Decision on Independence](#), para. 13.

³² [Decision on Independence](#), para. 13.

³³ [Decision on Independence](#), para. 13.

³⁴ [Decision on Independence](#), para. 13.

³⁵ [Decision on Independence](#), para. 14.

³⁶ [Decision on Independence](#), para. 15.

of her judicial tenure’.³⁷ The minority also stressed the risk that ‘approving Judge Ozaki’s request could result in an eventual disqualification request under article 41(2)(b) of the Statute in the *Ntaganda* case or could be raised on appeal’.³⁸

58. On 30 April 2019, Mr Ntaganda requested the reconsideration of the Decision on Independence (the ‘Request for Reconsideration’).³⁹

59. On 1 May 2019, the Presidency issued a notification concerning Judge Ozaki’s resignation as Japanese Ambassador to Estonia on 18 April 2019.⁴⁰

60. On 14 May 2019, the plenary of judges decided that ‘the same body’ of judges ‘which took the initial plenary decision under article 40(4) [...] with the exception of Judges Fremr and Chung who have subsequently been excused from subsequent related matters’, should rule on the Request for Reconsideration (the ‘Decision on Reconsideration’).⁴¹ The judges rejected the Request for Reconsideration and invited Mr Ntaganda, if he so wished, to make a request for disqualification.⁴²

61. The judges held that a distinction should be drawn ‘between a decision on an administrative issue’ of whether a judge’s activity, ‘in general, is likely to affect confidence in a judge’s independence’ under article 40 of the Statute and the issue of ‘a judge’s capacity to continue to sit in a particular case because his or her impartiality might reasonably be doubted on any ground (article 41 of the Statute)’.⁴³

62. The judges added that

[t]he fact that, at the Court, the decision-making authority in respect of both types of decisions is vested in the judges, has no bearing on the distinct nature of these two decision-making processes. Nor does the fact that, as a judge

³⁷ [Decision on Independence](#), para. 15 (emphasis in original).

³⁸ [Decision on Independence](#), para. 15.

³⁹ [Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute](#), ICC-01/04-02/06-2337.

⁴⁰ [Notification concerning Judge Kuniko Ozaki](#), ICC-01/04-02/06-2338, para. 3.

⁴¹ [Decision on the “Request for Reconsideration of the Decision of the Judges Concerning Judge Ozaki Pursuant to Article 40 of the Rome Statute” \(ICC-01/04-02/06-2337\) and the “Request for Reconsideration of ‘Decision concerning the “Request for disclosure concerning the Decision of the plenary of Judges on the judicial independence of Judge Ozaki”, the “Request for disclosure concerning the visit of the Registrar to Japan on 21 and 22 January 2019” \(Filing #2336\), and for Additional Disclosure” \(ICC-01/04-02/06-2339\) and related requests](#), ICC-01/04-02/06-2346, para. 12.

⁴² [Decision on Reconsideration](#), para. 24, p. 13.

⁴³ [Decision on Reconsideration](#), para. 17.

serving pursuant to article 36(10) of the Statute, Judge Ozaki's only remaining judicial duty at the Court is completing the *Ntaganda* trial.⁴⁴

63. The judges recalled that the Decision on Independence 'is an internal administrative decision of the judges concerning a question of judicial independence, not a decision pertaining to Judge Ozaki's capacity to sit in the *Ntaganda* case, with the latter issue not yet having arisen'.⁴⁵

64. With respect to Mr Ntaganda's contention that he had not been heard because of the *ex parte* nature of the article 40 proceedings, the judges held that '[a]rticle 40(4) and rule 34 of the Rules of Procedure and Evidence [...] set out only a number of limited procedural requirements for decisions thereunder, with any other questions of process which may arise falling to be determined by the judges themselves'.⁴⁶

65. The judges further found that decisions taken pursuant article 40(4) are 'general decisions concerning the functioning of a judge and are not decisions pertaining to the role of a judge in any specific case. It is not a decision which pertains to judicial proceedings and does not impact on the fair trial rights of any accused'.⁴⁷ They further held that such decision is 'a general and administrative one of a judge's capacity to undertake a certain activity or occupation and not a question of the judge's capacity to sit in a given case'.⁴⁸ The judges found that if a question regarding a judge's activity that 'may impact on his or her impartiality in a specific case' arises, a party can raise such concern under article 41(2)(b) of the Statute.⁴⁹

66. On 21 May 2019, Mr Ntaganda requested the disqualification of Judge Ozaki (the 'Request for Disqualification').⁵⁰

67. The Presidency convened a plenary of judges on 17 June 2019 to consider the request and, by absolute majority, the judges dismissed the Request for Disqualification (the 'Decision on Disqualification').⁵¹

⁴⁴ [Decision on Reconsideration](#), para. 17.

⁴⁵ [Decision on Reconsideration](#), para. 18.

⁴⁶ [Decision on Reconsideration](#), para. 19.

⁴⁷ [Decision on Reconsideration](#), para. 19.

⁴⁸ [Decision on Reconsideration](#), para. 19.

⁴⁹ [Decision on Reconsideration](#), para. 21.

⁵⁰ [Public Redacted Version of "Request for Disqualification of Judge Ozaki"](#), ICC-01/04-02/06-2347-Red (confidential version dated 20 May 2019 and registered on 21 May 2019 (ICC-01/04-02/06-2347-Conf)).

68. The plenary of judges held that the Request for Disqualification

does not allege any actual bias on the part of Judge Ozaki. To the extent that a claim of impartiality is concerned not with actual partiality but with the appearance of grounds to doubt impartiality, the plenary of judges have consistently considered the relevant standard of assessment to be whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias or a lack of partiality.⁵²

69. The plenary of judges found that the Request for Disqualification could ‘not be used as pretence to seek review of the [Decision on Independence]’.⁵³ The plenary of judges noted Mr Ntaganda’s argument that the role of a Court judge and that ‘of Japanese diplomat are incompatible *in abstracto*’ and decided that submissions ‘to this end need not be further entertained’.⁵⁴

70. With regard to the remainder of the Request for Disqualification, the plenary of judges considered that the request ‘misstate[d] the legal issue’ and raised the following issue:

whether the judges of the plenary are satisfied, to the requisite high threshold, that there is an objectively reasonable appearance that Judge Ozaki may be unable to discharge her judicial duties in the *Ntaganda* case impartially due to her having briefly held the senior diplomatic position of Ambassador of Japan to Estonia, in view of the entirety of the entailing circumstances, before, after and during such appointment.⁵⁵

71. The plenary of judges observed that the request did not contain any ‘allegations concerning the nature of any potential overlap of the functions of the Ambassador of Japan to Estonia and the work of Judge Ozaki in the *Ntaganda* case’.⁵⁶ Regarding the situation of Judge Ozaki, the plenary of judges considered the following:

⁵¹ [Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*](#), 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red (confidential version was registered on the same day (ICC-01/04-02/06-2355-Conf-AnxI)), paras 7, 56. Judges Eboe-Osuji, Morrison, Ibáñez Carranza and Balungi Bossa abstained from participating in the Disqualification Decision as ‘they had each reached a conviction that, in the particular circumstances, their participation may place them in a potential situation of conflict *vis-à-vis* their responsibilities as judges of the Appeals Division’. [Decision on Disqualification](#), para. 57.

⁵² [Decision on Disqualification](#), para. 32 (footnote omitted).

⁵³ [Decision on Disqualification](#), para. 34.

⁵⁴ [Decision on Disqualification](#), para. 34.

⁵⁵ [Decision on Disqualification](#), para. 35.

⁵⁶ [Decision on Disqualification](#), para. 37.

Judge Ozaki assumed the position of Ambassador of Japan to Estonia with the prior approval of a decision of the plenary of judges taken pursuant to article 40(4) of the Statute. Judge Ozaki's ambassadorship concerned only the bilateral relationship between Estonia and Japan. Judge Ozaki undertook that in the event that any matter arose in such context with implications for the *Ntaganda* case, she would take the appropriate steps to ensure no conflicts exist or to raise any issues with the Court immediately. The statement of Judge Ozaki's instructional relationship with the Foreign Minister is only applicable when she is '*pursuing the duties of the ambassadorship*'.⁵⁷

72. In light of this factual context, the plenary of judges was not convinced that 'a well-informed, reasonable observer with a proper understanding of the nature of judicial office would hold concerns as to the potential appearance that Judge Ozaki's impartiality in the *Ntaganda* case could be called into question by virtue of her relationship with Japan in connection with her appointment to a senior diplomatic position'.⁵⁸ The plenary of judges further noted 'Judge Ozaki's full availability and capacity to impartially fulfil her remaining duties in the *Ntaganda* case'.⁵⁹

73. In addition, the plenary of judges found that 'Judge Ozaki's resignation from the position of Ambassador of Japan to Estonia [was] not determinative of the question of whether her impartiality could be reasonably doubted'.⁶⁰

74. In conclusion, the plenary of judges considered that the Request for Disqualification failed to:

(i) show that the 'circumstances of Judge Ozaki's tenure as Ambassador of Japan to Estonia, which had been authorised pursuant to article 40(4) of the Statute, satisf[y] the high threshold necessary to rebut the presumption of impartiality';

(ii) 'demonstrate a reasonable appearance of bias in the *Ntaganda* case, arising from known circumstances of Judge Ozaki's appointment, ambassadorship or resignation from a senior diplomatic post';

(iii) 'present specific allegations of the appearance of any potential connection between Judge Ozaki's responsibilities as a Judge in the *Ntaganda* case and those of her role of Ambassador'.⁶¹

⁵⁷ [Decision on Disqualification](#), para. 38 (emphasis in original and footnotes omitted).

⁵⁸ [Decision on Disqualification](#), para. 39.

⁵⁹ [Decision on Disqualification](#), para. 40.

⁶⁰ [Decision on Disqualification](#), para. 43.

⁶¹ [Decision on Disqualification](#), para. 55.

2. *Summary of submissions*

(a) **Mr Ntaganda's submissions**

75. Mr Ntaganda submits that by assuming her duties as a Japanese diplomat while serving as a judge at the Court, Judge Ozaki 'lost the appearance of judicial independence'.⁶² He avers that Judge Ozaki 'was thereby disqualified from sitting as an ICC Judge, whether on a part-time or full-time basis'.⁶³ In Mr Ntaganda's view, Judge Ozaki could not participate in deliberations and therefore the Trial Chamber was not 'properly constituted' and the Conviction Decision was invalidly rendered and 'is a nullity'.⁶⁴

76. Mr Ntaganda submits that he has standing on appeal to challenge Judge Ozaki's independence.⁶⁵ He argues that the Decision on Independence was rendered without him being heard and that the 'Presidency refused to permit reconsideration' of this decision.⁶⁶ Mr Ntaganda argues that the matter of lack of independence of a judge is 'a justiciable matter, properly advanced on appeal'.⁶⁷

(b) **The Prosecutor's submissions**

77. The Prosecutor submits that Mr Ntaganda's first ground of appeal should be dismissed as it amounts to an appeal against the Decision on Independence, an appeal for which the Statute does not provide.⁶⁸ The Prosecutor argues that article 40(4) of the Statute clearly provides that matters referred to in this provision are to be decided 'by an absolute majority of the judges'.⁶⁹ Moreover, the Prosecutor avers that the 'object and purpose of article 40 supports the finality of such decisions' because this provision aims at ensuring that 'any activity of judges is not likely to affect confidence in their independence'.⁷⁰ She adds that in light of the 'potential

⁶² [Mr Ntaganda's Appeal Brief – Part I](#), para. 1.

⁶³ [Mr Ntaganda's Appeal Brief – Part I](#), para. 1.

⁶⁴ [Mr Ntaganda's Appeal Brief – Part I](#), paras 1, 16.

⁶⁵ [Mr Ntaganda's Appeal Brief – Part I](#), paras 2-5.

⁶⁶ [Mr Ntaganda's Appeal Brief – Part I](#), para. 2.

⁶⁷ [Mr Ntaganda's Appeal Brief – Part I](#), para. 4; [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part I](#), para. 4.

⁶⁸ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part I](#), paras 1, 3-4, 15.

⁶⁹ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part I](#), para. 4.

⁷⁰ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part I](#), para. 5.

ramifications of such matters on the Court's activities, efficiency requires that they are resolved promptly and definitively, without further and protracted litigation'.⁷¹

78. The Prosecutor argues that by 'only seeking reconsideration' of the Decision on Independence, Mr Ntaganda 'implicitly acknowledged' that such decision is not appealable as he would have otherwise tried to appeal it.⁷² She further avers that it would appear 'incongruous that five judges hear an appeal against a decision rendered by the Plenary of judges, of which they have been part'.⁷³

(c) The victims' observations

79. Victims Group 1 submit that Mr Ntaganda merely repeats arguments advanced in both his requests for reconsideration and for disqualification and 'misinterprets the permissible scope of the present appeal'.⁷⁴

(d) Mr Ntaganda's response to the victims

80. Mr Ntaganda argues that the right 'to be tried before an independent tribunal is an integral component' of the right to a fair trial and that the submission of Victims Group 1 that issues of independence under article 40 of the Statute are 'sealed off from appellate review' is incorrect.⁷⁵

(e) Mr Ntaganda's reply to the Prosecutor

81. Mr Ntaganda submits that 'independence and impartiality are a "special circumstance" and matters of "general importance" which Appeals Chambers have addressed, regardless of if, when and how they were previously raised'.⁷⁶

3. Determination by the Appeals Chamber

82. The Appeals Chamber notes that, under this ground of appeal, Mr Ntaganda argues that Judge Ozaki's judicial independence under article 40 of the Statute⁷⁷ was

⁷¹ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part I](#), para. 5.

⁷² [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part I](#), para. 6.

⁷³ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part I](#), para. 6.

⁷⁴ [Observations of Victims Group 1 on Appeal – Part I](#), paras 4-8.

⁷⁵ [Mr Ntaganda's Response to Observations of Victims Group 1 on Appeal - Part I](#), paras 3-4.

⁷⁶ [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part I](#), para. 3.

⁷⁷ Article 40 of the Statute provides that:

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

affected when she assumed her duties as a Japanese diplomat while continuing to serve as a judge at the Court.⁷⁸ In his view, this disqualified her from sitting as a judge at the Court.⁷⁹ He contends that, as she could not participate in the deliberations, as required by article 74(1) of the Statute, the Trial Chamber was not ‘properly constituted’ and the Conviction Decision ‘is a nullity’.⁸⁰ Mr Ntaganda argues that the matter of a judge’s lack of independence is ‘properly advanced on appeal’.⁸¹

83. The Appeals Chamber notes that the issues which Mr Ntaganda raises are the same as the ones with which the judges in plenary session dealt in the Decision on Independence. Indeed, Mr Ntaganda explicitly acknowledges that ‘[t]his ground of appeal, in substance, raises the same issues that were adjudicated in the [Decision on Independence]’.⁸² The Appeals Chamber also notes that Mr Ntaganda is not raising any issue regarding the disqualification of Judge Ozaki. Therefore, it must be first determined whether Mr Ntaganda can raise, in an appeal against the Conviction Decision, an issue that has been comprehensively addressed in a decision taken by an absolute majority of the judges pursuant to article 40 of the Statute.

84. The Appeals Chamber notes that, pursuant to article 40(4) of the Statute, issues relating to a judge’s judicial independence ‘shall be decided by an absolute majority of the judges’ of the Court. Such a decision on the matter of the independence of a judge in the performance of her or his judicial functions and duties is taken by all judges of the Court (apart, of course, the judge or judges concerned). This specific statutory framework aims at safeguarding the independence of a judge and demonstrates its significance for ensuring fairness of the judicial proceedings. This is also in line with article 3 of the Court’s Code of Judicial Ethics on the judicial independence of Judges at the Court.⁸³ While the Code of Judicial Ethics is ‘advisory

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraph 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, the judge shall not take part in the decision.

⁷⁸ [Mr Ntaganda’s Appeal Brief – Part I](#), para. 1.

⁷⁹ [Mr Ntaganda’s Appeal Brief – Part I](#), para. 1.

⁸⁰ [Mr Ntaganda’s Appeal Brief – Part I](#), paras 1, 16.

⁸¹ [Mr Ntaganda’s Appeal Brief – Part I](#), para. 4.

⁸² [Mr Ntaganda’s Appeal Brief – Part I](#), para. 5.

⁸³ ICC-BD/02-01-05. Article 3 on Judicial Independence provides that:

in nature’, it serves as ‘guidelines’ to the judges ‘on the essential ethical standards required of judges in the performance of their duties’.⁸⁴ The Appeals Chamber notes that the drafters of the Statute underscored the importance of these principles by imposing stringent scrutiny of the judicial independence of a judge by requiring an absolute majority of all judges of the Court to decide this matter rather than a bench of five judges of the Appeals Chamber or a bench of three judges of any of the other Chambers of the Court.

85. The Appeals Chamber considers that the legal framework of the Court does not provide for any appeal against a decision taken by an absolute majority of the judges under article 40 of the Statute to the Appeals Chamber. While Judge Eboe-Osuji does not concur with this reasoning, he concurs with the Appeals Chamber’s ultimate outcome.⁸⁵ The Appeals Chamber consider that such a possibility would not be logical and feasible under the court’s legal framework, given that the judges of the Appeals Chamber are may have been part of the plenary of judges in session that decides on this matter; if an appeal were possible, the judges of the Appeals Chamber could thus be required to review their own decision. Even if one or more judges of the Appeals Chamber did not participate in such decision this would not mean that the Appeals Chamber should then have jurisdiction to review a decision on the independence of a judge taken by the absolute majority of the judges under article 40 of the Statute, given the statutory scheme.

86. The Appeals Chamber emphasises that the judicial independence of judges is at the core of the Court’s legal framework to safeguard the general integrity of the proceedings before the Court. It is for this reason that the Statute provides for a

1. Judges shall uphold the independence of their office and the authority of the Court and shall conduct themselves accordingly in carrying out their judicial functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

⁸⁴ Article 11(1) which reads: 1. The principles embodied in this Code shall serve as guidelines on the essential ethical standards required of judges in the performance of their duties. They are advisory in nature and have the object of assisting judges with respect to ethical and professional issues with which they are confronted.

⁸⁵ Judge Eboe-Osuji expresses a different opinion. He is of the view that the Appeals Chamber is not precluded from considering the issue of Judge Ozaki’s independence just because it was already determined by the plenary of judges. However, after having examined Mr Ntaganda’s arguments, Judge Eboe-Osuji would still confirm the conclusion of the plenary of judges that the independence of Judge Ozaki was not affected when she assumed the role of Ambassador of Japan to Estonia, and accordingly would reject this ground of appeal.

specific mechanism in article 40 which focuses on this subject matter and sets out the procedure to follow should an issue about the independence of a judge arise. This procedure has been followed in the present case. In the Decision on Independence, an absolute majority of the judges held that Judge Ozaki's assumption of the role of Ambassador of Japan to Estonia while continuing to serve as a non-full-time judge of the Court did not violate any aspect of article 40 of the Statute. Therefore, the majority in that decision has examined and adjudicated the question of Judge Ozaki's independence. The Appeals Chamber recalls that Mr Ntaganda's request for reconsideration of the Decision on Independence of Judge Ozaki was unsuccessful. Mr Ntaganda cannot now raise the same matters on appeal.

87. While the issue of judicial independence is not appealable before the Appeals Chamber,⁸⁶ an appellant may still raise on appeal matters affecting the fairness of the proceedings.⁸⁷ In that regard, the Appeals Chamber notes that article 81(1)(b)(iv) of the Statute expressly provides the convicted person, or the Prosecutor on his or her behalf, with the possibility to raise a ground that 'affects the fairness or reliability of the proceedings or decision'. In the present case, Mr Ntaganda neither presents arguments challenging the fairness or reliability of the Conviction Decision under that provision.

88. Judge Ibáñez Carranza, while agreeing with the outcome of the majority of the Appeals Chamber, disagrees with its reasoning insofar as it concludes that 'the issue of judicial independence is [...] not appealable before the Appeals Chamber'. In her view, the determination of the matter cannot be based on the administrative decision adopted by the plenary of judges which was unrelated to any specific judicial proceedings. A judicial decision cannot find its reasoning only in an administrative decision. The nature, object and consequences of these are different. The Appeals Chamber must now address a judicial ground of appeal in the context of a final appeal brought against a conviction decision in which the convicted person is arguing that one of the judges lacked judicial independence (or at least the appearance of judicial independence) and therefore could not have adjudicated the matter because the risk of implicit unfairness.

⁸⁶ As stated above, Judge Eboe-Osuji does not concur with this reasoning.

⁸⁷ See [Ayyash Joint Opinion](#), para. 27.

89. Judge Ibáñez Carranza considers that Mr Ntaganda has a right to raise any issue that may have affected the fairness of the proceedings pursuant to article 81(1)(b)(iv) of the Statute. The right to appeal on the basis of an alleged lack of independence on the part of one of the judges adjudicating a case is also a corollary of the internationally recognised human right ‘to a fair and public hearing by a competent, independent and impartial tribunal established by law’.⁸⁸ Judge Ibáñez Carranza is of the view that the judges of the Appeals Chamber are not prevented from addressing this ground of appeal on its merits. Indeed, in the Decision on Disqualification, Judges Eboe-Osuji, Morrison, Ibáñez Carranza and Balungi Bossa abstained from participating as ‘they had each reached a conviction that, in the particular circumstances, their participation may place them in a potential situation of conflict *vis-à-vis* their responsibilities as judges of the Appeals Division’ towards the concrete appeal of Mr Ntaganda (Judge Hofmański was not present at the moment, and therefore he did not participate in the decision of the plenary).⁸⁹

90. For reasons set out in her dissent to the Decision on Independence, Judge Ibáñez Carranza remains of the view that it is incorrect and reproachable that a judge who is adjudicating grave crimes that amount to gross human rights violations is, at the same time, performing executive functions for a State Party to the Rome Statute. In her opinion, this inevitably affected the appearance of independence of the concerned judge and put at risk the fairness of the proceedings. However, Judge Ibáñez Carranza considers that Mr Ntaganda has failed to show a material effect of the alleged lack of independence of Judge Ozaki.

91. As noted above, Mr Ntaganda repeats the arguments advanced before the plenary of judges. Article 83(2) of the Statute requires that the reliability of the decision must have been affected as a result of a ground affecting the fairness of the proceedings. Judge Ibáñez Carranza is of the view that Mr Ntaganda does not show how the Conviction Decision was affected by the alleged lack of independence and how he was prejudiced as a result. Judge Ibáñez Carranza finds that an analysis of the Conviction Decision shows that Mr Ntaganda was convicted for 18 charges on the basis of solid reasoning and an assessment of the evidence that established beyond

⁸⁸ ICCPR, article 14.1.

⁸⁹ [Decision on Disqualification](#), para. 57.

reasonable doubt his culpability. The reasoning and outcome were unanimous. In her view, this means that any alleged lack of independence on the part of Judge Ozaki did not have a material impact on the Conviction Decision.

4. Overall conclusion

92. In light of the above reasons, the Appeals Chamber dismisses this ground of appeal.

B. Second ground of appeal: Alleged violations of Mr Ntaganda's right to a fair trial due to procedural irregularities

93. Under the second ground of appeal, Mr Ntaganda raises allegations of unfairness. In particular, he submits that his right to a fair trial was violated because:

(i) the Trial Chamber resorted, in an excessive manner, to *ex parte* material;⁹⁰

(ii) the Prosecutor failed to disclose Mr Ntaganda's non-privileged conversations in her possession and the Trial Chamber did not take measures to mitigate the prejudice that resulted from these disclosure violations;⁹¹

(iii) the Trial Chamber failed to suspend the proceedings prior to the resolution of the 'no case to answer' appeal;⁹² and

(iv) the Trial Chamber prioritised expeditiousness at the expense of Mr Ntaganda's right to a fair hearing.⁹³

94. The Appeals Chamber will consider these four sub-grounds in turn.

95. The Appeals Chamber notes, at the outset, that when raising on appeal an issue which the appellant previously raised at trial and on which the trial chamber ruled, he or she must identify alleged errors in relevant decisions of the trial chamber, to the extent that those decisions deal with that issue raised on appeal.⁹⁴ As summarised below, Mr Ntaganda made a number of procedural requests regarding the issues he now raises on appeal and the Trial Chamber ruled on these requests. In some of the arguments raised under this ground of appeal, Mr Ntaganda raises the same issues

⁹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 5-20; [T-270](#), p. 87, lines 10-13.

⁹¹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 5, 21-41.

⁹² [Mr Ntaganda's Appeal Brief – Part II](#), paras 5, 42-47.

⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 5, 48-57.

⁹⁴ [Bemba Dissenting Opinion to Appeal Judgment](#), para. 387. See also [Lubanga Appeal Judgment](#), para. 155.

anew without identifying errors in the relevant rulings of the Trial Chamber. The Appeals Chamber has taken it into account when examining the arguments on appeal.

1. The Trial Chamber's alleged excessive resort to ex parte material

96. Under this sub-ground of appeal, Mr Ntaganda argues that the Trial Chamber's excessive resort to *ex parte* material violated his right to a fair trial.⁹⁵

(a) Background

(i) Ex parte submissions regarding P-0768

97. On 8 August 2014, the Prosecutor requested the Trial Chamber to impose restrictions pursuant to regulation 101(2) of the Regulations of the Court on the contact between Mr Ntaganda and other persons, alleging that [REDACTED].⁹⁶ In support of her allegations, the Prosecutor filed as annexes to her request [REDACTED].⁹⁷ On the same day, the Prosecutor also filed a confidential redacted version of the request.⁹⁸ Confidential redacted versions of [REDACTED] were filed on 19 December 2014.⁹⁹

98. From 19 to 22 October 2015, P-0768 gave testimony at the Court.¹⁰⁰

99. In an *ex parte* filing of 21 April 2015, the Prosecutor informed [REDACTED]. The filing refers to [REDACTED].¹⁰¹ A confidential redacted version of this filing was filed on 5 November 2019.¹⁰²

100. On 9 May 2016, the Prosecutor provided the Trial Chamber with further information relevant to the restrictions on Mr Ntaganda's contacts.¹⁰³

⁹⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 5-20.

⁹⁶ Public redacted version of "Prosecution's urgent request for measures under regulation 101(2) of the Regulations of the Court", 8 August 2014, ICC-01/04-02/06-349-Conf-Exp, 15 January 2016, ICC-01/04-02/06-349-Red3 (the '[Prosecutor's Request for Restrictions](#)') (confidential *ex parte* version was registered on 8 August 2014 (ICC-01/04-02/06-349-Conf-Exp)), paras 1, 4, 53-54.

⁹⁷ Annexes to [Prosecutor's Request for Restrictions](#), ICC-01/04-02/06-349-Conf-Exp-AnxA, ICC-01/04-02/06-349-Conf-Exp-AnxB.

⁹⁸ ICC-01/04-02/06-349-Conf-Red (the latest confidential version was registered on 14 March 2017, ICC-01/04-02/06-349-Conf-Red4).

⁹⁹ ICC-01/04-02/06-349-Conf-AnxA-Red, ICC-01/04-02/06-349-Conf-AnxB-Red.

¹⁰⁰ [T-33](#), [T-34](#), [T-35](#), [T-36](#).

¹⁰¹ [REDACTED], ICC-01/04-02/06-565-Conf-Exp, paras 1, 13-15.

¹⁰² ICC-01/04-02/06-565-Conf-Red.

¹⁰³ Prosecution's submissions on the restrictions to NTAGANDA's contacts, ICC-01/04-02/06-1313-Conf-Exp (confidential redacted version was registered on 10 May 2016 (ICC-01/04-02/06-1313-Conf-

(ii) *Access to transcript of hearing of 30 October 2015*

101. On 8 August 2014, the Prosecutor filed, *ex parte*, a request for [REDACTED].¹⁰⁴ This request was reclassified as confidential on 12 June 2017.¹⁰⁵

102. On 30 October 2015, the Trial Chamber held an *ex parte* hearing with P-0055, in the presence of the Victims and Witnesses Unit, to address matters of security.¹⁰⁶

103. On 2 November 2015, Mr Ntaganda sought re-classification of the transcript of the hearing of 30 October 2015, arguing that its content was material to the preparation of the defence.¹⁰⁷

104. On 11 November 2015, the Trial Chamber decided to provide the parties with a summary of the hearing of 30 October 2015, including ‘verbatim extracts’ with redactions to ‘information that should not be disclosed in the interests of the security of the witness, and to information which the Chamber [did] not consider to be relevant to the preparations of the parties and participants’.¹⁰⁸

105. On 22 February 2016, Mr Ntaganda requested the provision of the full transcript of the hearing of 30 October 2015.¹⁰⁹

106. On 24 February 2016, the Trial Chamber rejected the request, noting, *inter alia*, that the security situation of the witness concerned had not changed.¹¹⁰

(iii) *Request for disclosure of ex parte materials*

107. On 17 February 2017, Mr Ntaganda requested ‘disclosure of any and all *ex parte* materials before the Chamber that concern, directly or indirectly, allegations of

Exp-Red)); confidential redacted versions were registered on 28 November 2016 (ICC-01/04-02/06-1313-Conf-Red2) and on 28 March 2017 (ICC-01/04-02/06-1313-Conf-Red3); public redacted versions were registered on 17 May 2016 (ICC-01/04-02/06-1313-Red) and on 14 December 2016 ([ICC-01/04-02/06-1313-Red2](#)).

¹⁰⁴ [REDACTED], ICC-01/04-02/06-348-Conf-Exp, paras 1, 20, 23.

¹⁰⁵ ICC-01/04-02/06-348-Conf.

¹⁰⁶ T-42.

¹⁰⁷ Email communication, as summarised in Decision on Defence request seeking provision of transcript of the *ex parte* hearing held on 30 October 2015, 24 February 2016, ICC-01/04-02/06-1189-Conf (the ‘Decision on Access to Transcript’), para. 2.

¹⁰⁸ Provision of summary of *ex parte* hearing to parties and participants, ICC-01/04-02/06-995-Conf (the ‘Summary of *Ex Parte* Hearing’), para. 3, p. 4.

¹⁰⁹ Urgent request on behalf of Mr Ntaganda seeking provision of full transcript of the *ex parte* hearing held on 30 October 2015, ICC-01/04-02/06-1185-Conf.

¹¹⁰ Decision on Access to Transcript, para. 12, p. 7.

witness coaching against Mr Ntaganda or his associates and family'.¹¹¹ He argued, *inter alia*, that the 'prohibition on *ex parte* communications is necessary to "preserve the confidence of the public in the impartiality of the judiciary"'.¹¹²

108. On 16 March 2017, the Trial Chamber issued its decision on Mr Ntaganda's request,¹¹³ where it noted that:

Whereas the present case record contains materials that are marked *ex parte* because they relate to the Prosecution's allegations of interference with and coaching of witnesses, and the related litigation concerning the restrictions placed on Mr Ntaganda's contacts, other materials have been marked *ex parte* for different reasons, such as that they were obtained, or contain information that was obtained, pursuant to Article 54(3)(e) of the Statute, or relate to the security of witnesses and/or victim applicants.¹¹⁴

109. The Trial Chamber noted the Prosecutor's undertaking to file lesser redacted versions of eight filings related to allegations of witness interference and authorised the requested reclassifications.¹¹⁵ It also reviewed all its decisions that had not been notified or had been notified with redactions to Mr Ntaganda, to conclude that the redactions applied to the versions accessible to Mr Ntaganda 'continue[d] to be necessary to protect the safety and security of the witnesses or other persons'.¹¹⁶ The Trial Chamber held that one *ex parte* decision would remain *ex parte* for that same reason.¹¹⁷ Regarding decisions relating to the litigation on restrictions to Mr Ntaganda's contacts, the Trial Chamber found it appropriate to give him access to full or lesser redacted decisions, noting, however, that 'the information that would become available as a result [was] mostly already known to the Defence due to public versions or lesser redacted version having been issued or the information having been referred to in a later decision'.¹¹⁸

¹¹¹ Motion on behalf of Mr Ntaganda requesting access to *ex parte* material before the Chamber in Case ICC-01/04-02/06, ICC-01/04-02/06-1790-Conf ('Mr Ntaganda's Motion for Access to *Ex Parte* Material'), para. 1.

¹¹² Mr Ntaganda's Motion for Access to *Ex Parte* Material, para. 14.

¹¹³ Decision on Defence request for access to *ex parte* material, ICC-01/04-02/06-1826 (the '[First Decision on Ex Parte Material](#)').

¹¹⁴ [First Decision on Ex Parte Material](#), para. 4.

¹¹⁵ [First Decision on Ex Parte Material](#), para. 5.

¹¹⁶ [First Decision on Ex Parte Material](#), para. 7.

¹¹⁷ [First Decision on Ex Parte Material](#), para. 7.

¹¹⁸ [First Decision on Ex Parte Material](#), para. 8.

110. The Trial Chamber noted that ‘any [*ex parte*] material underlying the Prosecution’s filings is covered by the regular disclosure regime, subject to any reasons that would prevent the disclosure of these materials’.¹¹⁹ Regarding transcripts of *ex parte* hearings, the Trial Chamber noted that only one hearing was held in the absence of Mr Ntaganda, that the parties received a summary thereof and that Mr Ntaganda’s request for access to the transcript of that hearing had already been rejected.¹²⁰ The Trial Chamber also rejected the request for access to *ex parte* correspondence between the Prosecutor and the Trial Chamber, noting that

[n]o *ex parte* e-mail communication addressing any substantive matters has taken place between the Chamber and the Prosecution that, in view of the Chamber, should be provided to the Defence. The Defence’s allegation that communications exist that would be material to its preparations and its reference to appearance of bias in this regard is inapposite.¹²¹

(iv) *Access to ex parte submissions from sources other than the Prosecutor*

111. On 28 November 2019, after the Conviction Decision and the Sentencing Decision were rendered, Mr Ntaganda requested: (i) information about 56 *ex parte* submissions originating from sources other than the Prosecutor; and (ii) the Trial Chamber’s assistance in ensuring that those sources file redacted or public versions of these submissions.¹²²

112. On 11 December 2019, the Trial Chamber, in its new composition, granted the request in part¹²³ and held that:

even though it now reclassifies a number of filings from *ex parte* to confidential, in relation to some of them, the Defence was already privy to the relevant information contained therein, and that due to the nature of the filings and/or their content, no prejudice arises to Mr Ntaganda as a result of such filings not having been available to the Defence until this point. The Chamber also emphasises that no prejudice arises to Mr Ntaganda as a result of the

¹¹⁹ [First Decision on Ex Parte Material](#), para. 9.

¹²⁰ [First Decision on Ex Parte Material](#), para. 10, referring to Decision on Access to Transcript.

¹²¹ [First Decision on Ex Parte Material](#), para. 11.

¹²² Email communication, as summarised in Decision on Defence request in relation to *ex parte* filings, 11 December 2019, ICC-01/04-02/06-2451 (the ‘[Second Decision on Ex Parte Material](#)’), para. 6.

¹²³ [Second Decision on Ex Parte Material](#), p. 7.

continued *ex parte* status of certain filings, as their content does not concern the charges and/or evidence of the criminal case against Mr Ntaganda.¹²⁴

(b) Summary of submissions

(i) Mr Ntaganda's submissions

113. Mr Ntaganda submits that the Court's legal texts provide for *ex parte* submissions only in exhaustively enumerated circumstances,¹²⁵ consistent with, *inter alia*, the jurisprudence of the ECtHR.¹²⁶ He submits that of the 214 written *ex parte* submissions which the Trial Chamber received during trial, '91 remained undisclosed at the end of trial' and many of the other ones 'remained *ex parte* until many months after they were first presented'.¹²⁷ He argues that some of the *ex parte* filings included material prejudicial to him, in particular, [REDACTED] P-0768, [REDACTED].¹²⁸

114. Mr Ntaganda further argues that '[t]he Chamber's tolerance for these sub-sonic, and often highly prejudicial, written communications – and its failure to require their prompt disclosure – violated Mr. Ntaganda's right to a fair trial'.¹²⁹ In this respect, Mr Ntaganda refers to the case of P-0055, whom the Trial Chamber heard *ex parte* to receive, what Mr Ntaganda believes are, prejudicial allegations against him.¹³⁰ Mr Ntaganda contends that, as a result, the findings based on P-0055's evidence are unsafe.¹³¹

(ii) The Prosecutor's submissions

115. The Prosecutor submits that Mr Ntaganda 'fails to show that the limited use of *ex parte* submissions at trial – for the purpose of maintaining the integrity and fairness of the proceedings, and protecting victims and witnesses, in accordance with the Statute' – occasioned unfairness that affected the reliability of the Conviction Decision.¹³² The Prosecutor argues that the trial chamber has discretion to receive *ex*

¹²⁴ [Second Decision on Ex Parte Material](#), para. 10.

¹²⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 6-7.

¹²⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 9.

¹²⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 12, referring to annex C to Mr Ntaganda's Appeal Brief – Part II.

¹²⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 13; [T-270](#), p. 87, lines 10-13.

¹²⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 14.

¹³⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 15; [T-270](#), p. 87, lines 14-24.

¹³¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 19.

¹³² [Prosecutor's Response to Appeal – Part II](#), paras 23-24.

parte submissions and that such submissions are contemplated not only in the circumstances listed by Mr Ntaganda.¹³³

116. The Prosecutor further contends that Mr Ntaganda's concern that 'his interests may be, or may have been, adversely affected by 40 *ex parte* submissions to which he does not have access', is 'unfounded, and incorrect', as some of them appear not to be material to 'the assessment of Ntaganda's guilt or innocence'.¹³⁴ Regarding P-0768, the Prosecutor submits that Mr Ntaganda shows no prejudice, as he knew of the relevant allegations before trial and the filings in question and '[a]t no point was "consciousness of guilt" or "bad character" evidence considered in determining the charges'.¹³⁵ Regarding P-0055, the Prosecutor argues that: (i) the trial chamber has the power to hear from a witness [REDACTED] on an *ex parte* basis; (ii) the summary of the hearing, provided to the parties, is extensive and Mr Ntaganda 'made no serious effort to explore [the] issue [of P-0055's credibility] in cross-examination'; and (iii) his 'undeveloped allegation of bias' is insufficient 'to overturn the [...] presumption of judicial impartiality'.¹³⁶

(iii) The victims' observations

117. Victims Group 2 submit that they support the Prosecutor's arguments in relation to some of the alleged infringements.¹³⁷ Regarding Mr Ntaganda's request for an order for retrial, Victims Group 2 argue that such an order is an 'exceptional measure' and resort to it must be limited, and that, in any event, none of the criteria for such a remedy are met.¹³⁸

¹³³ [Prosecutor's Response to Appeal – Part II](#), para. 25.

¹³⁴ [Prosecutor's Response to Appeal – Part II](#), para. 27.

¹³⁵ [Prosecutor's Response to Appeal – Part II](#), para. 30.

¹³⁶ [Prosecutor's Response to Appeal – Part II](#), para. 31.

¹³⁷ [Observations of Victims Group 2 on Appeal – Part II](#), para. 18, referring to [Prosecutor's Response to Appeal – Part II](#), paras 24-37.

¹³⁸ [Observations of Victims Group 2 on Appeal – Part II](#), paras 19-20.

(c) **Determination by the Appeals Chamber**

(i) *Whether a trial chamber may resort to ex parte material*

118. Mr Ntaganda submits that *ex parte* submissions are allowed only in exhaustively enumerated circumstances¹³⁹ and that, where they concern the credibility of witnesses, an *inter partes* disclosure is required.¹⁴⁰

119. The Appeals Chamber notes that *ex parte* proceedings are not subject to a general prohibition before the Court.¹⁴¹ However, the Appeals Chamber points out that resort to such proceedings should be limited. When deciding on the advisability or modalities of the notification of an *ex parte* submission to the accused person, a trial chamber must be mindful of the duty to respect the principle of the equality of arms. It finds relevant the jurisprudence of the ECtHR on which Mr Ntaganda relies in this context.¹⁴² It notes the following ruling of the ECtHR:

In a system where the filing of written observations by the parties before a hearing is not excluded and where a court, therefore, when deliberating on a case has at its disposal in addition to oral statements made at a hearing written statements filed beforehand, a party which is not informed about written submissions of the opposing party and thus deprived from reacting thereto is put at a substantial disadvantage vis-à-vis its opponent.¹⁴³

120. Regarding the requirement of notification of the other party of an *ex parte* application, the Appeals Chamber recalls its ruling in the case of *The Prosecutor v. Thomas Lubanga Dyilo*:

¹³⁹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 6-7.

¹⁴⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 10.

¹⁴¹ [Bemba Dissenting Opinion to Appeal Judgment](#), para. 429. In that regard, the Appeals Chamber observes that such proceedings are expressly referred to, for instance, in rule 74(4) of the Rules on self-incrimination by a witness: 'Before giving such an assurance [with respect to self-incrimination], the Chamber shall seek the views of the Prosecutor, *ex parte*, to determine if the assurance should be given to this particular witness'; in rule 83 of the Rules on a ruling on exculpatory evidence: 'The Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2'; in rule 88(2) of the Rules on special measures regarding, for instance, the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence: 'A Chamber may hold a hearing on a motion or a request [for special measures], if necessary *in camera* or *ex parte*, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness'.

¹⁴² [Mr Ntaganda's Appeal Brief – Part II](#), para. 9.

¹⁴³ [Lanz Judgment](#), para. 62. See also [Brandstetter Judgment](#), paras 67-68.

The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for *ex parte* proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognized human rights standards, as required by article 21 (3) of the Statute. By making a decision that does not allow for any degree of flexibility, the Pre-Trial Chamber precluded proper handling of such cases.¹⁴⁴

121. The Appeals Chamber therefore finds that '*ex parte* submissions may be used only to the extent that they are strictly necessary'.¹⁴⁵ It further considers that '[w]hether *ex parte* proceedings are acceptable, and for how long *ex parte* submissions can be withheld from the other party, will depend on the specific circumstances of the case and, in particular, the risk of prejudice to the fair trial of an ongoing case'.¹⁴⁶

(ii) *Whether prejudice must be presumed in cases where ex parte submissions have been made*

122. The Appeals Chamber is unable to accept Mr Ntaganda's proposition that '[w]here the judge to whom the *ex parte* submissions have been made is the decider of fact, prejudice may be presumed'.¹⁴⁷ Under the Court's legal framework, there are *ex parte* procedures in which judges are expected to rule on issues relating to the substance of the case, notably in respect of the authorisation of non-disclosure of material to the defence, pursuant to rule 81(2) of the Rules. The fact that judges of a trial chamber make such a ruling in an *ex parte* procedure does not mean that prejudice automatically results therefrom. Pursuant to article 74(2) of the Statute, the judges are expected to base their decision on the guilt or innocence of an accused person 'only on evidence submitted and discussed [...] at the trial'. This provides a safeguard for the party excluded from *ex parte* proceedings because any material of which the judges may have become aware may not be used when determining the guilt or innocence of the accused person, unless it subsequently was submitted and

¹⁴⁴ [Lubanga OA3 Judgment](#), para. 67.

¹⁴⁵ See [Bemba Dissenting Opinion to Appeal Judgment](#), para. 429.

¹⁴⁶ See [Bemba Dissenting Opinion to Appeal Judgment](#), para. 429.

¹⁴⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 11.

discussed at trial. There is therefore no reason for a presumption of prejudice, to which Mr Ntaganda refers.¹⁴⁸

123. The Appeals Chamber will therefore proceed to analyse Mr Ntaganda's arguments regarding the alleged prejudice in accordance with the applicable standard of appellate review.

(iii) *Whether the Trial Chamber's resort to ex parte proceedings was excessive*

124. Mr Ntaganda submits that 91 *ex parte* submissions 'remained undisclosed at the end of trial' and many other were only disclosed with a delay of months.¹⁴⁹ He argues that these submissions were 'often highly prejudicial'.¹⁵⁰

125. The Appeals Chamber notes that when withholding information from Mr Ntaganda, the Trial Chamber relied on article 54(3)(e) of the Statute and on reasons related to the security of witnesses and/or victim applicants.¹⁵¹ The Appeals Chamber is satisfied that resort to *ex parte* proceedings was based on valid grounds in this instance.

126. The Appeals Chamber also notes that the Trial Chamber specifically rejected Mr Ntaganda's allegation of prejudice on account of lack of access to *ex parte* submissions, as, in many cases, he had been privy to the relevant information contained therein¹⁵² and, in other cases, the *ex parte* email communications between the Trial Chamber and the Prosecutor did not concern substantive matters.¹⁵³ Mr Ntaganda does not challenge these findings of the Trial Chamber.

127. The Appeals Chamber will now turn to Mr Ntaganda's arguments regarding the specific cases of P-0768 and P-0055.

(a) P-0768

¹⁴⁸ See [Bemba Dissenting Opinion to Appeal Judgment](#), para. 441.

¹⁴⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 12.

¹⁵⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 14.

¹⁵¹ [First Decision on Ex Parte Material](#), para. 4.

¹⁵² [First Decision on Ex Parte Material](#), para. 8; [Second Decision on Ex Parte Material](#), para. 10.

¹⁵³ [First Decision on Ex Parte Material](#), para. 11.

128. Mr Ntaganda refers to [REDACTED] P-0768, [REDACTED].¹⁵⁴ The Appeals Chamber notes that, although the Prosecutor’s application for restrictions, based on the allegations of interference with P-0768, was filed *ex parte*, a confidential redacted version of the application was notified to Mr Ntaganda on the same day.¹⁵⁵ A confidential redacted version of [REDACTED] was notified to him on 19 December 2014.¹⁵⁶ He was thus privy to, at least the essence of, the allegations against him before the witness came to testify in October 2015. Therefore, Mr Ntaganda was in a position to explore these matters with the witness or otherwise react to the allegations before the Trial Chamber made its final determination as to his guilt.

(b) P-0055

129. Mr Ntaganda also refers to the case of P-0055, whom the Trial Chamber heard *ex parte*.¹⁵⁷ Mr Ntaganda: (i) challenges the legal basis for that hearing;¹⁵⁸ (ii) objects to the Trial Chamber’s failure to provide the parties with an unredacted transcript of the hearing;¹⁵⁹ and (iii) argues that [REDACTED] created a bias in the judges against him.¹⁶⁰

130. The Appeals Chamber notes that Mr Ntaganda had been on notice that such a hearing would be held. To address concerns which Mr Ntaganda’s Lead Counsel expressed in the courtroom just before the Trial Chamber took the decision to hold that hearing,¹⁶¹ it invited the Victims and Witnesses Unit to attend.¹⁶² Shortly after that hearing, the Trial Chamber ensured the provision of a summary of that hearing, including ‘verbatim extracts’ with redactions.¹⁶³ The redactions were applied to information which could not be disclosed for security reasons and to information which the Trial Chamber found not to be ‘relevant to the preparations of the parties and participants’.¹⁶⁴ The Appeals Chamber finds that the withholding of information

¹⁵⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 13.

¹⁵⁵ ICC-01/04-02/06-349-Conf-Red.

¹⁵⁶ ICC-01/04-02/06-349-Conf-AnxA-Red.

¹⁵⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 15.

¹⁵⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 16.

¹⁵⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 17.

¹⁶⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 18.

¹⁶¹ [T-41](#), p. 17, lines 4-25.

¹⁶² [T-41](#), p. 17, line 21 to p. 18, line 13.

¹⁶³ Summary of *Ex Parte* Hearing, p. 4. See also [First Decision on Ex Parte Material](#), para. 10.

¹⁶⁴ Summary of *Ex Parte* Hearing, para. 3.

from Mr Ntaganda was justified in this instance and that the Trial Chamber took adequate measures to counterbalance potential prejudice. Mr Ntaganda was on notice of at least the essence of the information and was free to explore these issues with the witness or otherwise react to the information before the Trial Chamber made its final determination as to his guilt.

(iv) *Conclusion*

131. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's resort to *ex parte* material as allegedly excessive and rendering the proceedings unfair, the Appeals Chamber rejects this sub-ground of appeal.

2. *Alleged disclosure violations and restrictions related to allegations of witness interference*

132. Mr Ntaganda argues that the Prosecutor obtained access to his non-privileged conversations from the Detention Centre, without informing him thereof, and that for a period of 13 months she did not disclose them to him.¹⁶⁵ He submits that despite his requests, the Trial Chamber failed to take measures to mitigate the prejudice caused by these disclosure violations.¹⁶⁶ Mr Ntaganda contends that his right to know the case he has to meet and the principle of equality of arms were violated and argues that the only appropriate remedy for these violations is 'a full acquittal'.¹⁶⁷ He also submits that the Trial Chamber's response to the Prosecutor's allegations of witness interference 'impeded [his] preparedness for trial and the fairness of the proceedings'.¹⁶⁸

(a) **Background**

(i) *Restrictions on Mr Ntaganda's telephone conversations*

133. In the Prosecutor's Request for Restrictions of 8 August 2014, the Prosecutor alleged that there were instances of intimidation of and interference with witnesses and sought the imposition of restrictions on communication between Mr Ntaganda and other persons.¹⁶⁹ She requested, *inter alia*, that the Registry provide a report, 'to

¹⁶⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 21-41.

¹⁶⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 22, 31-33, 36-39.

¹⁶⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 22, 41.

¹⁶⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 53.

¹⁶⁹ [Prosecutor's Request for Restrictions](#), paras 1, 3-4, 27.

the Prosecution and Chamber, based upon a review of all the non-confidential phone calls made by the Accused since arriving at the Detention Centre'.¹⁷⁰

134. On 8 December 2014, the Trial Chamber partially granted the Prosecutor's request (the 'First Decision on Restrictions').¹⁷¹ The Trial Chamber noted:

In addition to a request for restrictions to contact, the Chamber is asked to rule on the provision of information relating to allegations of breaches of confidentiality and witness interference or intimidation, to the same Prosecution that is prosecuting Mr Ntaganda. During the entirety of the proceedings against the accused, the Chamber has to carefully balance the accused's rights, including his right to receive adequate information to mount an effective defence, whilst at the same time ensuring that appropriate measures are taken to protect witnesses. The Defence should receive as much information as is reasonably possible, without compromising the safety of any witnesses referred to in the materials concerned.¹⁷²

135. The Trial Chamber instructed the Registry, *inter alia*, 'to conduct a *post factum* review of the non-privileged conversations made by [...] Mr Ntaganda [...] and to submit a report of this review to the Chamber and the Defence'.¹⁷³ The Trial Chamber indicated that it would 'then set a deadline by which the report is to be sent to the Prosecution, allowing sufficient time for the Defence to raise with the Chamber any objections to certain parts of the report being provided to the Prosecution'.¹⁷⁴

136. On 13 March 2015, the Trial Chamber imposed additional restrictions, including an active monitoring of non-privileged telephone calls.¹⁷⁵

137. On 26 June 2015, Mr Ntaganda filed a request for an immediate adjournment of the proceedings 'until the necessary conditions [were] in place to ensure a fair trial' ('Mr Ntaganda's Request for Adjournment of June 2015').¹⁷⁶

¹⁷⁰ [Prosecutor's Request for Restrictions](#), paras 51, 54.

¹⁷¹ Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs, ICC-01/04-02/06-410-Conf-Exp-Red (corrected *ex parte* confidential version registered on 16 February 2015, (ICC-01/04-02/06-410-Conf-Exp-Corr); upon the Trial Chamber's instruction of 12 May 2017, the decision was reclassified as confidential on 15 May 2017 (ICC-01/04-02/06-410-Conf-Corr)), p. 26.

¹⁷² First Decision on Restrictions, para. 47.

¹⁷³ First Decision on Restrictions, pp. 26-27.

¹⁷⁴ First Decision on Restrictions, para. 56.

¹⁷⁵ Order instructing the Registry to put in place additional temporary restrictions on contact, ICC-01/04-02/06-508-Conf-Exp, para. 7, p. 5.

138. On 3 July 2015, the Trial Chamber partially granted Mr Ntaganda's request for adjournment (the 'Adjournment Decision of July 2015').¹⁷⁷

139. On 18 August 2015, the Trial Chamber decided to maintain restrictions on Mr Ntaganda's communications, subject to modification (the 'Second Decision on Restrictions').¹⁷⁸

140. The Trial Chamber recalled that the previous restrictions had been imposed 'to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings'.¹⁷⁹ The Trial Chamber found that there were reasonable grounds to believe that Mr Ntaganda, *inter alia*, had: (i) used coded language 'to disguise attempts to disclose confidential information or to interfere with witnesses';¹⁸⁰ (ii) disclosed the identity of Prosecution witnesses;¹⁸¹ and (iii) 'instructed his interlocutors to coach witnesses, or directly told his interlocutors which story to tell'.¹⁸² However, the Trial Chamber was not convinced that during the active monitoring period Mr Ntaganda's behaviour 'amount[ed] to witness interference' or that it 'otherwise affect[ed] the integrity of the proceedings'.¹⁸³ The Trial Chamber ordered, *inter alia*, that the restrictions imposed on Mr Ntaganda's communications already in place and the active monitoring, subject to certain modifications, be maintained.¹⁸⁴ The Trial Chamber underlined that in ordering the continuation of the active monitoring of Mr Ntaganda's non-privileged phone calls, it

¹⁷⁶ [Public redacted version of "Corrected version of 'Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial', 26 June 2015, ICC-01/04-02/06-677-Conf-Exp"](#), 29 June 2015, ICC-01/04-02/06-677-Corr-Red (the corrected confidential *ex parte* version dated 26 June 2015 was registered on 29 June 2015 (ICC-01/04-02/06-677-Conf-Exp-Corr); original confidential *ex parte* version was registered on 26 June 2015 (ICC-01/04-02/06-677-Conf-Exp)), paras 73, 76, p. 20; [T-22](#), p. 4, lines 6-7.

¹⁷⁷ [T-22](#), p. 4, line 5, to p. 5, line 20.

¹⁷⁸ [Decision on Prosecution request to impose restrictions on Mr Ntaganda's contacts](#), ICC-01/04-02/06-785-Red (the confidential *ex parte* version was registered on the same day (ICC-01/04-02/06-785-Conf-Exp)), pp. 35-36.

¹⁷⁹ [Second Decision on Restrictions](#), para. 44.

¹⁸⁰ [Second Decision on Restrictions](#), para. 50. *See also* paras 48-49.

¹⁸¹ [Second Decision on Restrictions](#), paras 51-54.

¹⁸² [Second Decision on Restrictions](#), para. 57. *See also* para. 56.

¹⁸³ [Second Decision on Restrictions](#), para. 58.

¹⁸⁴ [Second Decision on Restrictions](#), paras 66-69, p. 35.

took into account his ‘right to have ‘adequate facilities’ for the preparation of his defence’.¹⁸⁵

141. On 7 September 2016, the Trial Chamber decided to maintain the restrictions on Mr Ntaganda’s non-privileged conversations (the ‘Decision Reviewing Restrictions’), noting that its previous findings continued to stand.¹⁸⁶ The Trial Chamber recalled its prior guidance to the Prosecutor that any article 70 investigations ‘should be concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence be made as soon as possible’.¹⁸⁷ The Trial Chamber concluded that ‘certain restrictions remain[ed] necessary to ensure the safety of witnesses, prevent breaches of confidentiality and ensure the integrity of the proceedings’.¹⁸⁸

142. On 16 September 2016, the Trial Chamber, by majority, granted Mr Ntaganda’s request for leave to appeal the Decision Reviewing Restrictions.¹⁸⁹

143. On 8 March 2017, the Appeals Chamber confirmed the Decision Reviewing Restrictions.¹⁹⁰

(ii) *Article 70 investigation*

144. On 3 July 2015, the Presiding Judge of the Trial Chamber stated that [REDACTED].¹⁹¹

145. On 13 August 2015, the Prosecutor filed before the pre-trial chamber a request for judicial assistance (the ‘Prosecutor’s Request for Judicial Assistance’),¹⁹² in which

¹⁸⁵ [Second Decision on Restrictions](#), para. 61.

¹⁸⁶ [Second Public redacted version of Decision reviewing the restrictions placed on Mr Ntaganda’s contacts, 7 September 2015, ICC-01/04-02/06-1494-Conf-Exp](#), 21 November 2016, ICC-01/04-02/06-1494-Red4 (confidential *ex parte* redacted version was registered on 7 September 2016 (ICC-01/04-02/06-1494-Conf-Exp-Red)), para. 22.

¹⁸⁷ [Decision Reviewing Restrictions](#), para. 24.

¹⁸⁸ [Decision Reviewing Restrictions](#), para. 33.

¹⁸⁹ [Decision on Defence request for leave to appeal the ‘Decision reviewing the restrictions placed on Mr Ntaganda’s contacts’](#), ICC-01/04-02/06-1513, p. 10. Judge Chang-ho Chung dissented. *See also* Public redacted version of “Request for leave to appeal decision maintaining restrictions on Mr Ntaganda’s communications and contacts”, 13 September 2016, ICC-01/04-02/06-1501-Red (the ‘[Request for Leave to Appeal Decision Reviewing Restrictions](#)’) (confidential *ex parte* version was registered on the same day (ICC-01/04-02/06-1501-Conf-Exp)).

¹⁹⁰ Judgment on Mr Bosco Ntaganda’s appeal against the decision reviewing restrictions on contacts of 7 September 2016, ICC-01/04-02/06-1817-Red (OA4) (the ‘[Ntaganda OA4 Judgment](#)’) (confidential version issued on the same day (ICC-01/04-02/06-1817-Conf)), para. 103.

¹⁹¹ [T-22](#), p. 2, line 23 to p. 3, line 6.

she sought access to, *inter alia*, Mr Ntaganda's non-privileged call logs and recordings of non-privileged telephone conversations from the day he entered the Court's detention centre.¹⁹³ The Prosecutor argued that she might use the information contained in the requested material 'during trial in pursuit of the establishment of the truth'.¹⁹⁴

146. On 14 August 2015, the Prosecutor requested the Trial Chamber to order the transfer of the relevant part of the case record to Pre-Trial Chamber II.¹⁹⁵

147. On 18 September 2015, the Single Judge of Pre-Trial Chamber I granted to the Prosecutor access to recorded materials from the ICC Detention Centre (the 'Single Judge's Decision on Prosecutor's Request for Assistance').¹⁹⁶

148. In May 2016, the Trial Chamber became aware of the Prosecutor's access to additional non-privileged calls of Mr Ntaganda.¹⁹⁷

149. On 11 May 2016, Mr Ntaganda filed a request for disclosure of *ex parte* annexes to the Prosecutor's submissions on the restrictions to Mr Ntaganda's contacts,¹⁹⁸ arguing that 'the scale of the non-disclosure [] not only prejudices the Defence, but effectively denies the Defence any opportunity to address what appears

¹⁹² Request for judicial assistance to obtain evidence for investigation under article 70, ICC-01/04-638-Conf-Exp (confidential redacted version was registered on 28 November 2016 (ICC-01/04-638-Conf-Red)).

¹⁹³ Prosecutor's Request for Judicial Assistance, para. 68.

¹⁹⁴ Prosecutor's Request for Judicial Assistance, para. 67.

¹⁹⁵ [Public redacted version of "Request for transfer of part of the case record to Pre-Trial Chamber II", 14 August 2015, ICC-01/04-02/06-781-Conf](#), 30 November 2016, ICC-01/04-02/06-781-Red (confidential *ex parte* version was registered on 14 August 2015 (ICC-01/04-02/06-781-Conf-Exp); pursuant to the Trial Chamber's instruction of 23 November 2016, the request was reclassified as confidential on 24 November 2016 (ICC-01/04-02/06-781-Conf)).

¹⁹⁶ Decision on the Prosecutor's "Request for judicial assistance to obtain evidence for investigation under Article 70", dated 18 September 2015 and registered on 21 September 2015, ICC-01/04-729-Conf-Exp (pursuant to Pre-Trial Chamber I's instruction of 25 January 2017, the decision was reclassified as confidential on that same day (ICC-01/04-729-Conf)), para. 7.

¹⁹⁷ [T-159](#), p. 2, lines 15-16.

¹⁹⁸ [Second public redacted version of "Prosecution's submissions on the restrictions to NTAGANDA's contacts", 9 May 2016, ICC-01/04-02/06-1313-Conf-Exp](#), 14 December 2016, ICC-01/04-02/06-1313-Red2 (confidential *ex parte* version was registered on 9 May 2016 (ICC-01/04-02/06-1313-Conf-Exp); public redacted version was registered on 17 May 2012 (ICC-01/04-02/06-1313-Red)).

to be the core of the Prosecution's allegations' ('Mr Ntaganda's Request for Disclosure').¹⁹⁹

150. On 3 June 2016, the Trial Chamber rejected Mr Ntaganda's Request for Disclosure in most aspects (the 'Decision on Mr Ntaganda's Request for Disclosure').²⁰⁰ It noted that: (i) the Prosecutor's relevant submissions contained sufficient information, available to Mr Ntaganda, with respect to allegations of witness interference;²⁰¹ (ii) some material was *ex parte* as it related to investigations under article 70 of the Statute and its transmission might compromise those investigations;²⁰² and (iii) the withheld allegations are similar to those which Mr Ntaganda had received notice.²⁰³

151. The Trial Chamber emphasised that it was composed of professional judges and that 'no prejudice [would] be occasioned to the accused', given the limited purpose of the Prosecutor's submissions.²⁰⁴ It noted that to the extent the withheld information might be material to the preparation of the defence, rule 81 of the Rules 'would justify non-disclosure at [that] stage'.²⁰⁵ The Trial Chamber encouraged the Prosecutor 'to conclude relevant portions of [her] investigations as promptly as possible and to disclose all resulting information which [might] be material to the preparation of the Defence as soon as possible'.²⁰⁶ Regarding redactions to annexes filed *inter partes*, the Trial Chamber noted that most of them were 'strictly necessary for ensuring the protection of the witnesses'.²⁰⁷

¹⁹⁹ Urgent request on behalf of Mr Ntaganda seeking disclosure of the annexes to the Prosecution's submissions on the restrictions to Mr Ntaganda's contacts and related requests, ICC-01/04-02/06-1315-Conf-Exp-Corr, para. 5.

²⁰⁰ [Public redacted version of Decision on Defence request seeking certain material relating to review of restrictions placed on Mr Ntaganda's contacts, 3 June 2016, ICC-01/04-02/06-1364-Conf-Exp](#), 21 November 2016, ICC-01/04-02/06-1364-Red2 (confidential *ex parte* version was registered on 3 June 2016 (ICC-01/04-02/06-1364-Conf-Exp); pursuant to the Trial Chamber's instruction of 12 May 2017, the decision was reclassified as confidential on 15 May 2017), p. 13.

²⁰¹ [Decision on Mr Ntaganda's Request for Disclosure](#), para. 18.

²⁰² [Decision on Mr Ntaganda's Request for Disclosure](#), para. 19.

²⁰³ [Decision on Mr Ntaganda's Request for Disclosure](#), para. 20.

²⁰⁴ [Decision on Mr Ntaganda's Request for Disclosure](#), para. 21.

²⁰⁵ [Decision on Mr Ntaganda's Request for Disclosure](#), para. 22.

²⁰⁶ [Decision on Mr Ntaganda's Request for Disclosure](#), para. 22.

²⁰⁷ [Decision on Mr Ntaganda's Request for Disclosure](#), para. 25.

(iii) Request for suspension of proceedings

152. On 4 November 2016, the Single Judge of Pre-Trial Chamber I, upon the Prosecutor's request, ordered the Registry to provide Mr Ntaganda with immediate access to call records and recordings which were available to the Prosecutor.²⁰⁸

153. On 7 November 2016, the Prosecutor notified the Trial Chamber of the disclosure of non-privileged contact and visitor logs, and the recordings of non-privileged telephone conversations, obtained pursuant to article 70 of the Statute.²⁰⁹

154. On 14 November 2016, Mr Ntaganda requested an immediate suspension of proceedings until the disclosure of information described in the Prosecutor's notice of 7 November 2016 ('Mr Ntaganda's Request for Suspension').²¹⁰ He argued that '[t]he immediate disclosure of this information [was] necessary to limit the ongoing prejudice caused by past non-disclosure and to allow the Defence to make informed submissions to the Trial Chamber concerning the impact of the investigation and the non-disclosure on the fairness of the proceedings'.²¹¹

155. On 16 November 2016, the Trial Chamber, in an oral decision, rejected Mr Ntaganda's Request for Suspension.²¹² The Trial Chamber noted that what was being requested was in fact 'an immediate adjournment' and considered the request on that basis, rather than against the stringent standard for a stay of proceedings.²¹³

156. Regarding the alleged potential prejudice in the cross-examination of witnesses, the Trial Chamber noted that 'the allegations of witness coaching [were] based on the Prosecution's assessment of the accused's own conduct' and that he was 'best placed to advise the Defence team [...] in respect of whether lines of cross-examination being pursued [might] be compromised or prejudiced by his prior conduct'.²¹⁴ The

²⁰⁸ [Decision on the "Prosecution's request to provide Bosco Ntaganda with access to evidence obtained pursuant to article 70"](#), ICC-01/04-738, p. 4.

²⁰⁹ [Prosecution's Communication of the Disclosure of Evidence obtained pursuant to Article 70](#), ICC-01/04-02/06-1616, paras 1, 15.

²¹⁰ [Public redacted version of "Urgent Request for Stay of Proceedings" dated 14 November 2016](#), ICC-01/04-02/06-1629-Red (confidential version was registered on the same day (ICC-01/04-02/06-1629-Conf)), para. 1.

²¹¹ [Mr Ntaganda's Request for Suspension](#), para. 1.

²¹² [T-159](#), p. 2, line 13 to p. 7, line 24.

²¹³ [T-159](#), p. 3, lines 14-21.

²¹⁴ [T-159](#), p. 4, lines 5-7, 10-18.

Trial Chamber noted that the defence of Mr Ntaganda had been on notice of allegations of coaching ‘since prior to the commencement of the trial’.²¹⁵ The Trial Chamber observed that ‘significant portions of the recordings [would] not have any direct materiality to these proceedings’ and certain information might be relevant to ‘peripheral issues’.²¹⁶ The Trial Chamber was of the view that if the fairness of the proceedings had been impacted, an immediate adjournment would not be capable of remedying that.²¹⁷ It recognised that for purposes of the review of the disclosure Mr Ntaganda might require assistance and that he should address a relevant request to the Registry.²¹⁸

157. On 12 December 2016, the Trial Chamber rejected Mr Ntaganda’s request for leave to appeal the oral decision of 16 November 2016.²¹⁹

(iv) Request for a permanent stay of proceedings

158. On 20 March 2017, Mr Ntaganda requested a stay of the proceedings (‘Mr Ntaganda’s Request for Stay’),²²⁰ arguing that

[t]he acquisition by the Prosecution team in this case of 4,684 conversations of Mr Ntaganda, concurrent with trial proceedings, given the high relevance of those conversations to Defence strategy as well as to Mr Ntaganda’s personal knowledge of the case amounts to an abuse of the Court’s process, as a result of which Mr Ntaganda cannot receive a fair trial.²²¹

159. On 28 April 2017, the Trial Chamber rejected the request for stay of proceedings (the ‘Decision on Mr Ntaganda’s Request for Stay’).²²² When assessing the actual prejudice, the Trial Chamber noted that the material to which the Prosecutor had had access, included ‘information on the whereabouts of the accused and other individuals at the relevant times, names of individuals who could have provided information for the Defence and potential witnesses, and which may therefore be

²¹⁵ [T-159](#), p. 4, lines 19-23.

²¹⁶ [T-159](#), p. 5, lines 19-24.

²¹⁷ [T-159](#), p. 6, lines 7-11.

²¹⁸ [T-159](#), p. 6, lines 12-15.

²¹⁹ [Decision on request for leave to appeal the Chamber’s decision rejecting the Defence request for a stay of proceedings](#), ICC-01/04-02/06-1677, p. 9.

²²⁰ [Public redacted version of “Defence Request for stay of proceedings with prejudice to the Prosecutor”](#), 20 March 2017, ICC-01/04-02/06-1830-Conf, 21 March 2017, ICC-01/04-02/06-1830-Red (confidential version was registered on 20 March 2017 (ICC-01/04-02/06-1830-Red)), p. 30.

²²¹ [Mr Ntaganda’s Request for Stay](#), para. 2.

²²² [Decision on Defence request for stay of proceedings with prejudice to the Prosecution](#), ICC-01/04-02/06-1883, para. 61, p. 34.

relevant to defence strategy'.²²³ The Trial Chamber found that access to such information placed the Prosecutor 'in an unduly advantageous position vis-à-vis the Defence' and was prejudicial to Mr Ntaganda.²²⁴ However, the Trial Chamber found that the information relevant to defence strategy 'appear[ed] to be limited' and that Mr Ntaganda had not identified concrete instances of use of such information by the Prosecutor to his prejudice.²²⁵ The Trial Chamber held that any prejudice could be 'remedied, retroactively and prospectively, through alternative, less drastic measures', rather than a stay of proceedings, for which the threshold was not reached.²²⁶

160. Regarding the length of the *ex parte* proceedings, the Trial Chamber noted that

[i]n the present case, *ex parte* classification of the relevant proceedings was initially ordered by the Pre-Trial Chamber on the basis that disclosure of the information would have compromised ongoing investigations, as provided for under Rule 81(2) of the Rules. In that context, the Chamber reminded the Prosecution on two occasions that the Article 70 investigations should be concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence should be made as soon as possible.²²⁷

161. The Trial Chamber found that Mr Ntaganda's arguments on the alleged prejudice 'appear[ed] speculative' and did not consider that he suffered prejudice warranting a stay of proceedings.²²⁸ The Trial Chamber recalled that it had rejected the Prosecutor's request for admission into evidence of material from the article 70 proceedings and that it was 'capable of disregarding any irrelevant information'.²²⁹ As an 'alternative measure', the Trial Chamber decided that the Prosecutor should 'not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence's presentation of evidence unless specifically authorised by the Chamber [...] upon receipt of a substantiated request'.²³⁰

²²³ [Decision on Mr Ntaganda's Request for Stay](#), para. 42.

²²⁴ [Decision on Mr Ntaganda's Request for Stay](#), para. 42. *See also* para. 43.

²²⁵ [Decision on Mr Ntaganda's Request for Stay](#), para. 43.

²²⁶ [Decision on Mr Ntaganda's Request for Stay](#), para. 43. *See also* para. 61.

²²⁷ [Decision on Mr Ntaganda's Request for Stay](#), para. 50 (footnote omitted).

²²⁸ [Decision on Mr Ntaganda's Request for Stay](#), para. 51.

²²⁹ [Decision on Mr Ntaganda's Request for Stay](#), paras 56-57.

²³⁰ [Decision on Mr Ntaganda's Request for Stay](#), para. 61, p. 34.

162. On 13 June 2017, the Trial Chamber rejected, by majority, Mr Ntaganda's request for leave to appeal the Decision on Mr Ntaganda's Request for Stay.²³¹

(b) Summary of submissions

(i) Mr Ntaganda's submissions

(a) Alleged disclosure violations

163. Mr Ntaganda submits that for 13 months during the presentation of her case, the Prosecutor was in possession of 4,684 non-privileged telephone conversations made by Mr Ntaganda from the Court's detention centre, without his knowledge.²³² He argues that those conversations comprise information about his whereabouts at relevant times, defence investigations, the identity of defence witnesses and defence strategy.²³³ He contends that the Prosecutor's access to this information and its non-disclosure for an extended period of time, without informing him, 'constitutes an abuse of process'.²³⁴ Mr Ntaganda argues that, despite the Prosecutor's intention to use the recordings of his non-privileged conversations in the trial, the Single Judge of Pre-Trial Chamber I erred in granting the Prosecutor's request for access to those conversations.²³⁵ He contends that he should have been informed of the Prosecutor's unrestricted access to his past conversations and that the Prosecutor had no discretion to withhold disclosure.²³⁶ Mr Ntaganda argues that the Trial Chamber erred by declining to adjourn the proceeding and to order a permanent stay of proceedings.²³⁷

(b) Litigation related to restrictions

164. Mr Ntaganda submits that the Trial Chamber's response to the Prosecutor's allegations of witness interference 'impeded [his] preparedness for trial and the fairness of the proceedings'.²³⁸ He alleges that the Trial Chamber 'took [these] allegations at face value', as it did not hear any witnesses involved in the non-

²³¹ [Decision on Defence request for leave to appeal the 'Decision on Defence request for stay of proceedings with prejudice to the Prosecution'](#), ICC-01/04-02/06-1955, p. 8; [Dissenting opinion of Judge Robert Fremr](#), ICC-01/04-02/06-1955-Anx.

²³² [Mr Ntaganda's Appeal Brief – Part II](#), para. 21; [T-270](#), p. 88, lines 1-5, 11-14.

²³³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 21; [T-270](#), p. 88, lines 15-19.

²³⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 21.

²³⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 26-27; [T-270](#), p. 88, lines 6-10.

²³⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 28.

²³⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 36-38; [T-270](#), p. 88, line 20 to p. 89, line 15.

²³⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 53.

privileged telephone conversations and ‘found reasonable grounds to believe that the accused intended or was involved in a scheme to interfere with witnesses’.²³⁹ Mr Ntaganda contends that the Trial Chamber could then ‘dispose of the issue quickly by imposing permanent restrictions on [Mr Ntaganda]’ without having to change the starting date of the trial.²⁴⁰ He avers that by doing so the Trial Chamber failed to ‘invest the necessary time to verify the reliability of the allegations and statements submitted by the Prosecution, and properly adjudicate the issue’.²⁴¹

(ii) *The Prosecutor’s submissions*

(a) Alleged disclosure violations

165. The Prosecutor argues that Mr Ntaganda fails to show an abuse of process or any unfairness arising from her access to his non-privileged conversations.²⁴² She submits that when the Trial Chamber granted her request for restrictions to Mr Ntaganda’s non-privileged contacts, it also formally notified him that the Registry might listen to his non-privileged conversations.²⁴³ The Prosecutor contends that she was relieved from a duty to disclose materials obtained for the purpose of her investigation, pursuant to rule 81 of the Rules.²⁴⁴ The Prosecutor argues that Mr Ntaganda did not sustain ‘irremediable prejudice’, as her access to information about his whereabouts at relevant times was not unfettered.²⁴⁵

(b) Litigation related to restrictions

166. The Prosecutor submits that Mr Ntaganda does not ‘address any aspect of the Chamber’s reasoning with specificity [...] or its finding that his alternative interpretations were implausible’.²⁴⁶ The Prosecutor avers that Mr Ntaganda’s contention that ‘litigation of matters concerning the integrity of the trial itself caused prejudice’ because it took away time and resources from trial preparation is

²³⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 53.

²⁴⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 53.

²⁴¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 53.

²⁴² [Prosecutor’s Response to Appeal – Part II](#), para. 32.

²⁴³ [Prosecutor’s Response to Appeal – Part II](#), para. 33.

²⁴⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 36.

²⁴⁵ [Prosecutor’s Response to Appeal – Part II](#), paras 38-39.

²⁴⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 57.

‘unconvincing’.²⁴⁷ The Prosecutor argues such pre-trial litigation and matters are expected.²⁴⁸

167. Regarding Mr Ntaganda’s claim that ‘this matter was not in fact litigated enough’, the Prosecutor submits that it was never suggested that Mr Ntaganda’s conduct in that regard would be considered by the Trial Chamber ‘in determining his guilt or innocence of the charges’.²⁴⁹

(iii) *The victims’ observations on disclosure violations*

168. Victims Group 2 submit that they support the Prosecutor’s arguments in relation to ‘other alleged infringements’.²⁵⁰ Regarding Mr Ntaganda’s argument that he must be fully acquitted, Victims Group 2 argue that none of the criteria for such a remedy are met.²⁵¹

(c) Determination by the Appeals Chamber

(i) *Whether the Prosecutor could withhold material from disclosure*

169. Mr Ntaganda argues that the Prosecutor’s access to his non-privileged conversations and their non-disclosure for an extended period of time, without informing him, constitutes an abuse of process.²⁵² He thus alleges disclosure violations. The relevant provisions are the following.

170. Rule 77 of the Rules reads:

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

171. Rule 81 of the Rules provides in its relevant parts:

²⁴⁷ [Prosecutor’s Response to Appeal – Part II](#), para. 58.

²⁴⁸ [Prosecutor’s Response to Appeal – Part II](#), para. 58.

²⁴⁹ [Prosecutor’s Response to Appeal – Part II](#), para. 59 (emphasis in original).

²⁵⁰ [Observations of Victims Group 2 on Appeal – Part II](#), para. 18, referring to [Prosecutor’s Response to Appeal – Part II](#), paras 24-37.

²⁵¹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 20.

²⁵² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 21.

2. Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

[...]

4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

172. The Appeals Chamber notes that it is not in dispute that at least parts of the recordings of non-privileged conversations of Mr Ntaganda and other material which the Prosecutor obtained in the course of her investigations met the criteria for disclosure under rule 77 of the Rules. When authorising the Prosecutor to withhold disclosure or apply redactions, the Trial Chamber relied on the protection of witnesses²⁵³ and the risk of prejudice to ongoing investigations, specifically referring to rule 81²⁵⁴ or rule 81(2) of the Rules.²⁵⁵

173. The Appeals Chamber notes that Mr Ntaganda does not explain why, in his view, the Trial Chamber erred in considering that disclosure might prejudice the Prosecutor's ongoing investigation. He merely avers, without providing any detail, that the disclosure he sought 'would neither have revealed the existence nor the details of the Prosecution's article 70 investigation that could have continued without interference'.²⁵⁶

174. In these circumstances, the Appeals Chamber finds no error in the Trial Chamber's reliance on the risk of prejudice to the investigation, as well as on the

²⁵³ First Decision on Restrictions, para. 47; [Decision on Mr Ntaganda's Request for Disclosure](#), para. 25.

²⁵⁴ [Decision on Mr Ntaganda's Request for Disclosure](#), para. 22.

²⁵⁵ [Decision on Mr Ntaganda's Request for Stay](#), para. 50.

²⁵⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 31.

protection of witnesses, as reasons for withholding parts of the relevant material from disclosure. The Appeals Chamber will separately consider whether the Trial Chamber adequately protected Mr Ntaganda's rights in relation to that non-disclosure.

(ii) *Whether the Prosecutor erroneously obtained access to Mr Ntaganda's conversations without his knowledge*

175. Mr Ntaganda argues that the Single Judge of Pre-Trial Chamber I erred in granting the Prosecutor's request for access to his non-privileged conversations, without informing him thereof.²⁵⁷ He contends that the Prosecutor had no discretion to withhold disclosure.²⁵⁸

176. The Appeals Chamber notes that the Single Judge granted to the Prosecutor access to the recordings of non-privileged telephone conversations held by Mr Ntaganda from the detention centre to allow her to pursue her investigations on the alleged violations of article 70 of the Statute.²⁵⁹ It is noted that at the time, Mr Ntaganda was already on notice that his non-privileged conversations might be listened to and that his past conversations were subject to a *post factum* review.²⁶⁰ The Prosecutor confirms that she 'did not receive intelligible *summaries* even of the limited number of conversations initially identified as a priority for investigation until February 2016'.²⁶¹ She also submits that she did not review records of any conversations made since the start of trial and accessed a limited volume of recordings.²⁶² Therefore, additional information to which the Prosecutor was granted access was limited.

177. The Appeals Chamber nonetheless finds that in the process initiated by the Single Judge's Decision on Prosecutor's Request for Assistance, once the Prosecutor gained access to 'material or information [...] which must be disclosed in accordance with the Statute', as per rule 81(2) of the Rules, she should have promptly sought instructions from the Trial Chamber on whether disclosure of such material might

²⁵⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 27.

²⁵⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 28.

²⁵⁹ Single Judge's Decision on Prosecutor's Request for Assistance, para. 7.

²⁶⁰ First Decision on Restrictions, p. 27.

²⁶¹ [Prosecutor's Response to Appeal – Part II](#), para. 35 (emphasis in original).

²⁶² [Prosecutor's Response to Appeal – Part II](#), para. 35.

‘prejudice further or ongoing investigations’ and whether such material or information had to be disclosed to Mr Ntaganda.²⁶³

178. The Appeals Chamber notes that the Trial Chamber became aware of the Prosecutor’s access to additional parts of recordings of non-privileged calls of Mr Ntaganda only in May 2016²⁶⁴ and thus several months after the Single Judge of Pre-Trial Chamber I had granted such access.²⁶⁵ This made it difficult for the Trial Chamber to take any measures in that period to prevent any potential prejudice resulting from the Prosecutor’s access to additional material. It was only able to assess whether Mr Ntaganda suffered prejudice.²⁶⁶

(iii) Whether the Trial Chamber took adequate measures to protect Mr Ntaganda’s rights

179. Mr Ntaganda argues that the Trial Chamber erred by declining to adjourn the proceedings²⁶⁷ and to order a permanent stay of proceedings.²⁶⁸ He submits that the alternative measures adopted by the Trial Chamber were insufficient.²⁶⁹

180. The Appeals Chamber notes that in the Trial Chamber’s assessment prejudice to Mr Ntaganda was limited. In particular, the Trial Chamber found that ‘the allegations of witness coaching [were] based on the Prosecution’s assessment of the accused’s own conduct’ and that he was ‘best placed to advise the Defence team [...] in respect of whether lines of cross-examination being pursued [might] be compromised or prejudiced by his prior conduct’.²⁷⁰ The Trial Chamber took into account that ‘significant portions of the recordings [would] not have any direct materiality to these proceedings’.²⁷¹ Similarly, in the Decision on Mr Ntaganda’s Request for Stay, the Trial Chamber observed that the information relevant to defence strategy ‘appear[ed] to be limited’ and that Mr Ntaganda had not identified concrete instances of use of

²⁶³ See [Bemba Dissenting Opinion to Appeal Judgment](#), para. 438.

²⁶⁴ [T-159](#), p. 2, lines 15-16.

²⁶⁵ Single Judge’s Decision on Prosecutor’s Request for Assistance.

²⁶⁶ [Decision on Mr Ntaganda’s Request for Stay](#), para. 50. See also para. 24.

²⁶⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 36.

²⁶⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 37-38.

²⁶⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 39.

²⁷⁰ [T-159](#), p. 4, lines 5-7, 10-15.

²⁷¹ [T-159](#), p. 5, lines 19-24.

such information by the Prosecutor to his prejudice.²⁷² Mr Ntaganda does not demonstrate that these findings of the Trial Chamber are erroneous.

181. The Appeals Chamber takes note of the measures taken by the Trial Chamber to protect the rights of Mr Ntaganda. In particular, in its oral decision on Mr Ntaganda's request for suspension, the Trial Chamber recognised that for purposes of the review of the disclosure Mr Ntaganda might require assistance and that he should address a relevant request to the Registry.²⁷³ In the Decision on Mr Ntaganda's Request for Stay, the Trial Chamber recalled that it had rejected the Prosecutor's request for admission into evidence of material from the article 70 proceedings.²⁷⁴ The Trial Chamber also directed that the Prosecutor should 'not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence's presentation of evidence unless specifically authorised by the Chamber upon receipt of a request'.²⁷⁵ Mr Ntaganda does not explain why these measures were inadequate.

182. The Appeals Chamber also notes that, being on notice of at least the essence of the Prosecutor's allegations regarding witness interference, Mr Ntaganda was in a position to explore those issues with the witnesses concerned. Furthermore, having received outstanding disclosure, he could have sought to recall witnesses.

183. Regarding the Decision on Mr Ntaganda's Request for Stay, the Appeals Chamber recalls that

[a] Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached.²⁷⁶

184. The Appeals Chamber further recalls that the proceedings can be stayed where 'no fair trial can take place' because 'the breaches of the rights of the accused are

²⁷² [Decision on Mr Ntaganda's Request for Stay](#), para. 43.

²⁷³ [T-159](#), p. 6, lines 12-15.

²⁷⁴ [Decision on Mr Ntaganda's Request for Stay](#), para. 56.

²⁷⁵ [Decision on Mr Ntaganda's Request for Stay](#), p. 34.

²⁷⁶ [Lubanga OA13 Judgment](#), para. 84.

such as to make it impossible for him/her to make his/her defence within the framework of his rights'.²⁷⁷

185. Mr Ntaganda has not demonstrated that the Trial Chamber improperly exercised its discretion in finding that conditions for a stay of proceedings were not met.

(iv) Litigation related to restrictions

186. The Appeals Chamber finds no merit in Mr Ntaganda's contention that the allegations of witness interference were not properly adjudicated by the Trial Chamber because no witness was heard, and he did not have the opportunity to properly challenge the allegations.²⁷⁸ The Trial Chamber issued several decisions and orders addressing these allegations under regulation 101(2) of the Regulations of the Court. The Appeals Chamber recalls that the 'focus of the Trial Chamber's examination was whether the terms of regulation 101 (2) of the Regulations of the Court were met'.²⁷⁹ In particular, the Trial Chamber was called upon to determine whether contact between Mr Ntaganda and any other person: '(b) [c]ould prejudice or otherwise affect the outcome of the proceedings [...], or any other investigation', '(d) [c]ould be used [...] to breach an order for non-disclosure made by a judge' or '(f) [i]s a threat to the protection of the rights and freedom of any person'.²⁸⁰ The scope of the matter being adjudicated by the Trial Chamber was thus limited. Mr Ntaganda does not explain why the Trial Chamber was required to hear witnesses under the procedure set out in regulation 101 of the Regulations of the Court, in addition to receiving his and the Prosecutor's submissions, as well as reports of the Registry. As indicated above, the Appeals Chamber confirmed the Decision Reviewing Restrictions and found no error in the approach adopted by the Trial Chamber in assessing the allegations and in imposing the restrictions.

187. Moreover, the Appeals Chamber finds Mr Ntaganda's contention that he did not have 'an opportunity to challenge these adverse allegations' misguided.²⁸¹ It notes that the Trial Chamber was mindful of Mr Ntaganda having the opportunity to be heard

²⁷⁷ [Lubanga OA4 Judgment](#), para. 39. *See also* para. 37.

²⁷⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 53-54.

²⁷⁹ [Ntaganda OA4 Judgment](#), para. 61.

²⁸⁰ [Ntaganda OA4 Judgment](#), para. 60.

²⁸¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 54.

and noted, pursuant to regulation 101(3) of the Regulations of the Court, that [REDACTED].²⁸² In that regard, it held that ‘[d]uring the entirety of the proceedings against the accused, the Chamber has to carefully balance the accused’s rights, including his right to receive adequate information to mount an effective defence, whilst at the same time ensuring that appropriate measures are taken to protect witnesses’.²⁸³ Therefore, [REDACTED],²⁸⁴ which the Prosecutor did.

188. The Appeals Chamber notes that Mr Ntaganda had several opportunities to challenge the allegations at trial²⁸⁵ and on appeal,²⁸⁶ a fact which he acknowledged in one of his submissions. Indeed, in his request for leave to appeal the Decision Reviewing Restrictions, Mr Ntaganda indicated that he had not appealed the Second Decision on Restrictions because ‘despite having no burden of proof, [he] offered lengthy submissions on the numerous suspicions and suppositions put forward by both the Registry and the Prosecution’.²⁸⁷ This statement appears to contradict his contention that he lacked the opportunity to challenge the said allegations. In any event, the Appeals Chamber finds speculative Mr Ntaganda’s contention that the Trial Chamber erred in allowing the trial to continue in a context of unchallenged ‘adverse allegations, suggestive of a consciousness of guilt or at least of bad character, raised

²⁸² First Decision on Restrictions, para. 46.

²⁸³ First Decision on Restrictions, para. 47.

²⁸⁴ First Decision on Restrictions, para. 48.

²⁸⁵ See [Version publique expurgée de la «Réponse/Observations de M. Bosco Ntaganda à la Demande du Procureur pour l’imposition de mesures prévues à la norme 101\(2\) du Règlement de la Cour », ICC-01/04-02/06-360-Conf-Exp, 1^{er} septembre 2014](#), 12 January 2016, ICC-01/04-02/06-360-Red (confidential *ex parte* version was registered on 1 September 2014 (ICC-01/04-02/06-360-Conf-Exp)); [Public redacted version of “Further Submissions on Behalf of Mr Ntaganda”, ICC-01/04-02/06-379-Conf-Exp, 26 September 2014](#), 12 January 2016, ICC-01/04-02/06-379-Red (confidential *ex parte* version was registered on 26 September 2014 (ICC-01/04-02/06-379-Conf-Exp)); [Public redacted version of “Final Observations on Prosecution Requests for Restrictions on Mr Ntaganda’s Communications”, ICC-01/04-02/06-759-Conf-Exp, 3 August 2015](#), 13 January 2016, ICC-01/04-02/06-759-Red2 (confidential *ex parte* version registered on 3 August 2015 (ICC-01/04-02/06-759-Conf-Exp)); [Public redacted version of “Observations on behalf of Mr Ntaganda on restrictions on his contacts in detention”, 9 May 2016, ICC-01/04-02/06-1312-Conf-Exp](#), 11 October 2016, ICC-01/04-02/06-1312-Red (confidential *ex parte* version registered on 9 May 2016 (ICC-01/04-02/06-1312-Conf-Exp)); [Public redacted version of “Response on behalf of Mr Ntaganda to the ‘Prosecution’s submissions on the restrictions to NTAGANDA’s contacts\[’\]”, 13 June 2016, ICC-01/04-02/06-1391-Conf-Exp-Red](#), 11 October 2016, ICC-01/04-02/06-1391-Red2 (confidential *ex parte* version registered on 13 June 2016 (ICC-01/04-02/06-1391-Conf-Exp)).

²⁸⁶ The Appeals Chamber observes that in his appeal against the Decision Reviewing Restrictions, Mr Ntaganda argued that ‘the Trial Chamber “failed to accord Mr Ntaganda an adequate hearing in several respects”’. The Appeals Chamber rejected his argument. See [Ntaganda OA4 Judgment](#), paras 76, 87-91.

²⁸⁷ [Request for Leave to Appeal Decision Reviewing Restrictions](#), para. 8.

by Prosecution witnesses who later testified'.²⁸⁸ The Appeals Chamber also considers that Mr Ntaganda's argument lacks substantiation.

189. Equally unconvincing is his contention that this 'time-consuming and voluminous' litigation 'impeded [his] preparedness for trial and the fairness of the proceedings'.²⁸⁹ Apart from making this broad claim, Mr Ntaganda does not substantiate how his preparedness was affected or whether he suffered any prejudice.

190. Finally, the Appeals Chamber finds speculative his claim that the Prosecutor's continuous allegations about the accused's bad character and attempts to interfere with witnesses had an impact on the Judges of the Trial Chamber in any manner.²⁹⁰ Mr Ntaganda does not point to any finding in the Conviction Decision where the Trial Chamber actually relied on these allegations or afforded weight to these allegations when assessing and ultimately determining his guilt.

(v) *Conclusion*

191. Having rejected the entirety of Mr Ntaganda's arguments challenging the restrictions imposed on him, the Appeals Chamber finds that Mr Ntaganda has not demonstrated that in relation to these restrictions there were any procedural irregularities that rendered the proceedings in his case unfair. Accordingly, the Appeals Chamber rejects this sub-ground of appeal.

3. *Failure to suspend the trial proceedings prior to the resolution of the 'no case to answer' appeal*

192. Under this sub-ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in rejecting his request for adjournment and requiring him to proceed with his testimony prior to the resolution of his appeal against the Trial Chamber's decision rejecting his request for leave to file a motion for a no case to answer.²⁹¹ He argues that as a result the Trial Chamber violated his 'right to be informed promptly and in detail of the charges, and to remain silent'.²⁹²

²⁸⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 54.

²⁸⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 53.

²⁹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 54.

²⁹¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 43.

²⁹² [Mr Ntaganda's Appeal Brief – Part II](#), paras 43, 45.

(a) Background

193. On 2 June 2015, the Trial Chamber issued a decision on the conduct of the proceedings in which it held that if the ‘Defence wish[ed] to file [...] a motion [asserting that there was no case for it to answer], it should seek leave to do so including, *inter alia*, submissions on the applicable standard and procedure, no later than five days after the end of the Prosecution’s presentation of evidence, or, if applicable, the presentation of evidence by the [Victims]’.²⁹³

194. On 25 April 2017, Mr Ntaganda requested leave to file a motion for a no case to answer.²⁹⁴

195. On 12 May 2017, Mr Ntaganda requested a modification of the evidentiary schedule to allow him to testify ‘at the earliest opportunity during the presentation of the case for the Defence’.²⁹⁵

196. On 17 May 2017, the Trial Chamber, by email, communicated an amended schedule, which included the modification requested by Mr Ntaganda.²⁹⁶

197. On 29 May 2017, the Trial Chamber, by oral decision, rejected Mr Ntaganda’s Request for Leave for No Case to Answer Motion.²⁹⁷ The decision containing written reasons was issued on 1 June 2017 (the ‘Decision Denying Leave to File No Case to Answer Motion’).²⁹⁸

198. On 6 June 2017, Mr Ntaganda requested leave to appeal the Decision Denying Leave to File No Case to Answer Motion.²⁹⁹

²⁹³ [Decision on the conduct of proceedings](#), ICC-01/04-02/06-619, para. 17.

²⁹⁴ Request for leave to file motion for partial judgment of acquittal, ICC-01/04-02/06-1879-Conf (‘Mr Ntaganda’s Request for Leave for No Case to Answer Motion’).

²⁹⁵ [Urgent Defence Request on behalf of Mr Ntaganda seeking modification of the schedule for the first two evidentiary blocks](#), ICC-01/04-02/06-1903, para. 2. *See also* paras 5, 10.

²⁹⁶ *See* [Decision on Defence request to modify the schedule for the first two evidentiary blocks](#), 19 May 2017, ICC-01/04-02/06-1914, para. 9.

²⁹⁷ [T-206](#), p. 5, lines 1-4.

²⁹⁸ [Decision on Defence request for leave to file a ‘no case to answer’ motion](#), ICC-01/04-02/06-1931, para. 25, p. 11.

²⁹⁹ [Urgent Request for leave to appeal “Decision on Defence request for leave to file a ‘no case to answer’ motion”, 1 June 2017, ICC-01/04-02/06-1931](#), dated 5 June 2017 and registered on 6 June 2017, ICC-01/04-02/06-1937.

199. On 14 June 2017, the Trial Chamber granted, by oral decision, Mr Ntaganda's request for leave to appeal with respect to two issues.³⁰⁰ The Trial Chamber emphasised that while it notified the parties and participants of its decision at that stage, it did not consider it necessary to wait for the resolution of that appeal before commencing the testimony of Mr Ntaganda, 'noting that any such appeal relates to whether a "no case to answer" motion must be entertained, rather than necessarily granted or denied'.³⁰¹

200. During that same hearing on 14 June 2017, Mr Ntaganda requested an adjournment of the proceedings for two reasons: (i) to allow him to file a request seeking suspensive effect of the Decision Denying Leave to File No Case to Answer Motion before the Appeals Chamber; and (ii) to protect his right to remain silent by not having to testify while his appeal was pending before the Appeals Chamber.³⁰²

201. At that same hearing, the Trial Chamber, by oral decision, rejected Mr Ntaganda's request for adjournment of the proceedings and requested that Mr Ntaganda proceed with his scheduled testimony (the 'Adjournment Decision of June 2017').³⁰³

202. On 19 June 2017, the Appeals Chamber rejected Mr Ntaganda's request for suspensive effect (the 'Decision on Suspensive Effect').³⁰⁴

203. On 27 June 2017, Mr Ntaganda filed his appeal brief against the Decision Denying Leave to File No Case to Answer Motion.³⁰⁵ In his appeal brief, Mr Ntaganda requested the Appeals Chamber to order the immediate suspension of the trial proceedings pending resolution of his appeal.³⁰⁶

³⁰⁰ [T-209](#), p. 4, lines 6-10, p. 24, line 15 to p. 26, line 13.

³⁰¹ [T-209](#), p. 4, lines 11-15. *See also* p. 27, lines 17-19.

³⁰² [T-209](#), p. 8, line 16 to p. 11, line 20.

³⁰³ [T-209](#), p. 27, line 25 to p. 28, line 1. *See also* p. 26, line 14 to p. 27, line 24.

³⁰⁴ [Decision on suspensive effect](#), ICC-01/04-02/06-1968 (OA6), para. 10; [Notice of appeal and urgent request for suspensive effect](#), 14 June 2017, ICC-01/04-02/06-1960 (OA6) (the '[Request for Suspensive Effect](#)').

³⁰⁵ Appeal from decision denying leave to file a 'no case to answer motion', ICC-01/04-02/06-1975 (OA6) ('[Mr Ntaganda's Appeal Against Decision Denying Leave to File No Case to Answer Motion](#)').

³⁰⁶ [Mr Ntaganda's Appeal Against Decision Denying Leave to File No Case to Answer Motion](#), para. 31.

204. On 28 June 2017, the Appeals Chamber dismissed *in limine* his request.³⁰⁷

205. On 5 September 2017, the Appeals Chamber confirmed the Decision Denying Leave to File No Case to Answer Motion.³⁰⁸

206. Mr Ntaganda testified from June to September 2017, for a total of 30 court days.³⁰⁹

(b) Summary of submissions

(i) *Mr Ntaganda's submissions*

207. Mr Ntaganda submits that in all cases either at the Court or at the *ad hoc* tribunals, no accused was required 'to present [his] evidence' prior to the resolution of the no case to answer challenge.³¹⁰ He avers that '[t]o do so would undermine the primary rationale of a "no case" submission, being that "an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantially insufficient to engage the need for the defence to mount a defence case"'.³¹¹ Mr Ntaganda argues that he was prejudiced as the Trial Chamber relied on his testimony 'given prior to the Appeals Chamber's decision, to make adverse factual findings' on the challenged charges.³¹² Consequently, he requests 'the reversal of these findings, and the convictions that rest thereon'.³¹³

(ii) *The Prosecutor's submissions*

208. The Prosecutor submits that the Trial Chamber did not abuse its discretion in refusing to stay the proceedings pending the resolution of Mr Ntaganda's appeal.³¹⁴ She argues that Mr Ntaganda fails to address the Trial Chamber's reasoning for

³⁰⁷ Decision on request to suspend the trial proceedings, ICC-01/04-02/06-1976 (OA6) (the '[Decision Dismissing Request for Suspension of June 2017](#)'), para. 9.

³⁰⁸ Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion", ICC-01/04-02/06-2026 (OA6) ('[Ntaganda OA6 Judgment](#)'), para. 59.

³⁰⁹ [Annex A to Conviction Decision](#), para. 13. The Trial Chamber recalled that because of the summer recess, 'a 37-day break occurred between the seventh day of the cross-examination by the Prosecution and the remainder of the cross-examination'. See [Annex A to Conviction Decision](#), para. 13, fn. 40.

³¹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 44.

³¹¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 44 (emphasis in original omitted).

³¹² [Mr Ntaganda's Appeal Brief – Part II](#), para. 47, referring to [Conviction Decision](#), paras 329, 521, 554, 555, 564-565, 638, 647-651, fns 879-888, 1672, 1684-1685, 1688-1690, 1715, 1720, 1723, 1725, 2035, 2062, 2065-2067, 2070, 2073-2074, 2077, 2080-2081.

³¹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 47.

³¹⁴ [Prosecutor's Response to Appeal – Part II](#), para. 43.

declining the adjournment of the proceedings.³¹⁵ She also argues that his ‘undeveloped reference to article 67(1)(a) and (g)’ fails to demonstrate any error in the Trial Chamber’s approach.³¹⁶

209. In addition, the Prosecutor argues that Mr Ntaganda was informed of the case to answer and the charges against him.³¹⁷ She adds that Mr Ntaganda ‘made an informed choice to testify, with assistance of counsel’ and that it is ‘untenable to claim, retrospectively’ that it could not be an informed choice ‘when the charges could still change’.³¹⁸

(iii) The victims’ observations

210. Victims Group 2 argue that Mr Ntaganda’s speculative arguments of ‘what could have been the impact’ if the Appeals Chamber’s decision would have been different ‘cannot be the subject of an appeal’.³¹⁹ Victims Group 2 aver that Mr Ntaganda cannot have suffered any prejudice since the Appeals Chamber confirmed the Decision Denying Leave to File No Case to Answer Motion and the charges against him remained the same.³²⁰ Victims Group 2 maintain that Mr Ntaganda ‘knowingly took the decision to testify’ since he requested to ‘be heard at the beginning of his case’.³²¹

(iv) Mr Ntaganda’s response to the victims

211. Mr Ntaganda submits that by ‘forcing’ him to testify before the Appeals Chamber’s decision was rendered, the Trial Chamber took the position that “‘no case to answer’” submissions do not have the effect of staying the trial until their resolution’.³²² He argues that following this logic, ‘the *Gbagbo and Blé Goudé* Trial Chamber could have proceeded to hear the defence evidence while simultaneously adjudicating the defence motions for acquittal’.³²³ He adds that whether he could have chosen not to give evidence, this ‘does not circumvent the unfairness’, as

³¹⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 45.

³¹⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 45.

³¹⁷ [Prosecutor’s Response to Appeal – Part II](#), para. 47.

³¹⁸ [Prosecutor’s Response to Appeal – Part II](#), para. 48.

³¹⁹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 29.

³²⁰ [Observations of Victims Group 2 on Appeal – Part II](#), para. 29; [T-271](#), p. 70, lines 9-17.

³²¹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 30.

³²² [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 6.

³²³ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 6.

Mr Ntaganda should never have been put in such position ‘before the question of the sufficiency of evidence was settled’.³²⁴

(c) Determination by the Appeals Chamber

212. With respect to Mr Ntaganda’s contention that the ‘Trial Chamber violated his right to be informed promptly and in detail of the charges, and to remain silent’,³²⁵ the Appeals Chamber notes that in his request for adjournment, Mr Ntaganda raised the issue of his right to remain silent and not to have to testify on charges for which there was insufficient evidence.³²⁶ In the Adjournment Decision of June 2017, the Trial Chamber rejected Mr Ntaganda’s request, holding that there were no ‘compelling reasons’ to order an adjournment of the proceedings.³²⁷ It stressed that neither ‘the Defence [n]or the accused would suffer any negative effect or undue prejudice from commencing the testimony of Mr Ntaganda at this stage’.³²⁸ The Trial Chamber recalled that it

is composed of a bench of professional judges. It is well equipped to appropriately assess the evidence, including in light of any ruling of the Appeals Chamber in relation to the upcoming appeal, in relation to any no case to answer motion or any procedural issues arising therefrom that may impact the present proceedings. Further, the Chamber notes [...] that such appeal relates to whether a no case to answer motion must be entertained rather than necessarily granted or denied in substance.³²⁹

213. The Trial Chamber considered that Mr Ntaganda’s request was ‘premised on unduly speculative grounds’.³³⁰ It then concluded that it would not ‘be in the interests of justice, nor the fairness or expeditiousness of the proceedings to adjourn the proceedings pending resolution by the Appeals Chamber of the foreshadowed Defence request for suspensive effect’.³³¹ The Trial Chamber indicated that Mr Ntaganda was expected to testify as scheduled.³³²

³²⁴ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 8.

³²⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 43.

³²⁶ See [Adjournment Decision of June 2017](#), p. 9, line 25 to p. 10, line 24.

³²⁷ [Adjournment Decision of June 2017](#), p. 27, lines 7-8.

³²⁸ [Adjournment Decision of June 2017](#), p. 27, lines 9-11.

³²⁹ [Adjournment Decision of June 2017](#), p. 27, lines 12-19.

³³⁰ [Adjournment Decision of June 2017](#), p. 27, lines 19-20.

³³¹ [Adjournment Decision of June 2017](#), p. 27, lines 21-24.

³³² [Adjournment Decision of June 2017](#), p. 27, line 25 to p. 28, line 1.

214. The Appeals Chamber notes that Mr Ntaganda does not challenge the Trial Chamber's reasoning or approach adopted in the Adjournment Decision of June 2017.

215. Moreover, when requesting suspensive effect of the Decision Denying Leave to File No Case to Answer Motion, Mr Ntaganda sought the suspension of the trial pending the resolution of his appeal on the ground of his right to remain silent.³³³ Indeed, he argued that if the proceedings continued, he would 'testify and answer to charges for which the Prosecution might have presented insufficient evidence at the end of its case thereby violating his fundamental right to remain silent, the right not to be subjected to any reversal of the burden of proof'.³³⁴

216. In rejecting Mr Ntaganda's request, the Appeals Chamber considered that '[w]ith the [Decision Denying Leave to File No Case to Answer Motion] [...] the Trial Chamber did not order that the trial continue'; rather, '[i]t denied a procedural request, namely, a request for leave to file a "no case to answer" motion'.³³⁵ The Appeals Chamber was of the view that the suspension of the trial proceedings, sought by Mr Ntaganda, could not 'be attained through a suspension of the [Decision Denying Leave to File No Case to Answer Motion]' as it was 'difficult to discern any effect that suspending a decision that merely rejects a procedural motion would have'.³³⁶ Nonetheless, the Appeals Chamber recalled the Trial Chamber's power 'to adapt the proceedings before it in such a way as to address any concerns that Mr Ntaganda may have resulting from [his] appeal'.³³⁷

217. The Appeals Chamber therefore does not accept Mr Ntaganda's contention that the Appeals Chamber's rejection of his Request for Suspensive Effect did not justify the Trial Chamber to proceed with the trial.³³⁸ In this regard, Mr Ntaganda does not show that because the Appeals Chamber dismissed his request 'on the basis that [suspension of the trial] could not be attained through the suspension of the [Decision Denying Leave to File No Case to Answer Motion], and not on its merits',³³⁹ the Trial

³³³ [Request for Suspensive Effect](#), paras 24, 27.

³³⁴ [Request for Suspensive Effect](#), paras 24, 27.

³³⁵ [Decision on Suspensive Effect](#), para. 9.

³³⁶ [Decision on Suspensive Effect](#), para. 9.

³³⁷ [Decision on Suspensive Effect](#), para. 10.

³³⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 46.

³³⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 46.

Chamber erred in ordering the continuation of the trial. In particular, Mr Ntaganda does not explain why the Trial Chamber, despite the Appeals Chamber rejecting his request, should have nonetheless stayed the proceedings.³⁴⁰ Article 82(3) of the Statute clearly provides that an interlocutory appeal does ‘not of itself have suspensive effect unless the Appeals Chamber so orders’.³⁴¹ The effect of the Appeals Chamber’s ruling was that the conduct of the trial proceedings continued as scheduled without any interruption related to the pending appeal before the Appeals Chamber.

218. Moreover, in dismissing *in limine* Mr Ntaganda’s request for an immediate suspension of the proceedings pending resolution of his appeal, the Appeals Chamber observed that: (i) Mr Ntaganda had already sought the suspension of the trial proceedings pending the outcome of the appeal and that his request was rejected; and (ii) ‘Mr Ntaganda d[id] not explain why the Appeals Chamber should reconsider the Decision on Suspensive Effect or on what legal basis the Appeals Chamber could grant the relief sought with the Request for [Suspensive Effect]’.³⁴²

219. In the present appeal, the Appeals Chamber finds that Mr Ntaganda merely repeats unsuccessful arguments presented at trial and on appeal without setting out any specific error in the Trial Chamber’s reasoning or approach in refusing to adjourn the proceedings pending the resolution of his appeal.

220. In that regard, the appeal of Mr Ntaganda related to a decision on whether to consider a motion of no case to answer or not, rather than to a decision on the merits of such a motion. In view of the nature of that decision: (i) the charges against Mr Ntaganda, including those challenged in his Request for Leave for No Case to

³⁴⁰ In the Adjournment Decision of June 2017, the Trial Chamber correctly noted article 82(3) of the Statute and the procedure for a request for suspensive effect under rule 156(2) of the Rules, and held that, ‘leaving aside any issue of the appropriateness of such a remedy to the present situation, such application is to be made before the Appeals Chamber and is thus to be decided by the Appeals Chamber’. However, the Trial Chamber addressed the request for adjournment on the basis that it had rejected Mr Ntaganda’s Request for Leave for No Case to Answer Motion and that the proceedings had to continue ‘as scheduled unless the Chamber is persuaded that there are compelling reasons to adjourn’. See [Adjournment Decision of June 2017](#), p. 26, line 20 to p. 27, line 5.

³⁴¹ See also [Decision Dismissing Request for Suspension of June 2017](#), para. 8, where the Appeals Chamber held that ‘in the context of interlocutory appeals, “[an application designed to stay proceedings] is a remedy unknown to the Statute and wholly separate from the one envisaged by article 82 (3) of the Statute”, meaning that the only interim relief expressly recognised by this provision of the Statute in respect of interlocutory appeals is the suspension of the decision subject to appeal.’ (Footnote omitted).

³⁴² [Decision Dismissing Request for Suspension of June 2017](#), para. 8.

Answer Motion, remained the same; and (ii) there was no ongoing litigation that would directly affect those charges such that their status should be considered to be uncertain. Mr Ntaganda's submission that he was not properly informed of the charges while testifying is therefore without merit. In that same vein, his contention that he was prejudiced because the Trial Chamber relied on his testimony 'given prior of the Appeals Chamber's decision' to make adverse factual findings³⁴³ on the related charges is unfounded, as the proceedings were never suspended and the Appeals Chamber confirmed the Decision Denying Leave to File No Case to Answer Motion. Therefore, it was within the discretion of the Trial Chamber to rely on the evidence presented during the evidentiary period when Mr Ntaganda's appeal was pending.

221. Furthermore, the Appeals Chamber finds misguided Mr Ntaganda's contention that the Trial Chamber should have considered that submissions on a no case to answer 'have the effect of staying the trial until their resolution', as well as his reliance on the case of *Gbagbo and Blé Goudé*.³⁴⁴ As held above, Mr Ntaganda's request was a procedural request on whether or not he could be authorised to file submissions on a no case to answer. Hence, his motion for leave did not trigger the procedure of a no case to answer request, as in the case on which he relies. In these circumstances, the Trial Chamber was not required to suspend the proceedings.

(d) Conclusion

222. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's decision not to suspend the proceedings prior to the resolution of his appeal against the Decision Denying Leave to File No Case to Answer Motion, the Appeals Chamber rejects this sub-ground of appeal.

4. *Alleged violation of the right to a fair hearing*

223. Mr Ntaganda submits that by prioritising the expeditiousness of the proceedings without regard to his 'pleas for assistance and delay', the Trial Chamber 'wrongly exercised its discretion in making repeated decisions which violated his right to a fair trial; his right to have adequate time and facilities to prepare his defence and the right

³⁴³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 47.

³⁴⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 44; [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 6.

to full answer and defence'.³⁴⁵ He adds that the Trial Chamber rejected a number of his requests for leave to appeal these and other issues.³⁴⁶

224. In support of his contention, Mr Ntaganda raises the following three issues:

- (i) the date of commencement of the trial;
- (ii) the suspension of a Defence investigator; and
- (iii) the re-scheduling of P-0290's cross-examination.³⁴⁷

225. Mr Ntaganda submits that '[t]hese errors can only be remedied by ordering a new trial'.³⁴⁸

226. The Appeals Chamber will address these issues in turn.

(a) Commencement of the trial

227. Mr Ntaganda submits that the Trial Chamber abused its discretion in rejecting his request to postpone the trial until 2 November 2015.³⁴⁹

(i) Background

228. On 9 October 2014, the Trial Chamber scheduled the commencement of the trial for 2 June 2015.³⁵⁰

229. On 7 April 2015, Mr Ntaganda requested the Trial Chamber to postpone the trial until 2 November 2015.³⁵¹

230. On 22 April 2015, the Trial Chamber, in an oral decision,³⁵² postponed the commencement of the trial and scheduled the opening statements for the 'second or

³⁴⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 57.

³⁴⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 57; [T-270](#), p. 86, line 25 to p. 87, line 9.

³⁴⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 48-57.

³⁴⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 57.

³⁴⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 50.

³⁵⁰ [Corrigendum of 'Order Scheduling a Status Conference and Setting the Commencement Date for the Trial'](#), 28 November 2014, ICC-01/04-02/06-382-Corr (original registered on 9 October 2014 (ICC-01/04-02/06-382)), p. 9.

³⁵¹ Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution's Case until 2 November 2015 at the earliest with Public Annex A, dated 2 April 2015 and registered on 7 April 2015, ICC-01/04-02/06-541-Red (the '[Request for Postponement of April 2015](#)'), para. 11, p. 18.

³⁵² [T-19](#), p. 3, line 9 to p. 8, line 4.

third week of July 2015’ and the hearing of evidence for the week of 17 August 2015 (the ‘Postponement Decision of April 2015’).³⁵³

231. On 21 May 2015, the Trial Chamber rejected Mr Ntaganda’s request for leave to appeal the Postponement Decision of April 2015.³⁵⁴

(ii) *Summary of submissions*

(a) Mr Ntaganda’s submissions

232. Mr Ntaganda submits that the Trial Chamber abused its discretion in rejecting his request to postpone the trial until 2 November 2015 ‘despite [...] the addition of 29 new Prosecution witnesses on 15 January’ and ‘failed to take into account relevant considerations’.³⁵⁵ He argues that he was faced with: (i) a ‘three-fold increase’ in the Prosecutor’s disclosure; (ii) the Prosecutor’s failure to meet her disclosure obligations ‘in a timely manner’; and (iii) ‘investigation difficulties’.³⁵⁶ He argues that the Trial Chamber’s limited postponement was ‘mainly to accommodate the Registry’s own logistical difficulties’.³⁵⁷ He argues that, as a result, his ‘right to adequate time and facilities to prepare his Defence’ was violated.³⁵⁸

233. Mr Ntaganda adds that the Trial Chamber erred in rejecting his request for leave to appeal the Postponement Decision of April 2015, as the ‘criteria in article 82(1)(d) were met’.³⁵⁹

(b) The Prosecutor’s submissions

234. The Prosecutor submits that Mr Ntaganda does not identify any error in the Trial Chamber’s reasoning in its Postponement Decision of April 2015.³⁶⁰ Regarding his claim about the ‘29 new Prosecution witnesses’, she argues that the addition of

³⁵³ [Postponement Decision of April 2015](#), p. 7, lines 7-18.

³⁵⁴ [Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date](#), ICC-01/04-02/06-604, p. 11; Request on behalf of Mr Ntaganda seeking leave to appeal the Chamber’s decision on Defence urgent request for postponement of the Prosecution’s case, 24 April 2015, ICC-01/04-02/06-572 (the ‘[Request for Leave to Appeal the Postponement Decision of April 2015](#)’).

³⁵⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 50.

³⁵⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 50.

³⁵⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 50.

³⁵⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 50.

³⁵⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 50.

³⁶⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 51.

those witnesses ‘complied with the Chamber’s deadlines, and is not unusual in a complex case progressing from confirmation to trial’.³⁶¹ As to the disclosure issue, the Prosecutor avers that Mr Ntaganda omits to mention that ‘almost 60% of this disclosure was made up of photos and videos taken during exhumations and post mortem examinations, requiring limited review, and a further 20% of *re*-disclosed documents (for example, with redactions lifted)’.³⁶²

(c) The victims’ observations

235. Victims Group 2 submit that the Trial Chamber properly exercised its discretion.³⁶³

(iii) Determination by the Appeals Chamber

236. The Appeals Chamber notes that in reaching the Postponement Decision of April 2015, the Trial Chamber was ‘mindful of its obligation to ensure full respect for the rights of the accused, including in particular the right to have adequate time and facilities for preparation of the defence’.³⁶⁴ The Trial Chamber also recalled its duty to ensure a ‘fair and expeditious trial’.³⁶⁵ It considered Mr Ntaganda’s submissions in that context but found that ‘a significant number of the issues raised by the Defence were either already known to it at the time it made submissions on the schedule for preparation for trial, or should reasonably have been anticipated by it at that stage’.³⁶⁶ Among these issues, the Trial Chamber noted the ‘status of Defence investigations at that time, the impact of changes in the composition of the Defence team and to some extent the potential volume of disclosure’.³⁶⁷

237. The Trial Chamber was also of the view that ‘a number of the other difficulties’ raised by Mr Ntaganda ‘either [fell] within the range of normal investigative difficulties that might be anticipated in a case of this nature, or relate[d] to matters

³⁶¹ [Prosecutor’s Response to Appeal – Part II](#), para. 52 (footnote omitted).

³⁶² [Prosecutor’s Response to Appeal – Part II](#), para. 52 (emphasis in original).

³⁶³ [Observations of Victims Group 2 on Appeal – Part II](#), para. 35.

³⁶⁴ [Postponement Decision of April 2015](#), p. 5, lines 13-15.

³⁶⁵ [Postponement Decision of April 2015](#), p. 5, lines 16-17.

³⁶⁶ [Postponement Decision of April 2015](#), p. 5, lines 19-22.

³⁶⁷ [Postponement Decision of April 2015](#), p. 5, lines 22-24.

which in the Chamber's view d[id] not legitimately justify the Defence postponement request'.³⁶⁸

238. The Trial Chamber also considered that the Prosecutor's 'request for delayed disclosure and for non-standard redactions' had 'been appropriately limited in number and scope' and would not therefore 'justify an alteration of the trial commencement date'.³⁶⁹ In addition, it found that Mr Ntaganda should have 'a clear outline and understanding of the Prosecution's case' from the pre-trial brief and the updated Document Containing the Charges in addition to the information contained in the Confirmation Decision.³⁷⁰

239. The Appeals Chamber notes that Mr Ntaganda does not challenge the reasoning or any specific finding of the Postponement Decision of April 2015. Rather, he repeats arguments presented before the Trial Chamber without explaining how the Trial Chamber erred in rejecting them.³⁷¹ The Appeals Chamber further observes that his argument that the Trial Chamber 'failed to take into account relevant considerations'³⁷² is unsubstantiated as he does not identify considerations which, in his view, should have been taken into account by the Trial Chamber. In any event, the Trial Chamber considered matters related to the Prosecutor's disclosure and the difficulties encountered by the Defence. Mr Ntaganda does not specifically challenge the Trial Chamber's findings on these issues. His undeveloped arguments, limited to a mere disagreement with the Trial Chamber's decision, fail to show that the Trial Chamber abused its discretion.

240. Furthermore, the Appeals Chamber considers Mr Ntaganda's allegation that the postponement mainly served to accommodate the Registry to be misplaced. The Trial Chamber noted the Registry's submissions regarding additional time needed 'to facilitate the holding of opening statements in the DRC' and considered that while the matter was before the Presidency, it was 'in the interest of justice' to have the opening statements in Bunia in the DRC in order to bring 'the judicial work of the Court closer

³⁶⁸ [Postponement Decision of April 2015](#), p. 5, line 25 to p. 6, line 3.

³⁶⁹ [Postponement Decision of April 2015](#), p. 6, lines 4-8.

³⁷⁰ [Postponement Decision of April 2015](#), p. 6, lines 9-12.

³⁷¹ See Request for Postponement of April 2015, paras 25, 32, 35, 39; [Request for Leave to Appeal the Postponement Decision of April 2015](#), paras 15, 19, 23, 28, 37.

³⁷² [Mr Ntaganda's Appeal Brief – Part II](#), para. 50.

to the most affected communities'.³⁷³ Moreover, in deciding to postpone the commencement of the trial for a limited period, the Trial Chamber took into account not only the Registry's logistical difficulties but also 'to a lesser extent the Defence submissions that it would not be in a position to commence trial as scheduled, including on the basis of certain delays in completion of full disclosure by the Prosecution'.³⁷⁴

241. Hence, contrary to Mr Ntaganda's claim, when deciding to postpone the trial the Trial Chamber took into account Mr Ntaganda's submissions regarding the difficulties in the preparation of his defence. In particular, the Trial Chamber 'recognized that such a postponement may assist the Defence in completing its review of the incriminating material disclosed to date'.³⁷⁵ It therefore decided that the trial would commence on 7 July 2015 and the presentation of evidence would start in the week of 17 August 2015.³⁷⁶ The Trial Chamber observed that 'this revised schedule will in effect provide the Defence with approximately two and a half months of additional preparation time, which the Chamber considers to be entirely ample in the current circumstances'.³⁷⁷ Furthermore, it rejected the Prosecutor's request to revise the disclosure deadlines as it 'would compromise the ability of the Defence to adequately prepare'.³⁷⁸ Mr Ntaganda does not present any arguments challenging these findings.

242. Finally, regarding the Trial Chamber's decision rejecting Mr Ntaganda's Request for Leave to Appeal the Postponement Decision of April 2015, the Appeals Chamber notes that by arguing that the 'criteria in article 82(1)(d) were met',³⁷⁹ Mr Ntaganda is in fact appealing that decision, which is not permissible. The Appeals Chamber recalls that decisions denying leave to appeal may not be appealed.³⁸⁰

³⁷³ [Postponement Decision of April 2015](#), p. 6, lines 13-19.

³⁷⁴ [Postponement Decision of April 2015](#), p. 6, lines 20-24.

³⁷⁵ [Postponement Decision of April 2015](#), p. 7, lines 1-2.

³⁷⁶ [Postponement Decision of April 2015](#), p. 7, lines 13-18.

³⁷⁷ [Postponement Decision of April 2015](#), p. 7, lines 19-21.

³⁷⁸ [Postponement Decision of April 2015](#), p. 7, lines 22-25.

³⁷⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 50.

³⁸⁰ See [Lubanga Review Judgment](#), paras 35, 39-40. See also [Norman et al. Decision](#), para. 25: 'An appeal from the decision of the Trial Chamber refusing leave to appeal could itself, in such a case, have been brought pursuant to leave sought and granted by the Trial Chamber. The prospect of an endless series of applications for leave to appeal from a decision of the Trial Chamber that would make it absurd to contemplate an appeal by leave of the Trial Chamber from such refusal, does lend some

243. The Appeals Chamber will now address Mr Ntaganda's arguments related to the suspension of a Defence investigator.

(b) Suspension of a Defence investigator

244. Mr Ntaganda avers that because of the Trial Chamber's 'undue concern for the existing trial calendar', it failed to 'address Defence concerns' regarding the impact of allegations [REDACTED] on his investigations.³⁸¹

(i) Background

245. On 23 June 2015, upon an *ex parte* request from the Prosecutor, the Trial Chamber suspended one Defence investigator on the basis of allegations of breach of confidentiality (the 'Interim Suspension Order').³⁸² Noting the seriousness of the allegations and the need 'to ensure the effectiveness of the measures taken', the Trial Chamber considered that it was 'appropriate to proceed at this stage on the basis of the Prosecution's *ex parte* Request'.³⁸³ Nonetheless, the Trial Chamber, 'mindful of the impact the requested measures [might] have on the Defence', ordered that the Defence 'be provided with a copy of the [Prosecutor's *ex parte*] Request, with minimal redactions', and be given 'an opportunity to make submissions on it'.³⁸⁴

246. On 26 June 2015, Mr Ntaganda filed his Request for Adjournment of June 2015.³⁸⁵

247. On 3 July 2015, the Trial Chamber, in an oral decision, postponed the opening statements to 2 September 2015 and the commencement of the Prosecutor's presentation of evidence to 15 September 2015.³⁸⁶

248. On 4 August 2015, the Trial Chamber rejected Mr Ntaganda's request for leave to appeal the Adjournment Decision of July 2015.³⁸⁷

strength to the view that the intention of the Rules, though not expressly stated, is to exclude appeals from refusal of the Trial Chamber to grant leave to appeal'.

³⁸¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 51.

³⁸² [Public redacted version of 'Order taking interim measures in relation to a Defence investigator and related matters' ICC-01/04-02/06-667-Conf-Exp](#), 10 March 2021, ICC-01/04-02/06-667-Red (confidential *ex parte* version was registered on 26 June 2015 (ICC-01/04-02/06-667-Conf-Exp)), para. 8, p. 8.

³⁸³ [Interim Suspension Order](#), para. 6.

³⁸⁴ [Interim Suspension Order](#), para. 6.

³⁸⁵ [Mr Ntaganda's Request for Adjournment of June 2015](#). See also paragraph 137 above.

³⁸⁶ [Adjournment Decision of July 2015](#), p. 5, lines 12-14. See also paragraph 138 above.

249. On 12 August 2015, the Trial Chamber made a ruling regarding the Defence investigator (the ‘Suspension Decision of August 2015’).³⁸⁸ It considered that there were ‘reasonable grounds to believe that the First Investigator engaged in conduct sufficiently detrimental to the integrity of the proceedings and the safety and well-being of witnesses to warrant his continued suspension from the *Ntaganda* case’.³⁸⁹ Pursuant to section 10 of the Code of Conduct for Investigators, the Trial Chamber directed the Registry to transmit the matter to the ‘Commissioner of the Disciplinary board [...] for consideration and any further action deemed appropriate’.³⁹⁰ The Trial Chamber further held that if ‘compelling circumstances arise, such as an exonerating finding by the Disciplinary Board’, it would ‘if appropriate, review its findings’ regarding the first investigator ‘as soon as practicable’.³⁹¹

(i) *Summary of submissions*

(a) **Mr Ntaganda’s submissions**

250. Mr Ntaganda argues that the Trial Chamber failed ‘to take into account relevant factors’ and ‘was required to address [allegations of witness interference] before the start of trial’, as is done before other international courts.³⁹² He further avers that it was unreasonable for the Trial Chamber to allow the commencement of the trial before his ‘investigators were absolved or new investigators were in place’.³⁹³ Mr Ntaganda argues that as a result the cross-examination of Prosecution witnesses was done with no ability ‘to investigate their allegations, or verify issues raised by their testimony’.³⁹⁴ Mr Ntaganda further argues that the Trial Chamber erred in

³⁸⁷ Public redacted version of ‘Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date’, ICC-01/04-02/06-760-Red (the ‘[Decision Rejecting Leave of August 2015](#)’) (confidential version was registered on the same day (ICC-01/04-02/06-760-Conf)), p. 12; [Public redacted version of “Application on behalf of Mr Ntaganda seeking leave to appeal the Chamber’s oral decision on ‘Urgent motion on behalf of Mr Ntaganda seeking immediate adjournment of the proceedings until the necessary conditions are in place to ensure a fair trial’”](#), 10 July 2015, ICC-01/04-02/06-709-Red (confidential *ex parte* version was registered on the same day (ICC-01/04-02/06-709-Conf-Exp)).

³⁸⁸ [Public redacted version of ‘Decision on Prosecution request for suspension of investigators and related matters’ ICC-01/04-02/06-777-Conf-Exp](#), 10 March 2021, ICC-01/04-02/06-777-Red (confidential *ex parte* version was registered on 12 August 2015 (ICC-01/04-02/06-777-Conf-Exp)).

³⁸⁹ [Suspension Decision of August 2015](#), para. 28, p. 18.

³⁹⁰ [Suspension Decision of August 2015](#), para. 29, p. 19.

³⁹¹ [Suspension Decision of August 2015](#), para. 30.

³⁹² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 51, fn. 119.

³⁹³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 52.

³⁹⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 52.

rejecting his request for leave to appeal the Adjournment Decision of July 2015 as the criteria under article 82(1)(d) were met.³⁹⁵

(b) The Prosecutor's submissions

251. The Prosecutor submits that Mr Ntaganda's arguments do not show an error in the Trial Chamber's decision to suspend a Defence investigator.³⁹⁶ The Prosecutor argues that Mr Ntaganda's claim that the Trial Chamber was required to resolve the issue of the allegations against his investigator before the commencement of the trial is 'not only unsupported by the authorities that [he] cites, but contradicts the practice of this Court'.³⁹⁷

(ii) Determination by the Appeals Chamber

252. The Appeals Chamber notes that Mr Ntaganda's contention that the Trial Chamber was required to address allegations of witness interference against his investigator 'before the start of trial, as is the practice before other international courts'³⁹⁸ is unfounded.

253. The Appeals Chamber observes that Mr Ntaganda refers to case-law relating to contempt of court implying that the Trial Chamber's determination of the investigator's issue amounted to proceedings regarding that type of offence. However, the Trial Chamber's conclusions were not made under article 70 of the Statute on offences against the administration of justice. Rather it treated the issue as a disciplinary matter and it transmitted it to the 'Commissioner of the Disciplinary board [...] for consideration and any further action deemed appropriate'.³⁹⁹ By doing so, the Trial Chamber adjudicated the matter, contrary to Mr Ntaganda's contention, before the commencement of the trial which was set to start on 2 September 2015.

254. The Appeals Chamber further notes that Mr Ntaganda refers to notices filed before the Trial Chamber, in which he updated the Trial Chamber on the progress made in the recruitment of a new investigator and a resource person.⁴⁰⁰ These notices

³⁹⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 52.

³⁹⁶ [Prosecutor's Response to Appeal – Part II](#), para. 54.

³⁹⁷ [Prosecutor's Response to Appeal – Part II](#), para. 54 (footnote omitted).

³⁹⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 51.

³⁹⁹ [Suspension Decision of August 2015](#), para. 29, p. 19.

⁴⁰⁰ [Mr Ntaganda's Appeal Brief – Part II](#), fn. 118.

were only informative and Mr Ntaganda did not seize the Trial Chamber with any specific request or concern.⁴⁰¹ In fact, in his notice of 1 September 2015, he indicated that a ‘postponement of the beginning of the presentation of the Prosecutor’s case’ scheduled to start on 15 September 2015 was not required at that time.⁴⁰²

255. Mr Ntaganda further argues that the Trial Chamber’s limited extension until 2 September 2015 ‘was of no meaningful use’ because the requested postponement was required until the absolution of the Defence investigators or their replacement.⁴⁰³ In the Adjournment Decision of July 2015, the Trial Chamber noted Mr Ntaganda’s submissions that an immediate adjournment of the proceedings was required ‘until the necessary conditions [were] in place to ensure a fair trial’ and that he could not be ‘ready to start the trial proceedings in the current schedule’.⁴⁰⁴ Considering the submissions from the parties and the Registry on ‘certain practical matters related to one of the issues the Defence faces’, the Trial Chamber was convinced that Mr Ntaganda’s situation at the time affected his ability ‘to prepare for the start of trial’.⁴⁰⁵ It therefore considered that Mr Ntaganda ‘should be provided a limited amount of additional time to be able to address certain issues’ and considered ‘appropriate to order a limited postponement of the evidentiary phase of the proceedings’.⁴⁰⁶

256. In reaching this decision, the Trial Chamber was mindful of its obligations under article 64(2) of the Statute, ‘in particular, to ensure the fairness of the trial and the rights of the accused’.⁴⁰⁷ Accordingly, the Trial Chamber rescheduled the opening statements for 2 until 4 September 2015 and the start of the ‘evidentiary stage, with the first three witnesses scheduled for the first block’ to commence on

⁴⁰¹ See for example Public redacted version of ‘Notice on behalf of Mr Ntaganda informing the Chamber of the assignment of a new Defence investigator and a new Defence resource person, and the consequences thereof’, 1 September 2015, ICC-01/04-02/06-807-Red ([‘Mr Ntaganda’s Notice’](#)).

⁴⁰² [Mr Ntaganda’s Notice](#), para. 19.

⁴⁰³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 52.

⁴⁰⁴ [Adjournment Decision of July 2015](#), p. 4, lines 5-9.

⁴⁰⁵ [Adjournment Decision of July 2015](#), p. 4, lines 18-19, 25, p. 5, line 1.

⁴⁰⁶ [Adjournment Decision of July 2015](#), p. 5, lines 4-7.

⁴⁰⁷ [Adjournment Decision of July 2015](#), p. 5, lines 2-4. See also [Decision Rejecting Leave of August 2015](#), para. 23.

15 September.⁴⁰⁸ The Trial Chamber indicated that it was not useful, at that stage, to further modify the trial schedule.⁴⁰⁹

257. The Appeals Chamber observes that apart from challenging the limited length of the granted adjournment, Mr Ntaganda does not raise any specific error in the Trial Chamber's approach or reasoning in the Adjournment Decision of July 2015. The Trial Chamber's decision expressly took into account Mr Ntaganda's situation at the time and the need to conduct the proceedings fairly.

258. In addition, Mr Ntaganda's claim that the cross-examination of Prosecution witnesses was conducted with no ability 'to investigate their allegations, or verify issues raised by their testimony' is solely based on an extract of his defence press conference held on 1 September 2015.⁴¹⁰ Mr Ntaganda does not refer to the cross-examination of any particular witness and does not explain how that cross-examination was affected. Furthermore, the Appeals Chamber considers that Mr Ntaganda's mere reference to an extract of his Lead Counsel's general statement made at a press conference is insufficient to support his claim or to show an error in the Trial Chamber's approach.⁴¹¹

259. The Appeals Chamber further notes that when rejecting Mr Ntaganda's request for leave to appeal the Adjournment Decision of July 2015, the Trial Chamber explained that modifications made to the trial schedule and its instructions to the parties regarding the first evidentiary block 'were meant to enable the adjudication of the *Ex Parte* Litigation, to the extent deemed appropriate by the Chamber, prior to the commencement of the evidentiary phase of the trial, and to allow the Defence time to address its concerns and prepare for trial'.⁴¹² It clarified that while finding that further modifications to the trial schedule were not useful, it left 'open the possibility that such modification could be made in the future, should a legitimate need to do so

⁴⁰⁸ [Adjournment Decision of July 2015](#), p. 5, lines 12-14.

⁴⁰⁹ [Adjournment Decision of July 2015](#), p. 5, lines 15-16.

⁴¹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 52, fn. 122, referring to Ntaganda Case: Press conference of 1 September 2015, at 51:02 to 51:33.

⁴¹¹ See Ntaganda Case: Press conference of 1 September 2015, at 51:02 to 51:34 where Mr Ntaganda's Lead Counsel stated the following: 'We had insufficient time to prepare for this case and I will say this to the judges tomorrow but they already know. It is mainly due to the size of the case but also to some events that have taken place and I will simply say the fact that the case of the Prosecution has changed significantly since the decision of the confirmation of charges was rendered.'

⁴¹² [Decision Rejecting Leave of August 2015](#), para. 24 (footnote omitted).

arise'.⁴¹³ The Trial Chamber also recalled its 'trial management powers and the range of measures available to assist the Defence should concrete difficulties arise'.⁴¹⁴

260. The Appeals Chamber notes that Mr Ntaganda appears to challenge the Decision Rejecting Leave of August 2015.⁴¹⁵ As recalled above, this amounts to appealing a decision denying leave to appeal, which is impermissible.⁴¹⁶

261. The Appeals Chamber will now turn to the last issue, which concerns the re-scheduling of the cross-examination of one witness.

(c) Re-scheduling of P-0290's cross-examination

262. Mr Ntaganda submits that the Trial Chamber erred in rejecting his request to postpone the cross-examination of P-0290 and his request to recall this witness.⁴¹⁷

(i) Background

263. At the hearing on 20 January 2016, Mr Ntaganda's Lead Counsel informed the Trial Chamber that Mr Ntaganda's Associate Counsel, who was supposed to cross-examine P-0790 (testifying before P-0290), could not be in court for medical reasons and would therefore not be able to proceed with the cross-examination.⁴¹⁸ Mr Ntaganda's Lead Counsel stated that he was 'not able to step in for him on short notice this morning'.⁴¹⁹ He requested that the proceedings be adjourned 'for the day and to resume whenever the Chamber [was] ready to resume with either [his] colleague or [him]self proceeding with the cross-examination of Witness P-790'.⁴²⁰

264. The Trial Chamber adjourned the proceedings until the afternoon of that same day.⁴²¹ It stated that it was 'grateful to Mr Bourgon [the Lead Counsel] for his indication this morning that he thought he might be able to step in to resume the examination this afternoon in Mr Boutin's [the Associate Counsel] place'.⁴²² It noted that since then, Mr Ntaganda's Lead Counsel informed the Trial Chamber via an

⁴¹³ [Decision Rejecting Leave of August 2015](#), para. 25.

⁴¹⁴ [Decision Rejecting Leave of August 2015](#), para. 25.

⁴¹⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 52; [T-270](#), p. 86, line 25 to p. 87, line 9.

⁴¹⁶ See paragraph 242 above.

⁴¹⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 55-56.

⁴¹⁸ [T-55](#), p. 3, lines 4-6, 11-12.

⁴¹⁹ [T-55](#), p. 4, lines 9-10.

⁴²⁰ [T-55](#), p. 5, lines 13-15.

⁴²¹ [T-55](#), p. 9, lines 15-20.

⁴²² [T-55](#), p. 10, lines 2-3.

email that ‘he [was] not after all going to be able to start immediately [on that same] day’.⁴²³ The Trial Chamber was of the view that in light of the ‘unexpected and exceptional’ circumstances, it considered the Lead Counsel’s request ‘to not resume the examination until 4.30 [on the following day] to be reasonable’.⁴²⁴ Nonetheless, the Trial Chamber considered that ‘it [was] preferable to complete the testimony of this witness as soon as possible’.⁴²⁵ It proposed that the hearing could continue on Thursday, 21 January 2016 in the afternoon and again on Monday, 25 January 2016 in the afternoon.⁴²⁶ Mr Ntaganda’s Lead Counsel stated that he was grateful and that he was fine with the proposed schedule.⁴²⁷

265. During that same hearing, the Presiding Judge highlighted that further changes to the schedule would ‘require maximum effort from Judges, [...] for the interpreters, for those who are recording the transcript’, which meant that it would also require ‘maximum effort’ from Mr Ntaganda’s Lead Counsel.⁴²⁸ The Presiding Judge acknowledged that the situation was not easy for Mr Ntaganda’s Lead Counsel and that he was ‘very experienced counsel’ but he wanted to make sure that he would not indicate on the following day that he was ‘not ready again’.⁴²⁹ Mr Ntaganda’s Lead Counsel confirmed that he would ‘abide by the new schedule’.⁴³⁰

266. The next day, on 21 January 2016, Mr Ntaganda’s Lead Counsel updated the Trial Chamber on his Associate Counsel’s situation and stated that he would not be available ‘for at least a period of 5 to 10 days’.⁴³¹ He recalled that, as he had stated in an email sent the day before to the Trial Chamber, he needed ‘to take measures in order to facilitate the proceedings during this coming [evidentiary] block’.⁴³² He indicated having discussed the matter with a member of the Prosecution and agreed to

⁴²³ [T-55](#), p. 10, lines 4-5.

⁴²⁴ [T-55](#), p. 10, lines 6-8.

⁴²⁵ [T-55](#), p. 10, lines 9-10.

⁴²⁶ [T-55](#), p. 10, lines 11-13.

⁴²⁷ [T-55](#), p. 10, lines 19-20.

⁴²⁸ [T-55](#), p. 10, line 24 to p. 11, line 2.

⁴²⁹ [T-55](#), p. 11, lines 3-4, 9-10.

⁴³⁰ [T-55](#), p. 11, line 13.

⁴³¹ [T-56](#), p. 2, line 24 to p. 3, line 1.

⁴³² [T-56](#), p. 3, lines 5-6.

‘raise the issue and discuss [it] with the Chamber’.⁴³³ Mr Ntaganda’s Lead Counsel then resumed the cross-examination of P-0790.⁴³⁴

267. On 25 January 2016, Mr Ntaganda requested a modification of the schedule for the third and fourth evidentiary block on the ground that his Associate Counsel who was supposed to cross-examine the five remaining Prosecution witnesses, including [REDACTED], remained unavailable and his Lead Counsel was ‘unable to proceed with all the witnesses scheduled to testify in the third evidentiary block without the benefit of significant delays between each witness’.⁴³⁵ Mr Ntaganda proposed that P-0290 testify on ‘8, 9, 10, 11, 12 February 2016’.⁴³⁶

268. On 27 January 2016, Mr Ntaganda, via an email sent to the Trial Chamber, requested leave to reply to the Prosecutor’s submissions about: (i) the ‘Prosecution’s practice of having its witnesses arrive in The Hague weeks before their scheduled testimony’; (ii) the Prosecutor’s arguments with respect to the ‘state of Defence’s preparation’; and (iii) the ‘Registry’s decision on the Defence request for additional resources’.⁴³⁷

269. On 28 January 2016, the Trial Chamber rejected Mr Ntaganda’s request for leave to reply on the ground that it did not consider that it needed further submissions on the issue.⁴³⁸

270. On that same date, the Trial Chamber partially granted Mr Ntaganda’s Request for Modification of Evidentiary Blocks 3 and 4 and adopted the revised scheduled proposed by Mr Ntaganda in his request.⁴³⁹ The Trial Chamber recalled that it had ‘acknowledged that the unavailability of Associate Counsel for the Defence was an

⁴³³ [T-56](#), p. 3, lines 6-9.

⁴³⁴ [T-56](#), p. 4, lines 1-2.

⁴³⁵ Public redacted version of “Request on behalf of Mr Ntaganda seeking Trial Chamber VI to modify the schedule for evidentiary blocks 3 and 4”, ICC-01/04-02/06-1102-Red (confidential version registered on the same date (ICC-01/04-02/06-1102-Conf)) (the ‘[Request for Modification of Evidentiary Blocks 3 and 4](#)’), paras 9, 13.

⁴³⁶ [Request for Modification of Evidentiary Blocks 3 and 4](#), paras 23, 27.

⁴³⁷ Public redacted version of ‘Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks’, 28 January 2016, ICC-01/04-02/06-1115-Red (confidential version registered on the same date (ICC-01/04-02/06-1115-Conf)) (the ‘[Decision on Revised Witness Schedule](#)’), para. 5.

⁴³⁸ [T-58](#), p. 4, lines 15-17; [Decision on Revised Witness Schedule](#), para. 6.

⁴³⁹ [Decision on Revised Witness Schedule](#), para. 12; [Request for Modification of Evidentiary Blocks 3 and 4](#), paras 23, 27.

“unexpected and exceptional” event, which warranted some adjustment to the hearing schedule in respect of the witness who was then testifying’.⁴⁴⁰ It recognised that the circumstances would ‘place an additional burden’ on Mr Ntaganda’s Lead Counsel, while noting that ‘support [was] also available from the wider Defence team, whom the Chamber would expect are involved in the preparation for witnesses and should, at least, be in a position to assist Lead Counsel with any final detailed preparations which may be outstanding’.⁴⁴¹ However, the Trial Chamber was of the view that ‘some further modification of the current schedule may be warranted to assist the Defence, given the unexpected nature, and timing, of Associate Counsel’s absence’.⁴⁴²

271. On 1 February 2016, Mr Ntaganda requested reconsideration of the Decision on Revised Witness Schedule, *inter alia*, on the ground that the two-day break between the testimony of P-0290 and another witness was ‘unreasonable’ and amounted ‘to an abuse of the Chamber’s discretion’.⁴⁴³ He acknowledged that the Trial Chamber had adopted his proposed revised schedule for these two witnesses; however, he averred that if leave to reply had been granted, he would have explained that the proposed two-day break resulted ‘from an oversight’.⁴⁴⁴ In his view, the new dates for P-0290 should have been from ‘9 February 2016 until approximately 15 February 2016’ instead of ‘8 February 2016, until approximately 12 February 2016’.⁴⁴⁵

272. On 3 February 2016, the Trial Chamber rejected Mr Ntaganda’s Request for Reconsideration.⁴⁴⁶ The Trial Chamber found Mr Ntaganda’s submissions to be ‘largely set[] out [...] on certain of the issues for which leave to reply was rejected’.⁴⁴⁷ The Trial Chamber recalled that there is ‘no automatic right of reply’ and consequently, it was ‘incumbent on the Defence to provide all information it

⁴⁴⁰ [Decision on Revised Witness Schedule](#), para. 7.

⁴⁴¹ [Decision on Revised Witness Schedule](#), para. 7.

⁴⁴² [Decision on Revised Witness Schedule](#), para. 7.

⁴⁴³ Public redacted version of “Application on behalf of Mr Ntaganda seeking reconsideration of ‘Decision on Defence request to modify the schedule for the third and fourth evidentiary blocks’”, ICC-01/04-02/06-1122-Red (confidential version registered on the same date (ICC-01/04-02/06-1122-Conf)) (the ‘[Request for Reconsideration](#)’), paras 21-22, 25.

⁴⁴⁴ [Request for Reconsideration](#), paras 21-22.

⁴⁴⁵ [Request for Reconsideration](#), paras 21, 27, 30.

⁴⁴⁶ Public redacted version of ‘Decision on Defence request for reconsideration of the decision on the schedule for the third and fourth evidentiary blocks’, ICC-01/04-02/06-1143-Red (confidential version registered on the same date (ICC-01/04-02/06-1143-Conf)) (the ‘[Decision on the Request for Reconsideration](#)’), p. 7.

⁴⁴⁷ [Decision on the Request for Reconsideration](#), para. 10.

considered relevant to the Chamber’s determination’ in its original request.⁴⁴⁸ It added that ‘a reply should not serve to correct oversights or mistakes made in the initial request’.⁴⁴⁹ The Trial Chamber explained that in reaching the Decision on Revised Witness Schedule, it ‘made an objective assessment on the basis of the situation as known to the Chamber at the time’.⁴⁵⁰

273. With respect to Mr Ntaganda’s submission that his initially proposed schedule was an ‘oversight’, the Trial Chamber noted that ‘neither a reply [...], nor a request for reconsideration are appropriate avenues for seeking to amend the relief originally sought’.⁴⁵¹ It observed that ‘new facts and arguments arising since the decision was rendered may be relevant to the assessment’; however, it did not consider ‘the information brought to its attention in this manner to qualify as such’.⁴⁵²

274. On 8 February 2016, the Trial Chamber decided to adjourn the hearing to the following day because of Mr Ntaganda’s Lead Counsel’s absence for medical reasons.⁴⁵³

275. At the hearing on 10 February 2016, Mr Ntaganda’s Lead Counsel indicated that he could not cross-examine P-0290 after the Prosecutor’s examination of the witness and that there would be a request to recall the witness at a later stage to conduct the cross-examination.⁴⁵⁴ Mr Ntaganda’s Lead Counsel explained that this decision was due to: (i) insufficient time to prepare after the testimony of the preceding witness in view of the unavailability of the Associate Counsel;⁴⁵⁵ (ii) investigative difficulties;⁴⁵⁶ and (iii) the Trial Chamber’s rejection of the request for a five-day postponement.⁴⁵⁷

⁴⁴⁸ [Decision on the Request for Reconsideration](#), para. 10.

⁴⁴⁹ [Decision on the Request for Reconsideration](#), para. 10.

⁴⁵⁰ [Decision on the Request for Reconsideration](#), para. 10.

⁴⁵¹ [Decision on the Request for Reconsideration](#), para. 12.

⁴⁵² [Decision on the Request for Reconsideration](#), para. 12.

⁴⁵³ [T-64](#), p. 2, line 25 to p. 3, line 3, p. 4, lines 23-24.

⁴⁵⁴ [T-65](#), p. 4, line 25 to p. 5, line 1, p. 6, lines 21-24.

⁴⁵⁵ [T-65](#), p. 5, lines 2-9.

⁴⁵⁶ [T-65](#), p. 5, lines 10-19.

⁴⁵⁷ [T-65](#), p. 4, lines 9-12.

276. Having heard Mr Ntaganda's submissions, the Trial Chamber ruled 'that it should be possible to conduct cross-examination as intended'.⁴⁵⁸

277. At the hearing on the following day, the Trial Chamber noted Mr Ntaganda's *ex parte* communication regarding further information with respect to the preparation for the cross-examination of the witness.⁴⁵⁹ The Trial Chamber considered that 'this additional information has not changed its intention that the Defence should commence its cross-examination once the Prosecution finishes'.⁴⁶⁰

278. At the end of the Prosecutor's examination of P-0290 on 12 February 2016, the Trial Chamber again considered Mr Ntaganda's Lead Counsel's submission that he was 'not ready to proceed with the cross-examination of this witness'.⁴⁶¹ The Trial Chamber indicated that it had considered Mr Ntaganda's request and found that there was no basis for postponing the cross-examination.⁴⁶² Nevertheless, it invited Mr Ntaganda's Lead Counsel 'to make further submission on [the] matter'.⁴⁶³

279. Mr Ntaganda's Lead Counsel stated that he was 'not in a position to cross-examine' the witness and that he was seeking to recall the witness 'at a later point to complete his testimony'.⁴⁶⁴ He admitted that the issues that were discussed during the examination of P-0290 by the Prosecutor 'could be addressed in cross-examination with limited preparation time'.⁴⁶⁵ However, he observed that cross-examination went 'way further than answering the exact evidence that was [...] elicited from the witness during examination-in-chief'.⁴⁶⁶ Mr Ntaganda's Lead Counsel indicated that he was not able at that time 'to put [his] case to the witness' and he identified some of the issues regarding the witness's evidence on which he was not in a position to cross-examine the witness.⁴⁶⁷

⁴⁵⁸ [T-65](#), p. 11, lines 9-10.

⁴⁵⁹ [T-66](#), p. 2, lines 20-22.

⁴⁶⁰ [T-66](#), p. 2, lines 23-25.

⁴⁶¹ [T-67](#), p. 22, lines 17-18.

⁴⁶² [T-67](#), p. 22, lines 20-21.

⁴⁶³ [T-67](#), p. 22, lines 22-23.

⁴⁶⁴ [T-67](#), p. 23, lines 8-10.

⁴⁶⁵ [T-67](#), p. 24, lines 7-8.

⁴⁶⁶ [T-67](#), p. 24, lines 9-11.

⁴⁶⁷ [T-67](#), p. 24, lines 12-13, 22-24, p. 25, lines 14 to p. 26, line 16.

280. During that same hearing, the Trial Chamber rendered its oral decision on Mr Ntaganda's request to postpone the cross-examination of P-0290.⁴⁶⁸ It stated that it had 'recognized the difficult circumstances that lead counsel [...] faced'.⁴⁶⁹ Nonetheless, the Trial Chamber did not 'accept that an experienced counsel supported by his team and on notice for over two and a half months of the scheduling of the present witness testimony [was] not in a position to conduct the cross-examination'.⁴⁷⁰

281. In addition, the Trial Chamber found that there was no 'material change in circumstances from when the Defence itself submitted the schedule, which included the examination of this witness'.⁴⁷¹ It considered that the 'investigative leads referred to by the Defence appear to have been on standing for some time and do not themselves provide the basis for postponing the cross-examination'.⁴⁷² The Trial Chamber recalled that it was open for Mr Ntaganda's Defence 'to proceed with cross-examination now and subsequently either seek to recall the witness should it be able to properly justify such a request or to present relevant information as part of its own defence case'.⁴⁷³

282. As to the contention that Mr Ntaganda's defence was 'not in a position to put its case to the witness', the Trial Chamber recalled its previous ruling that '[t]he cross-examining party is required to put to the witness any facts or evidence available at the time and upon which it intends to rely to impeach his or her credibility'.⁴⁷⁴ On that basis, it 'strongly recommend[ed] the Defence to proceed with its cross-examination of Witness P-290'.⁴⁷⁵ The Trial Chamber underlined that while Mr Ntaganda was not forced to do so, it required Mr Ntaganda's Lead Counsel to 'confirm that Mr Ntaganda fully underst[ood] the potential consequences of this choice' not to proceed with the cross-examination,⁴⁷⁶ which could 'be construed as a waiver of the right to cross-examine' the witness.⁴⁷⁷ The Trial Chamber acknowledged that it could

⁴⁶⁸ [T-67](#), p. 38, line 8 to p. 41, line 2.

⁴⁶⁹ [T-67](#), p. 39, line 10.

⁴⁷⁰ [T-67](#), p. 39, lines 12-14.

⁴⁷¹ [T-67](#), p. 39, lines 17-19.

⁴⁷² [T-67](#), p. 39, lines 20-22.

⁴⁷³ [T-67](#), p. 39, lines 23-25.

⁴⁷⁴ [T-67](#), p. 40, lines 1-5.

⁴⁷⁵ [T-67](#), p. 40, lines 6-7.

⁴⁷⁶ [T-67](#), p. 40, lines 7-10.

⁴⁷⁷ [T-67](#), p. 40, line 18.

still be open for Mr Ntaganda to ‘subsequently request in the future that the witness be recalled, but cogent reasons should exist to warrant such recalling’ and noted that there was ‘no guarantee that such a request would be granted’.⁴⁷⁸

283. Following further submissions made by Mr Ntaganda’s Lead Counsel, the Presiding Judge clarified that the Trial Chamber had the duty to guarantee a fair and expeditious trial and pointed out that the Trial Chamber was ‘not only interested’ in ‘an expeditious trial at any rate’.⁴⁷⁹

284. On 17 February 2017, the Trial Chamber rejected Mr Ntaganda’s request to have P-0290 recalled before the end of the presentation of the Prosecutor’s evidence or, in the alternative, to allow Mr Ntaganda to call the witness as a Defence witness.⁴⁸⁰ The Trial Chamber found that Mr Ntaganda did not demonstrate ‘cogent reasons warranting the recall’ of P-0290 as he failed to ‘sufficiently substantiate’ his request and essentially repeated prior submissions already addressed.⁴⁸¹ The Trial Chamber recalled that it had ‘cautioned the Defence that by deciding not to cross-examine the Witness, it might lose the opportunity to cross-examine the Witness’.⁴⁸²

285. The Trial Chamber further considered that contrary to Mr Ntaganda’s contention, the ‘absence of cross-examination does not *per se* “minimise” the probative value of the Witness’s testimony’ and that this factor would ‘be taken into account in the ultimate determination of the weight to be given to his testimony’.⁴⁸³ It added that Mr Ntaganda was ‘still in a position to challenge’ P-0290’s evidence.⁴⁸⁴ The Trial Chamber pointed out that the rejection of Mr Ntaganda’s request was

⁴⁷⁸ [T-67](#), p. 40, lines 20-22.

⁴⁷⁹ [T-67](#), p. 44, lines 2-5.

⁴⁸⁰ Public redacted version of Decision on Defence request for recall of Witness P-0290, 17 February 2017, ICC-01/04-02/06-1791-Red (confidential version registered on the same date (ICC-01/04-02/06-1791-Conf)) (the ‘[Decision on Recall of Witness P-0290](#)’), paras 5, 17, p. 10; [Public redacted version of “Request on behalf of Mr Ntaganda seeking Trial Chamber VI to recall Witness P-0290”, 25 February 2017, ICC-01/04-02/06-1751-Conf](#), 3 March 2017, ICC-01/04-02/06-1751-Red2 (confidential *ex parte* version dated 24 January 2017 and registered on 25 January 2017 (ICC-01/04-02/06-1751-Conf-Exp)). *See also* [Conviction Decision](#), fn. 340.

⁴⁸¹ [Decision on Recall of Witness P-0290](#), paras 11, 13, 17.

⁴⁸² [Decision on Recall of Witness P-0290](#), para. 11.

⁴⁸³ [Decision on Recall of Witness P-0290](#), para. 12.

⁴⁸⁴ [Decision on Recall of Witness P-0290](#), para. 12.

‘without prejudice to any future decision by the Chamber [...] to itself recall the Witness at a later stage’.⁴⁸⁵

286. On 29 November 2017, the Trial Chamber indicated that it considered calling P-0290 and invited the parties and the participants to file submissions on the matter.⁴⁸⁶

287. On 6 December 2017, Mr Ntaganda filed his submissions, in which he opposed the recall of P-0290 after the close of the Defence case, arguing that this would be unfair and infringe his right to remain silent.⁴⁸⁷

288. After considering: (i) Mr Ntaganda’s submissions on the matter; (ii) ‘the nature and scope of the expected testimony in relation to evidence presented by the Defence’; and (iii) ‘the totality of the evidence adduced so far in the case’, the Trial Chamber was not convinced that it would be ‘necessary or appropriate to recall the Witness at this stage of the proceedings’ to provide further evidence in the case.⁴⁸⁸

(ii) *Summary of submissions*

(a) Mr Ntaganda’s submissions

289. Mr Ntaganda submits that by rejecting his request to modify the witnesses schedule, the Trial Chamber ‘failed to judiciously balance the competing interests at play, and gave unwarranted precedence to the progress of the trial at all costs’.⁴⁸⁹ He adds that the Trial Chamber erred in rejecting his request for reconsideration of the Decision on Revised Witness Schedule.⁴⁹⁰ Mr Ntaganda submits that he had ‘reserved the right to recall P-0290 for cross-examination at the end of the Prosecution’s case’.⁴⁹¹ He argues that the Trial Chamber incorrectly exercised its discretion in

⁴⁸⁵ [Decision on Recall of Witness P-0290](#), para. 17.

⁴⁸⁶ [Order setting deadline for submissions related to Witness P-0290](#), ICC-01/04-02/06-2134, para. 6, p. 5.

⁴⁸⁷ Submissions concerning potential recall of Prosecution Witness P-0290, ICC-01/04-02/06-2143-Conf, paras 1, 49; Decision on presentation of evidence pursuant to Article 64(6)(b) and (d) and 69(3) of the Statute, 23 January 2018, ICC-01/04-02/06-2191 (the ‘[Decision on Potential Recall of Witness P-0290](#)’), para. 8.

⁴⁸⁸ [Decision on Potential Recall of Witness P-0290](#), para. 13, p. 8. *See also* [Conviction Decision](#), fn. 340.

⁴⁸⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 55.

⁴⁹⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 55.

⁴⁹¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 56.

rejecting his request to recall P-0290 which ‘compounded the unfairness of the proceedings’.⁴⁹²

(b) The Prosecutor’s submissions

290. The Prosecutor submits that Mr Ntaganda does not ‘show any unfairness’ in the Trial Chamber’s reasoning.⁴⁹³ The Prosecutor argues that contrary to Mr Ntaganda’s contention the Trial Chamber ‘granted his request to postpone one of six scheduled witnesses [...] to the next evidentiary block’.⁴⁹⁴ She further avers that Mr Ntaganda fails to demonstrate that the Trial Chamber erred in dismissing his Request for Reconsideration as he did not present any ‘new facts or arguments’ following the rendering of the original decision.⁴⁹⁵

(c) The victims’ observations

291. Victims Group 2 submit that the Trial Chamber’s decision to not recall P-0290 was within its discretion.⁴⁹⁶ They argue that Mr Ntaganda does not show that the Trial Chamber failed to take into account relevant considerations.⁴⁹⁷

(iii) Determination by the Appeals Chamber

292. The Appeals Chamber finds no merit in Mr Ntaganda’s argument that in rejecting his request to amend the witness schedule, the Trial Chamber ‘failed to judiciously balance the competing interests at play’.⁴⁹⁸ Contrary to Mr Ntaganda’s contention, the Trial Chamber partially granted his request to amend the schedule by adopting the one proposed by Mr Ntaganda, including for P-0290’s testimony.⁴⁹⁹ The Appeals Chamber finds that Mr Ntaganda merely repeats arguments presented at trial and does not identify any errors in the Trial Chamber’s reasoning or specific findings.

293. In that regard, the Appeals Chamber notes that the Trial Chamber was fully aware of the said ‘interests at play’.⁵⁰⁰ It expressly acknowledged that the

⁴⁹² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 56.

⁴⁹³ [Prosecutor’s Response to Appeal – Part II](#), paras 61, 67.

⁴⁹⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 61.

⁴⁹⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 63.

⁴⁹⁶ [Observations of Victims Group 2 on Appeal – Part II](#), para. 36.

⁴⁹⁷ [Observations of Victims Group 2 on Appeal – Part II](#), para. 36.

⁴⁹⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 55.

⁴⁹⁹ [Decision on Revised Witness Schedule](#), para. 12.

⁵⁰⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 55.

unavailability of Mr Ntaganda's Associate Counsel was an 'unexpected and exceptional' circumstance.⁵⁰¹ It also recognised the additional burden that it would put on Mr Ntaganda's Lead Counsel, noting however that 'the wider Defence team' could provide support.⁵⁰² Mr Ntaganda does not explain why these findings are, in his view, erroneous.

294. The Appeals Chamber further finds that Mr Ntaganda does not substantiate his argument that the Trial Chamber erred in rejecting his Request for Reconsideration of the Decision on Revised Witness Schedule 'despite the new arguments raised therein'.⁵⁰³ Mr Ntaganda neither identifies the said new arguments nor does he challenge the reasoning or any specific findings of the Trial Chamber. If Mr Ntaganda is to be understood to challenge the Trial Chamber's rejection of his further submissions on the oversight concerning the proposed dates for the revised schedule, the Trial Chamber explained in detail why it did not consider his clarification to be properly submitted.⁵⁰⁴ In particular, the Trial Chamber found Mr Ntaganda's submissions to repeat the ones for which he unsuccessfully sought leave to reply and recalled that Mr Ntaganda had the duty to provide all relevant information in his initial request.⁵⁰⁵ The Trial Chamber observed that the information provided by Mr Ntaganda did not constitute new facts to warrant reconsideration.⁵⁰⁶ Mr Ntaganda does not present any arguments challenging these findings.

295. Turning to Mr Ntaganda's contention that the Trial Chamber abused its discretion in rejecting his request to recall P-0290, the Appeals Chamber finds that he does not substantiate his claim. The Appeals Chamber notes that when Mr Ntaganda's Lead Counsel was absent for medical reason, the Trial Chamber adjourned the proceedings until his return to the Court.⁵⁰⁷ Furthermore, the Trial Chamber adopted a cautious approach, by taking into account Mr Ntaganda's rights to adequate preparation of his defence and to have fair and expeditious proceedings. It made it clear that it was open to Mr Ntaganda's Lead Counsel to cross-examine the witness on

⁵⁰¹ [Decision on Revised Witness Schedule](#), para. 7.

⁵⁰² [Decision on Revised Witness Schedule](#), para. 7.

⁵⁰³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 55.

⁵⁰⁴ See [Decision on the Request for Reconsideration](#), para. 10.

⁵⁰⁵ [Decision on the Request for Reconsideration](#), para. 10.

⁵⁰⁶ [Decision on the Request for Reconsideration](#), para. 12.

⁵⁰⁷ [T-64](#), p. 2, line 25 to p. 3, line 3, p. 4, lines 23-24.

that day, or, alternatively, to request to recall the witness, subject to proper justification, or to present relevant information as part of the defence case.⁵⁰⁸

296. In addition, the Trial Chamber duly warned Mr Ntaganda of the consequences of his choice not to proceed with the cross-examination of P-0290,⁵⁰⁹ as this could ‘be construed as a waiver of the right to cross-examine him’.⁵¹⁰ The Trial Chamber indicated that Mr Ntaganda could still seek to recall this witness if cogent reasons were shown warranting such recalling.⁵¹¹

297. The Appeals Chamber notes that when rejecting Mr Ntaganda’s request to recall P-0290, the Trial Chamber found that Mr Ntaganda did not provide cogent reasons for the recall.⁵¹² Mr Ntaganda does not present any arguments to show that the Trial Chamber erred in reaching this finding. Rather, Mr Ntaganda repeats some of the arguments previously raised in his Request for Reconsideration and other submissions related to requests for postponements.⁵¹³ The Appeals Chamber considers that Mr Ntaganda was adequately cautioned by the Trial Chamber of the risk that he might not be able to cross-examine P-0290 at a later stage in the proceedings.⁵¹⁴ The Appeal Chamber further notes that on another occasion, Mr Ntaganda in fact opposed the proposal of the Trial Chamber to recall the witness as a Chamber’s witness.⁵¹⁵ Apart from disagreeing with the Trial Chamber’s rejection of his own request to recall the witness, Mr Ntaganda does not present any argument calling into question the reasonableness of the Trial Chamber’s reasoning or demonstrating that it abused its discretion.

(d) Conclusion

298. Having rejected the entirety of Mr Ntaganda’s arguments that the Trial Chamber prioritised expeditiousness at the expense of his right to a fair hearing, the Appeals Chamber rejects this sub-ground of appeal.

⁵⁰⁸ [T-67](#), p. 39, lines 23-25.

⁵⁰⁹ [T-67](#), p. 40, lines 7-10, 23-25.

⁵¹⁰ [T-67](#), p. 40, lines 16-18.

⁵¹¹ [T-67](#), p. 40, lines 20-22.

⁵¹² [Decision on Recall of Witness P-0290](#), para. 13.

⁵¹³ See [Decision on Recall of Witness P-0290](#), para. 11.

⁵¹⁴ [Decision on Recall of Witness P-0290](#), para. 11.

⁵¹⁵ Submissions on Recall as Chamber Witness, paras 1, 49.

5. Overall conclusion

299. In view of the foregoing considerations, the Appeals Chamber rejects this ground of appeal.

C. Third ground of appeal: Whether the conviction exceeded the charges

300. Under the third ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in convicting him of criminal acts that were outside the scope of the charges.⁵¹⁶

1. Background and relevant part of the Conviction Decision

301. On 10 January 2014, the Prosecutor filed the DCC.⁵¹⁷ In the DCC, the Prosecutor charged Mr Ntaganda with a number of war crimes and crimes against humanity, based on 18 counts, under various modes of liability.

302. On 9 June 2014, the Pre-Trial Chamber confirmed charges against Mr Ntaganda.⁵¹⁸ In particular, the Pre-Trial Chamber found that:

There are substantial grounds to believe that, as part of the widespread and systematic attack against the non-Hema civilian population, pursuant to or in furtherance of the organisational policy adopted by the UPC/FPLC, and in the context of the *Non-International Armed Conflict*, UPC/FPLC soldiers, including, as the case may be, supporting civilians, committed the following acts in the course of the *First Attack*:

- (i) murder and attempted murder (counts 1 and 2) in Mongbwalu, Pluto, Nzebi, Sayo and Kilo;
- (ii) attacking civilians (count 3) in Mongbwalu and Sayo;
- (iii) rape (counts 4 and 5) in Mongbwalu, Kilo and Sayo;
- (iv) persecution (count 10) in Mongbwalu, Pluto, Nzebi, Sayo, Kilo;
- (v) pillaging (count 11) in Mongbwalu and Sayo;
- (vi) forcible transfer of population and displacing civilians (counts 12 and 13) in Mongbwalu and Nzebi;
- (vii) attacking protected objects (count 17) in Mongbwalu and Sayo;
- (viii) destroying the enemy's property (count 18) in Mongbwalu and Sayo.

⁵¹⁶ [Mr Ntaganda's Appeal Brief - Part I](#), para. 18, referring to [Bemba Appeal Judgment](#), paras 74, 104.

⁵¹⁷ [DCC](#).

⁵¹⁸ [Confirmation Decision](#).

There are substantial grounds to believe that Mr. Ntaganda himself committed the following acts in the course of the *First Attack*:

- (i) murder (counts 1 and 2) in Mongbwalu;
- (ii) attacking civilians (count 3) in Sayo;
- (iii) persecution (count 10) in Mongbwalu and Sayo[;]
- (iv) pillaging (count 11) in Mongbwalu and Sayo;
- (v) attacking protected objects (count 17) in Mongbwalu and Sayo.

There are substantial grounds to believe, that as part of the widespread and systematic attack against the non-Hema civilian population, pursuant to or in furtherance of the organisational policy adopted by the UPC/FPLC, and in the context of the *Non-International Armed Conflict*, UPC/FPLC soldiers, including, as the case may be, supporting civilians, committed the following acts in the course of the *Second Attack*:

- (i) murder and attempted murder (counts 1 and 2) in Kobu, Sangi, Bambu, Lipri, Tsili, Ngongo and Jitchu;
- (ii) attacking civilians (counts 3) in Bambu, Kobu, Lipri, Jitchu, Camp P.M., Buli, Djuba, Sangi, Tsili, Katho, Gola, Mpetsi/Petsi, Avetso, Nyangaray, Pili, Mindjo, Langa, Dyalo, Wadda, Goy, Dhepka, Mbidjo, Thali and Ngabuli;
- (iii) rape (counts 4 and 5) in Lipri, Kobu, Bambu, Sangi and Buli;
- (iv) sexual slavery (counts 7 and 8) in Kobu, Sangi, Buli, Jitchu, and Ngabuli;
- (v) persecution (count 10) in Kobu, Sangi, Bambu, Lipri, Tsili, Ngongo, Jitchu, Buli, Nyangaray, Gutsi, Camp P.M., Djuba, Sangi, Katho, Gola, Mpetsi/Petsi, Avetso, Pili, Mindjo, Langa, Dyalo, Wadda, Goy, Dhepka, Mbidjo, Thali and Ngabuli;
- (vi) pillaging (count 11) in Bambu, Kobu, Lipri and Jitchu;
- (vii) forcible transfer of population and displacing civilians (counts 12 and 13) in Lipri, Kobu, Bambu, Nyangaray, Tsili, Buli, Jitchu and Gutsi;
- (viii) attacking protected objects (count 17) in Bambu;
- (ix) destroying the enemy's property (counts 18) in Kobu, Lipri, Bambu, Camp P.M., Buli, Jitchu, Djuba, Sangi, Tsili, Katho, Gola, Mpetsi/Petsi, Avetso, Nyangaray, Pili, Mindjo, Langa, Dyalo, Wadda, Goy, Dhepka, Mbidjo, Thali and Ngabuli.⁵¹⁹

303. Regarding counts 6, 9, 14, 15 and 16, the Pre-Trial Chamber found:

⁵¹⁹ [Confirmation Decision](#), para. 36 (footnote omitted, emphasis in original).

There are substantial grounds to believe that in the context of the *Non-International Armed Conflict*, the UPC/FPLC soldiers committed acts of enlistment, including Mr. Ntaganda himself, as well as acts of conscription of children under the age of 15 years between on or about 6 August 2002 and 31 December 2003, in Ituri, in the DRC.

There are also substantial grounds to believe that the UPC/FPLC soldiers used children under the age of 15 years to participate actively in hostilities between on or about 6 August 2002 and on or about 30 May 2003, including Mr. Ntaganda himself, between on or about 6 August and March 2003, in Ituri, in the DRC.

There are substantial grounds to believe that the UPC/FPLC soldiers committed acts of rape and sexual slavery against child soldiers under the age of 15 years between on or about 6 August 2002 and 31 December 2003, in Ituri, in the DRC.⁵²⁰

304. The Pre-Trial Chamber found that there were substantial grounds to believe that Mr Ntaganda was criminally responsible for the crimes charged under article 25(3)(a), (b) and (d), as well as under article 28(a) of the Statute.⁵²¹

305. On 6 February 2015, the Trial Chamber directed the Prosecutor to file an updated DCC in accordance with the Trial Chamber's instructions, as well as a pre-trial brief.⁵²² When determining the content of the updated DCC, the Trial Chamber considered the parties' disputes as to various aspects of the Confirmation Decision. It noted, *inter alia*:

38. Having regard to the required content of the charges, the Chamber finds that the factual information provided in the 'operative paragraphs' of the Confirmation Decision alone would be insufficient to meet the required standard of notification of the nature, cause and content of the charges to the accused. Moreover, the Confirmation Decision makes the interpretation and understanding of those 'operative paragraphs' necessarily dependent on other portions of the decision, including through the use of defined terms and through the indication that the findings in those paragraphs are 'more specifically supported' by facts contained in subsequent subsections of the decision.

39. The Chamber additionally notes that, rather than explicitly designating any specific portion of the Confirmation Decision as comprehensively articulating the relevant 'facts and circumstances' confirmed, the Pre-Trial Chamber instead confirmed the 'charges presented by the Prosecutor', to the extent specified in the 'operative paragraphs'. In the Chamber's view, this means that, although the

⁵²⁰ [Confirmation Decision](#), para. 74 (emphasis in original).

⁵²¹ [Confirmation Decision](#), para. 97.

⁵²² [Decision on UDCC](#), pp. 39-40.

parameters of the charges confirmed by the Pre-Trial Chamber are contained in the Confirmation Decision, unruled upon allegations in the DCC may also constitute the ‘facts and circumstances described in the charges’. As a general principle, [...] where the Pre-Trial Chamber was silent on a particular allegation in the DCC, it cannot be presumed to have been rejected, and such silence need not automatically result in its removal from the Updated DCC.⁵²³

306. The Trial Chamber further held:

70. The Chamber does not accept the Prosecution’s argument that paragraphs 29 and 36 of the Confirmation Decision should be read together in a manner which confirms the charged crimes for the entirety of the Banyali-Kilo and Walendu-Djatsi *collectivités*. This is apparent, *inter alia*, from the language of paragraph 29 itself, which defines the First Attack and Second Attack as having occurred in ‘a number of villages’ within those *collectivités* ‘as identified by the Chamber’. Moreover, in the Chamber’s view, paragraph 36 of the Confirmation Decision, and its supporting paragraphs, evidences a clear intention to specify differentiated locations for each of the different confirmed crimes. [...]

72. [...] [T]he Chamber considers the proposed use of the word ‘including’, in relation to locations in which crimes allegedly occurred, to be impermissibly broad in the context of the confirmed charges. The Chamber shall not, therefore, authorise its introduction into the Updated DCC in a manner which would have such an expansive effect. An exception is crimes relating to child soldiers [...], in relation to which the Pre-Trial Chamber stated that the exact locations in which these crimes allegedly occurred did not need to be specified, provided that the relevant acts occurred ‘within the temporal and geographical framework of the charges’.⁵²⁴

307. On 16 February 2015, the Prosecutor filed the ‘Updated Document Containing the Charges’⁵²⁵ and, on 9 March 2015, the ‘Prosecution’s Pre-Trial Brief’.⁵²⁶

308. On 2 July 2018, Mr Ntaganda filed the ‘Defence Closing Brief’, in which he argued that ‘[a] conviction [could] be entered for “individual crimes” only to the extent specified in the UDCC’.⁵²⁷

309. On 17 July 2018, the Prosecutor and Victims Group 1 responded to Mr Ntaganda’s arguments regarding the scope of the charges.⁵²⁸

⁵²³ [Decision on UDCC](#), paras 38-39 (footnotes omitted).

⁵²⁴ [Decision on UDCC](#), paras 70, 72 (footnotes omitted).

⁵²⁵ [UDCC](#).

⁵²⁶ [Pre-Trial Brief](#).

⁵²⁷ [Mr Ntaganda’s Closing Brief](#), para. 23. *See also* paras 22, 1541-1543.

⁵²⁸ [Prosecutor’s Response to Mr Ntaganda’s Closing Brief](#), paras 8-14; [Victims’ Response to Mr Ntaganda’s Closing Brief](#), paras 12-32.

310. On 1 August 2018, Mr Ntaganda filed a reply to the Prosecutor’s response to his closing brief, including on the issue of scope of the charges.⁵²⁹ He argued that he ‘could not properly be committed for trial for murder, rape, pillage and other crimes defined no more specifically than that crimes occurred during a period totalling 29 days (or more), a vaguely-defined area consisting of at least 153 square kilometres (or more)’.⁵³⁰ Mr Ntaganda also contended that ‘Counts 6, 9, 14, 15 and 16 are even less defined, spanning a period of 17 months with no geographic limitation’.⁵³¹ He listed a number of ‘specific criminal acts within the scope of the two attacks for which the Prosecution [sought] a conviction where there [was] no counterpart charge in the UDCC’.⁵³²

311. In the Conviction Decision, the Trial Chamber addressed the scope of the charges:

39. Certain charges can be properly framed only at the level of individual criminal acts. [...]

40. Some charges may be properly framed more broadly (*e.g.* deportation of ‘civilians’ across a range of times and places), and need not necessarily be framed as a specific incident or an aggregate of acts (*e.g.* deportation of identified persons at a particular time and place). If in such a case a pre-trial chamber nonetheless refers to one or more specific incidents, which by themselves may amount to individual criminal acts, then these only serve as examples of the conduct falling within the parameters. In other words, the acts or the references to any individual victims become evidential details for proving that crimes within these parameters occurred. In these cases, the individual criminal acts do not delimit the charge, and other acts that were not explicitly mentioned in the confirmation decision but are proven beyond reasonable doubt can be equally used to prove this charge, as long as they fall within the specific parameters of the charge as confirmed by the pre-trial chamber.

41. Further, the Chamber may consider whether a specific type of criminal act (*e.g.* murder as a crime against humanity) is committed in narrowly confined temporal and geographical space and/or other parameters. These charges can be framed by these parameters and need not be framed at the level of individual criminal acts, as long as they fall within the specific parameters of the charge as confirmed by the pre-trial chamber.

⁵²⁹ [Mr Ntaganda’s Reply to Prosecutor’s Response to Closing Brief](#), paras 8-15.

⁵³⁰ [Mr Ntaganda’s Reply to Prosecutor’s Response to Closing Brief](#), para. 10.

⁵³¹ [Mr Ntaganda’s Reply to Prosecutor’s Response to Closing Brief](#), para. 11 (emphasis in original omitted).

⁵³² [Mr Ntaganda’s Reply to Prosecutor’s Response to Closing Brief](#), para. 14.

42. The Chamber may also consider whether the crimes charged are of a continuous nature. [...] Past cases from this Court and elsewhere have discussed sexual slavery and enlisting and conscripting children under the age of 15 as examples of potentially continuing crimes.⁵³³

312. The Trial Chamber also addressed Mr Ntaganda's arguments regarding specific criminal acts, which in his view exceeded the facts and circumstances described in the charges. In most cases, the Trial Chamber found the challenged acts to fall within the scope of the charges.⁵³⁴

2. *Summary of submissions*

(a) **Mr Ntaganda's submissions**

313. Mr Ntaganda challenges his conviction in respect of 15 criminal acts, as well as the corresponding acts underlying his conviction under count 10, on the basis that, in his view, these acts do not fall within the 'facts and circumstances described in the charges', within the meaning of article 74(2) of the Statute.⁵³⁵ He argues that '[s]imply listing the categories of crimes or stating, in broad general terms, the temporal and geographical parameters of the charge [...] does not allow for a meaningful application of article 74(2)' of the Statute.⁵³⁶ He submits that '[c]harges are not confirmed on the basis of a sample of criminal acts within a category'.⁵³⁷ Mr Ntaganda contends that expansion of the trial's factual parameters after confirmation is impermissible without recourse to article 61(9) of the Statute.⁵³⁸

314. Mr Ntaganda avers that the 'facts and circumstances' in the charges of this case were described at the level of individual criminal acts.⁵³⁹ Mr Ntaganda contends that the Trial Chamber's approach contradicts the approach taken by the Appeals Chamber in the case of *Bemba*.⁵⁴⁰

⁵³³ [Conviction Decision](#), paras 39-42 (footnotes omitted).

⁵³⁴ [Conviction Decision](#), paras 865, 868-870, 936, 938, 968-969, 1112-1113, 1153.

⁵³⁵ [Mr Ntaganda's Appeal Brief - Part I](#), paras 22-23, fn. 47.

⁵³⁶ [Mr Ntaganda's Appeal Brief - Part I](#), para. 19, referring, *inter alia*, to [Bemba Appeal Judgment](#), para. 110.

⁵³⁷ [Mr Ntaganda's Appeal Brief - Part I](#), para. 20.

⁵³⁸ [Mr Ntaganda's Appeal Brief - Part I](#), para. 20.

⁵³⁹ [Mr Ntaganda's Appeal Brief - Part I](#), para. 21, quoting [Bemba Appeal Judgment](#), para. 111 and referring to para. 115.

⁵⁴⁰ [Mr Ntaganda's Appeal Brief - Part I](#), para. 21.

(b) The Prosecutor’s submissions

315. The Prosecutor argues that the scope of the charges for crimes other than crimes against child soldiers was sufficiently specific because they were framed by reference to ‘narrow temporal and geographical parameters’ and described the manner in which the crimes were committed.⁵⁴¹ She submits that Mr Ntaganda erroneously draws an analogy between the present case and the *Bemba* case, as the present case ‘is pleaded with a significantly higher degree of specificity’.⁵⁴² The Prosecutor argues that ‘charges need not always be pleaded to the level of specific victims’.⁵⁴³

316. Regarding the ‘crimes against child soldiers’ – enlistment, conscription, rape and sexual slavery – the Prosecutor submits that these charges are also sufficiently specific.⁵⁴⁴ She argues that both the Pre-Trial Chamber and the Trial Chamber accepted the broader parameters of these crimes in view of their continuous nature and the fact that the perpetrators were continuously on the move.⁵⁴⁵

(c) The victims’ observations

317. Victims Group 1 submit that the charges concerning crimes against children under 15 years were ‘pleaded and confirmed by reference to confined parameters and not, as suggested by Mr Ntaganda, specific criminal acts’ and that the degree of specificity is consistent with the approach of the Court and the jurisprudence of other tribunals.⁵⁴⁶ Victims Group 1 argue that, in addition, counts 6 and 9 were framed by reference to a limited category of victims – ‘UPC/FPLC child soldiers under the age of 15’.⁵⁴⁷ Victims Group 1 submit, in relation to Mr Ntaganda’s challenge concerning the charges of sexual slavery, that the continuing nature of this crime has been widely recognised.⁵⁴⁸

(d) Mr Ntaganda’s response to the victims

318. Mr Ntaganda submits that Victims Group 1’s averment that the charges were formulated by reference to geographical and temporal parameters is incorrect, as the

⁵⁴¹ [Prosecutor’s Response to Appeal – Part I](#), paras 1, 26, 27, 35-36; [T-271](#), p. 59, lines 15-19.

⁵⁴² [Prosecutor’s Response to Appeal – Part I](#), paras 26, 30-31; [T-271](#), p. 60, lines 10-25.

⁵⁴³ [Prosecutor’s Response to Appeal – Part I](#), paras 33-34.

⁵⁴⁴ [Prosecutor’s Response to Appeal – Part I](#), paras 37, 39.

⁵⁴⁵ [Prosecutor’s Response to Appeal – Part I](#), paras 38-39; [T-271](#), p. 61, lines 3-5.

⁵⁴⁶ [Observations of Victims Group 1 on Appeal – Part I](#), para. 16.

⁵⁴⁷ [Observations of Victims Group 1 on Appeal – Part I](#), para. 18 (emphasis in original omitted).

⁵⁴⁸ [Observations of Victims Group 1 on Appeal – Part I](#), para. 19.

Confirmation Decision makes it clear that the charges were formulated by reference to additional and exhaustive factual detail.⁵⁴⁹ Regarding the crimes against children under 15 years, Mr Ntaganda argues that the factual allegations underlying these crimes were not referred to in the relevant parts of the Confirmation Decision and thus fall outside the facts and circumstances described in the charges.⁵⁵⁰

(e) Mr Ntaganda's reply to the Prosecutor

319. Mr Ntaganda submits that it is irrelevant that the 'temporal and geographical parameters in the present case are narrower than those in *Bemba*', as his argument on appeal is that 'criminal acts must be meaningfully, and exhaustively, identified as part of the confirmation process'.⁵⁵¹

3. Determination by the Appeals Chamber

320. Mr Ntaganda's central argument is that, in the confirmation of charges decision, '[c]riminal acts must be identified exhaustively'⁵⁵² and that, apart from counts 14-16, the charges in the present case 'were described, in relation to the crimes, at the level of individual criminal acts'.⁵⁵³ He submits that his conviction was partly based on individual acts that had not been confirmed in the Confirmation Decision and that, to this extent, his conviction exceeds 'the facts and circumstances described in the charges'.⁵⁵⁴

321. The argument on appeal appears to be that: (i) the Confirmation Decision must be understood to only confirm charges with respect to identified criminal acts, and (ii) the Trial Chamber erred in reading the Confirmation Decision differently. The Appeals Chamber will therefore consider this ground of appeal as follows. It will start by analysing the legal argument of Mr Ntaganda that '[c]riminal acts must be identified exhaustively'.⁵⁵⁵ It will then examine the argument that the Trial Chamber incorrectly understood the Confirmation Decision. Based on this analysis, the Appeals Chamber will then consider whether any of the criminal acts listed by Mr Ntaganda in

⁵⁴⁹ [Mr Ntaganda's Response to Observations of Victims Group 1 on Appeal - Part I](#), paras 11, 13.

⁵⁵⁰ [Mr Ntaganda's Response to Observations of Victims Group 1 on Appeal - Part I](#), paras 14-16.

⁵⁵¹ [Mr Ntaganda's Reply to Prosecutor's Response to Appeal - Part I](#), para. 15.

⁵⁵² [Mr Ntaganda's Appeal Brief - Part I](#), para. 20.

⁵⁵³ [Mr Ntaganda's Appeal Brief - Part I](#), para. 21.

⁵⁵⁴ [Mr Ntaganda's Appeal Brief - Part I](#), paras 18, 22-23.

⁵⁵⁵ [Mr Ntaganda's Appeal Brief - Part I](#), para. 20.

this ground of appeal were not confirmed and whether his conviction exceeds ‘the facts and circumstances described in the charges’, within the meaning of article 74(2) of the Statute.

(a) Whether charges must be formulated and confirmed with respect to individual criminal acts

322. The Appeals Chamber notes at the outset that the present ground of appeal concerns the level of detail required in the formulation and confirmation of charges allowing for a meaningful application of article 74(2) of the Statute.⁵⁵⁶ It does not concern the question whether Mr Ntaganda was informed of the charges in detail and sufficiently in advance.⁵⁵⁷ Regarding that latter question, the Appeals Chamber recalls that, pursuant to article 67(1)(a) of the Statute, the person must receive timely and sufficiently detailed notice of the charges.⁵⁵⁸ However, Mr Ntaganda does not argue under this ground of appeal that he did not receive sufficient notice of the charges against him. In its present discussion, the Appeals Chamber will thus focus on the requirements of article 74(2) of the Statute.

323. Article 74(2) of the Statute provides in relevant part:

The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

324. Pursuant to this provision, the trial chamber may enter a conviction only with respect to allegations that fall within the factual scope of the charges, as confirmed or amended. The Appeals Chamber finds that article 74(2) of the Statute serves to limit the trial chamber’s power to convict the person to facts and circumstances alleged by the Prosecutor in the charging document and confirmed by the pre-trial chamber.

⁵⁵⁶ Mr Ntaganda argues that ‘[s]imply listing the categories of crimes or stating, in broad general terms, the temporal and geographical parameters of the charge [...] does not allow for a meaningful application of article 74(2)’ ([Mr Ntaganda’s Appeal Brief - Part I](#), para. 19).

⁵⁵⁷ See [Bemba Appeal Judgment](#), para. 98.

⁵⁵⁸ Pursuant to rule 121(3) of the Rules, the Prosecutor shall provide to the pre-trial chamber and the person ‘a detailed description of the charges’. Regulation 52 of the Regulations of the Court reads, as far as relevant: ‘The document containing the charges [...] shall include: [...] (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court’. See also [Lubanga OA15 / OA16 Judgment](#), fn. 163; [Lubanga Appeal Judgment](#), para. 123.

325. The factual scope of a given trial – the facts and circumstances described in the charges that may not be exceeded in the conviction decision – is delineated in the course of the pre-trial proceedings, starting with the warrant of arrest or the summons to appear. In subsequent proceedings, the Prosecutor may include further particulars in the document containing the charges. Eventually the charges formulated by the Prosecutor are considered by the pre-trial chamber, which sets the parameters of the charges by confirming or declining to confirm them in the confirmation decision. After confirmation, ‘further details about the charges’ may be provided in ‘auxiliary documents’⁵⁵⁹ or the charges may be modified by means of amendment.

326. For the purposes of article 74(2) of the Statute, the charges must be described in such a way that the trial chamber as well as the parties and participants are able ‘to determine with certainty which sets of historical events, in the course of which crimes under the jurisdiction of the Court are alleged to have been committed form part of the charges, and which do not’.⁵⁶⁰ It is not necessarily the case that such determination is possible only where the charging documents list all criminal acts underlying each charge exhaustively. Depending on the circumstances of the case, the charges may be described in a less specific manner, for instance, by specifying a period of time during which and an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims.⁵⁶¹ While in such a case the document containing the charges may also list or make reference to specific criminal acts, the scope of the case is not necessarily limited to them – ‘other criminal acts not mentioned in the document containing the charges may still fall within the – broadly described – facts and circumstances of the charges’.⁵⁶² Whether such description of the charges is sufficient for purposes of article 74(2) of the Statute will depend, *inter alia*, on the scale of criminality and the mode of individual criminal responsibility alleged.

327. The Appeals Chamber therefore finds that, contrary to Mr Ntaganda’s contention, it is not necessarily inconsistent with article 74(2) of the Statute for the

⁵⁵⁹ [Lubanga Appeal Judgment](#), para. 124.

⁵⁶⁰ See [Bemba Dissenting Opinion to Appeal Judgment](#), para. 27.

⁵⁶¹ See [Bemba Dissenting Opinion to Appeal Judgment](#), para. 27.

⁵⁶² See [Bemba Dissenting Opinion to Appeal Judgment](#), para. 28.

Prosecutor to formulate and for the pre-trial chamber to confirm charges that do not consist of an exhaustive list of individual criminal acts.

(b) Whether the charges in this case are limited to criminal acts identified in the charging documents

328. Turning to the Confirmation Decision and the UDCC⁵⁶³ in the present case, the Appeals Chamber notes that these documents do not contain an exhaustive list of individual criminal acts underlying each charged crime. The charges are described by reference to certain parameters – for instance, location and time – and individual criminal acts appear as examples.⁵⁶⁴

329. In particular, the charges are described as follows:

(i) by reference to general parameters:

(a) most of the crimes charged cover the periods of 20 November to 6 December 2002 (to which the charging documents refer to as ‘the First Attack’) and 12 to 27 February 2003 (‘the Second Attack’), and the territories of Banyali-Kilo *collectivité* and Walendu-Djatsi *collectivité*,⁵⁶⁵

(b) for some crimes, namely rape of UPC/FPLC children under the age of 15 (Count 6), sexual slavery of UPC/FPLC children under the age of 15 (Count 9) and enlistment and conscription of children under the age of 15 and their use to participate actively in

⁵⁶³ In the present case, the Trial Chamber directed the Prosecutor to file an updated document containing the charges. This was in response to the wish for such a document, expressed by both parties ([Decision on UDCC](#), paras 1, 11, 14, 18-20), and following a procedure aimed at ensuring that the UDCC would ‘conform to the scope of the charges as confirmed in the Confirmation Decision’ ([Decision on UDCC](#), para. 19). Given the manner in which the Trial Chamber and the parties approached the matter, the Appeals Chamber finds it appropriate in its analysis of this ground of appeal to refer to both the Confirmation Decision and the UDCC. Both these documents will serve to identify ‘the facts and circumstances described in the charges’ in the present case.

⁵⁶⁴ For instance: the execution of two civilians at Nzebi ([UDCC](#), para. 69), the looting of ‘the orphanage, health facilities, schools, religious structures, and the headquarters of the Kilo Moto gold mining company’ in Bambu ([UDCC](#), para. 81), the murder of Burombi, a Lendu dignitary, in a banana field near Kobu ([UDCC](#), para. 90), the killing of priest Boniface Bwanalonga ([Confirmation Decision](#), para. 38), the attempted murder of P-0800 in Sayo ([Confirmation Decision](#), para. 40), the killing of a man and a woman in Mr Mulenda’s compound in Kobu ([Confirmation Decision](#), para. 42), the rape of a girl in Lipri ([Confirmation Decision](#), para. 51), and the rape of P-0113 on the road from Buli to Kobu ([Confirmation Decision](#), para. 51).

⁵⁶⁵ [UDCC](#), para. 5.

hostilities (Counts 14, 15 and 16), the relevant period is 6 August 2002 to 31 December 2003 and the geographical scope covers the territory of Ituri, DRC;⁵⁶⁶

- (ii) in addition, for most of the charges, by reference to more specific detail in the UDCC: the names of the villages or towns in which the crimes were committed, sometimes the manner of commission, the specific date or a relatively short period of time (not exceeding two weeks) and, sometimes, the approximate number of victims and/or a general description of the group of victims concerned;
- (iii) individual criminal acts provided as examples.

330. The Appeals Chamber⁵⁶⁷ therefore finds that, contrary to Mr Ntaganda's contention, the UDCC and the Confirmation Decision do not simply list the categories of crimes or state 'in broad general terms' the parameters of the charges.⁵⁶⁸

331. The Appeals Chamber notes that Mr Ntaganda was charged with the commission of crimes, *inter alia*, pursuant to a common plan, involving himself and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo.⁵⁶⁹ The crimes with which he was charged were committed at numerous locations and included many individual criminal acts, such as the killing of 'many civilians' or rapes committed 'routinely'.⁵⁷⁰ Having regard to the mode of responsibility and the scale of criminality charged, the Appeals Chamber finds that the charges were formulated with sufficient detail for the purposes of article 74(2) of the Statute, enabling the Trial Chamber and the parties and participants to identify the historical events involving commission of crimes which formed part of the charges.

⁵⁶⁶ [Confirmation Decision](#), para. 74.

⁵⁶⁷ Judge Hofmański indicates that, although he agrees that the level of detail of charges is different from that in the *Bemba* case, this is not the reason why he rejects the present ground of appeal. In his view, even if the level of detail were the same, Judge Hofmański would not consider it to be inconsistent with article 74(2) of the Statute (*see Bemba Dissenting Opinion to Appeal Judgment*, paras 20, 27-32, 39).

⁵⁶⁸ [Mr Ntaganda's Appeal Brief - Part I](#), para. 19, referring, *inter alia*, to [Bemba Appeal Judgment](#), para. 110.

⁵⁶⁹ [UDCC](#), paras 111-119; [Confirmation Decision](#), para. 105.

⁵⁷⁰ [UDCC](#), paras 63-108; [Confirmation Decision](#), paras 38-96.

332. Accordingly, Mr Ntaganda has not demonstrated that the Trial Chamber erred in considering the criminal acts which he challenges under this ground of appeal to be included in the charges against him and in finding those charges to be described in sufficient detail. This concerns the following criminal acts:

- (i) the murder of nine patients at Bambu hospital and the attempted murder of a tenth;⁵⁷¹
- (ii) the murder of various individuals in Kilo;⁵⁷²
- (iii) the murder of people in Mongbwalu and Sayo during the *ratissage* operations, including a Lendu woman accused of being a ‘chieftain’;⁵⁷³
- (iv) the murder of a woman, while she tried to defend herself against rape, and of P-0018’s sister-in-law in Sangi, during the Second Operation;⁵⁷⁴
- (v) the murder of men raped by UPC/FPLC soldiers during the Second Operation;⁵⁷⁵
- (vi) the attempted murder of P-0019 and P-0108;⁵⁷⁶
- (vii) the targeting, on the order of Mr Ntaganda personally, of civilians in Sayo using a grenade launcher;⁵⁷⁷
- (viii) the rape of women and girls during and in the immediate aftermath of the UPC/FPLC assault on Mongbwalu, save the rape spoken about by P-0017 at Salumu’s camp, and of girls, save P-0022, in Kilo, during the First Operation;⁵⁷⁸
- (ix) the rape of detained women in Kobu in so far as this finding relies on the findings: (a) that ‘UPC/FPLC soldiers detained several women and

⁵⁷¹ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(i).

⁵⁷² [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(iii).

⁵⁷³ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(iv).

⁵⁷⁴ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(v).

⁵⁷⁵ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(vi).

⁵⁷⁶ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(vii).

⁵⁷⁷ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(viii).

⁵⁷⁸ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(ix).

girls, in some instances for hours, in others over the course of several days’ and ‘raped them and otherwise subjected them to sexual violence on one or more occasions’; (b) that P-0019 ‘saw other women being raped inside and outside the house, including with sticks’; and (c) [crimes described in] paragraph 599 [of the Conviction Decision, which concern rapes committed in] Sangi;⁵⁷⁹

- (x) the rape of women in Sangi in so far as this finding concerns the rape of P-0018’s sister-in-law during the Second Operation;⁵⁸⁰
- (xi) the rape and sexual slavery of child soldiers in relation to P-0883 at Camp Bule, and Mave;⁵⁸¹ and
- (xii) individual criminal acts corresponding to the ones challenged by Mr Ntaganda under this ground of appeal and underlying the crime of persecution (count 10).⁵⁸²

333. In addition, Mr Ntaganda raises some specific arguments with respect to a few other criminal acts. Regarding: (i) the ‘murder of two children “during the assault” to take over Kobu’ and (ii) the looting of items other than roofs of houses, the Appeals Chamber understands Mr Ntaganda to additionally argue that the Confirmation Decision narrowed the scope of the relevant charges and that his conviction exceeds the charges thus described.⁵⁸³ In these cases, the description of crimes in the Confirmation Decision appears to be narrower than in the UDCC. In particular, the UDCC refers to ‘murder and attempted murder during and after the UPC/FPLC attack on Walendu-Djatsi *collectivité*’,⁵⁸⁴ whereas in the relevant part of the Confirmation Decision the Pre-Trial Chamber only examined evidence of criminal acts committed *after* the assault on Kobu.⁵⁸⁵ In the second case, the UDCC refers to pillage in

⁵⁷⁹ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(x) (footnotes omitted).

⁵⁸⁰ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(xi).

⁵⁸¹ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(xii).

⁵⁸² [Mr Ntaganda’s Appeal Brief - Part I](#), para. 23.

⁵⁸³ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(ii), (xiii) (emphasis in original omitted).

⁵⁸⁴ UDCC, para. 157(b). *See also* para. 80.

⁵⁸⁵ [Confirmation Decision](#), para. 42.

general,⁵⁸⁶ whereas the Confirmation Decision refers to evidence of the looting of ‘the roofs of houses in Bambu, Kobu and Lipri’.⁵⁸⁷

334. The Appeals Chamber is of the view that this has no impact on the scope of the charged crimes. It agrees with the Trial Chamber’s finding with respect to Mr Ntaganda’s challenge to the specificity of charging of the murder of two children in Kobu:

The Chamber notes that Kobu is one of the locations mentioned in paragraph 36 in relation to Counts 1 and 2 and that paragraph 42 of the Confirmation Decision states that: ‘after the UPC/FPLC had taken control of Kobu, UPC/FPLC patrols were organised and every civilian considered to be an enemy in Kobu was killed immediately or taken to Mr. Mulenda’s compound and executed there upon his orders. *In particular*, a man and a woman were executed in that compound by UPC/FPLC soldiers, including Commander Simba, and three Lendu men were also killed there by UPC/FPLC soldiers’ (footnotes omitted and emphasis added). In light of the foregoing, the Chamber finds that the killing of persons other than the ones specifically mentioned in paragraph 42 of the Confirmation Decision, particularly, the two children, falls within the scope of the charges.⁵⁸⁸

335. The Appeals Chamber also agrees with the following observation by the Trial Chamber:

As a general principle, [...] where the Pre-Trial Chamber was silent on a particular allegation in the DCC, it cannot be presumed to have been rejected, and such silence need not automatically result in its removal from the Updated DCC.⁵⁸⁹

336. The Appeals Chamber finds that there is no indication that the Pre-Trial Chamber intended to confirm the relevant charges only in part and to decline to confirm the remaining parts. Rather, the Pre-Trial Chamber considered evidence of some aspects of the crimes charged and, based on that evidence, confirmed the crimes charged in their entirety. The Appeals Chamber therefore finds that Mr Ntaganda’s conviction for: (i) the murder of two children during the assault to take over Kobu and (ii) the looting of items other than roofs of houses did not exceed the charges.

⁵⁸⁶ [UDCC](#), paras 72, 85.

⁵⁸⁷ [Confirmation Decision](#), para. 62 (footnotes omitted).

⁵⁸⁸ [Conviction Decision](#), para. 870 (emphasis in original).

⁵⁸⁹ [Decision on UDCC](#), para. 39.

337. Regarding another criminal act – the burning of a house in Sayo, Mr Ntaganda argues that ‘only burning caused by incendiary grenades was confirmed’.⁵⁹⁰ The allegation in the UDCC relevant to this criminal act is that ‘UPC/FPLC troops destroyed civilian houses in Mongbwalu and Sayo by deliberately targeting them with heavy weapons’.⁵⁹¹ The Pre-Trial Chamber made the following finding in relation to this allegation:

In the course of the *First Attack*, destruction of property of the adversary, which was protected from that destruction under international law of armed conflict, took place. More specifically, the UPC/FPLC troops used heavy weapons such as mortars in the attack on Mongbwalu, inhabited by a majority of Lendu, which resulted in the destruction of many infrastructures. Shortly after, UPC/FPLC troops systematically shelled Sayo, a predominantly Lendu village, using heavy weapons. UPC/FPLC soldiers also used incendiary grenades and burned houses while people were inside. The attack resulted in the destruction of many houses and buildings in Sayo.⁵⁹²

338. The Trial Chamber addressed Mr Ntaganda’s challenge to the inclusion of the burning of houses in the charge of destruction of property:

The Defence argues that any acts of destruction of property in Sayo other than with heavy weapons are outside of the scope of the charges. However, the Chamber notes that, in the case of Sayo, unlike for Mongbwalu, the Confirmation Decision does not contain such limitation. The Confirmation Decision in fact makes reference to the burning of houses in Sayo. For this reason, the Chamber considers that the destruction of houses by burning falls within the scope of the charges.⁵⁹³

339. Mr Ntaganda does not present any arguments to challenge this finding of the Trial Chamber. The Appeals Chamber finds no error in this finding.

340. Mr Ntaganda also challenges his conviction for the crime of ‘using children under the age of 15 to participate actively in hostilities in the First Operation in so far as this finding relies on evidence relating to Sayo’.⁵⁹⁴ With respect to this crime, the Trial Chamber found that ‘individuals under the age of 15 participated in the assaults forming part of the First Operation’.⁵⁹⁵ This finding was based, *inter alia*, on the

⁵⁹⁰ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(xv).

⁵⁹¹ UDCC, para. 73.

⁵⁹² [Confirmation Decision](#), para. 72 (footnotes omitted).

⁵⁹³ [Conviction Decision](#), para. 1153 (footnotes omitted).

⁵⁹⁴ [Mr Ntaganda’s Appeal Brief - Part I](#), para. 22(xiv).

⁵⁹⁵ [Conviction Decision](#), para. 1125, *referring to* para. 511.

evidence of P-0886, who testified that ‘he saw persons 14 years of age amongst the attackers in Sayo’.⁵⁹⁶

341. The Trial Chamber considered Mr Ntaganda’s challenge to the specificity of charging with respect to this criminal act:

the Chamber notes that active participation in hostilities is temporary in nature under IHL and that individuals cease to actively participate when not engaged in combat related activities. Any charge of active participation must therefore be framed in a more specific way. The Chamber notes that the Confirmation Decision indeed does so. Paragraph 74 of the Confirmation Decision, one of the operative bolded paragraphs which sets out the parameters for counts related to alleged child soldiers, including Count 16, sets out the temporal scope of the charge, *i.e.* from 6 August 2002 to 30 May 2003, whereas paragraphs 93 to 96 set out types of conduct, locations, and timeframes specific to this charge.⁵⁹⁷

342. Mr Ntaganda’s argument on appeal is specifically directed at the deployment of children under the age of 15 (count 16) in the assault on Sayo. The Appeals Chamber notes that the UDCC does not list Sayo among several locations where children were deployed in the attacks launched by the UPC/FPLC. However, it indicates that such deployment also occurred ‘elsewhere’.⁵⁹⁸ Furthermore, as the children were deployed in the assaults carried out by the UPC/FPLC, during which other charged crimes were committed, it is relevant that Sayo features as the location where such crimes were committed. The Appeals Chamber therefore considers that in light of the description of those other crimes, it is sufficiently clear that the crime of deployment of children in hostilities may have also been committed in Sayo.

343. In the Confirmation Decision, the Pre-Trial Chamber found that ‘[t]here are [...] substantial grounds to believe that the UPC/FPLC soldiers used children under the age of 15 years to participate actively in hostilities between on or about 6 August 2002 and on or about 30 May 2003, including Mr. Ntaganda himself, between on or about 6 August and March 2003, in Ituri, in the DRC’.⁵⁹⁹ There is no indication that the Pre-Trial Chamber intended to decline to confirm this charge in part, to the extent it concerned Sayo. On the contrary, the Pre-Trial Chamber confirmed the charge in its

⁵⁹⁶ [Conviction Decision](#), fn. 1508.

⁵⁹⁷ [Conviction Decision](#), para. 1113 (footnote omitted).

⁵⁹⁸ [UDCC](#), para. 98.

⁵⁹⁹ [Confirmation Decision](#), para. 74.

entirety, as correctly noted by the Trial Chamber.⁶⁰⁰ Mr Ntaganda has not demonstrated that his conviction under count 16 with respect to Sayo exceeds the relevant charge.

(c) Overall conclusion

344. In view of the foregoing, the Appeals Chamber finds that the criminal acts which Mr Ntaganda challenges under this ground of appeal were included in the confirmed charges and that, therefore, the Trial Chamber did not err in convicting Mr Ntaganda of these acts, as they do not exceed the facts and circumstances described in the charges. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's findings on the scope of the charges, the Appeals Chamber rejects this ground of appeal.

D. Fourth ground of appeal: Whether there was an 'organizational policy' within the meaning of article 7(2) of the Statute

345. Under the fourth ground of appeal, Mr Ntaganda challenges the Trial Chamber's finding that there was a UPC/FPLC policy to attack the civilian population.⁶⁰¹ He raises one error regarding the Trial Chamber's finding that the UPC/FPLC was an organisation within the meaning of article 7 of the Statute, but the majority of his arguments challenge the Trial Chamber's assessment of evidence relevant to its finding of a policy to attack a civilian population. These are addressed separately below.

1. Alleged error in finding that the UPC/FPLC was an organisation prior to 9 August 2002

(a) Summary of submissions

(i) Mr Ntaganda's submissions

346. Mr Ntaganda submits that the Trial Chamber erred by concluding that the UPC/FPLC was an "organization" pursuant to article 7 before the UPC/FPLC was officially constituted' and argues that it was not an 'organization' until 9 August 2002

⁶⁰⁰ [Conviction Decision](#), para. 1113.

⁶⁰¹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 104-128.

‘when it began exercising control over a territory’.⁶⁰² In support of this argument, he refers to decisions of the majority of Pre-Trial Chamber II in the Situation in the Republic of Kenya, which list non-exhaustive criteria relevant to determining whether a group is an ‘organisation’ within the meaning of article 7 of the Statute.⁶⁰³

(ii) *The Prosecutor’s submissions*

347. The Prosecutor contends that Mr Ntaganda’s argument ‘is undeveloped and should be dismissed’ and that he, in any event, ‘concedes that the UPC was an organisation at the relevant time, as of 9 August 2002’.⁶⁰⁴

(b) Determination by the Appeals Chamber

348. Mr Ntaganda takes issue with the Trial Chamber’s finding that ‘the “organisation” that set out the “policy” for the purpose of Article 7(1) existed before the UPC/FPLC was officially constituted’.⁶⁰⁵ However, he fails to set out the material effect of the alleged erroneous finding and it is not otherwise apparent how this finding, if overturned, would impact on Mr Ntaganda’s conviction. The Appeals Chamber notes that the Trial Chamber found that ‘[d]uring the temporal scope of the charges, when the “organizational policy” was allegedly implemented, the UPC/FPLC was a well-organised military armed group, consisted of a significant number of trained soldiers and possessed a significant arsenal of weapons, and resembled a conventional army’.⁶⁰⁶ Mr Ntaganda does not challenge these findings or suggest that the UPC/FPLC was not officially constituted or that it did not exercise control over a territory during the period relevant to the charges in the present case. Therefore, Mr Ntaganda’s argument is dismissed for failure to show material effect.

⁶⁰² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 107, referring to [Conviction Decision](#), paras 449, 676, 681.

⁶⁰³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 107, referring to [Kenya Decision Authorising Investigation](#), para. 93; [Ruto et al. Confirmation Decision](#), para. 185.

⁶⁰⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 100.

⁶⁰⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 107, referring to [Conviction Decision](#), paras 676, 681.

⁶⁰⁶ [Conviction Decision](#), para. 678 (emphasis added).

2. *Alleged errors in the assessment of evidence relevant to establishing a policy*

(a) **Summary of submissions**

(i) *Mr Ntaganda's submissions*

349. Mr Ntaganda argues that the Trial Chamber's assessment of the evidence relevant to the UPC/FPLC's policy was affected by the following errors: (i) the Trial Chamber erred in inferring that the UPC/FPLC had a policy to attack the civilian population and ignored other reasonable inferences, in particular given that documentary evidence referred to by the Chamber did not 'evidence any intent to target civilians of any ethnicity',⁶⁰⁷ (ii) the Trial 'Chamber erred by relying on [...the] un-corroborated testimony [of P-0014] concerning a meeting in June 2002 that stands out and goes way beyond the content of contemporaneous documents in evidence',⁶⁰⁸ (iii) the Trial Chamber failed to properly consider evidence that non-Iturians were members of the UPC/FPLC or welcomed to remain in Ituri and that there was no policy regarding them;⁶⁰⁹ (iv) the Trial Chamber erred in finding that 'the planning and unfolding of UPC/FPLC military actions directly contradicted the stated aim / ambition of the UPC/FPLC to defend the population as a whole',⁶¹⁰ (v) the Trial Chamber failed to consider evidence of the UPC/FPLC's efforts to build peace in Ituri, its multi-ethnic composition and its aim to protect the civilian population as a whole;⁶¹¹ and (vi) the Trial Chamber erred by inferring that the policy to attack the civilian population was actively promoted and failed to consider that the 'true UPC/FPLC policy to protect civilians without discrimination and to prohibit the commission of any crimes was clearly communicated to the troops by UPC/FPLC leaders and commanders'.⁶¹²

(ii) *The Prosecutor's submissions*

350. The Prosecutor argues that the Trial 'Chamber thoroughly assessed the evidence and correctly concluded that the UPC constituted an organisation that actively

⁶⁰⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 108-110.

⁶⁰⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 111.

⁶⁰⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 112.

⁶¹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 114.

⁶¹¹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 116-120.

⁶¹² [Mr Ntaganda's Appeal Brief – Part II](#), paras 121-127.

promoted a policy to attack civilians'.⁶¹³ She contends that Mr 'Ntaganda merely repeats his trial submissions and complains that the Chamber did not consider certain evidence, or disagreed with his interpretation of it'.⁶¹⁴

(iii) The victims' observations

351. Victims Group 2 submit that Mr Ntaganda 'mainly reiterates previous argument unsuccessfully brought before the Trial Chamber, [...] and generally disagrees with the findings of the Trial Chamber and the latter's interpretation of the evidence'.⁶¹⁵ They argue that it is clear from 'the Trial Chamber's discussion of the evidence [...that it] considered and weighed all the evidence before it and properly explained how it came to the conclusion that the evidence pointed to a policy targeting civilians'.⁶¹⁶

(iv) Mr Ntaganda's response to the victims

352. Mr Ntaganda argues that there was an 'abundance of evidence' providing 'a contemporaneous account of UPC/FPLC military operations' 'in the form of UPC/FPLC documents, statements, speeches, audio-visual recordings and other exhibits admitted, such as Mr. Ntaganda's logbook(s)', yet 'there is no documentary evidence which establishes the existence of a UPC/FPLC policy to attack and chase away the Lendu civilians and those perceived as non-Iturians'.⁶¹⁷ He reiterates that the Trial Chamber failed to consider the totality of the relevant evidence and failed to provide a reasoned opinion by explaining the link between its factual findings and legal conclusions.⁶¹⁸

(b) Determination by the Appeals Chamber

353. Mr Ntaganda raises a number of linked arguments regarding the Trial Chamber's overall assessment of the evidence relevant to its finding of an organisational policy. In the analysis below, the Appeals Chamber will first address those arguments that challenge the assessment of the evidence relevant to underlying factual findings relied upon to support the existence of an organisational policy. It will

⁶¹³ [Prosecutor's Response to Appeal – Part II](#), para. 99 (footnotes omitted).

⁶¹⁴ [Prosecutor's Response to Appeal – Part II](#), para. 99 (footnote omitted).

⁶¹⁵ [Observations of Victims Group 2 on Appeal – Part II](#), para. 51 (footnote omitted).

⁶¹⁶ [Observations of Victims Group 2 on Appeal – Part II](#), para. 56.

⁶¹⁷ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 20.

⁶¹⁸ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 22.

then consider Mr Ntaganda's arguments as a whole to determine whether the Trial Chamber's overall conclusion regarding the existence of an organisational policy was unreasonable.

354. However, certain arguments will not be considered further by the Appeals Chamber in this context for the reasons that follow. A number of arguments have not been substantiated in the appeal brief and the Appeals Chamber will not consider them as to do so would allow the page limit for the appeal to be circumvented.⁶¹⁹ Therefore, these arguments are dismissed *in limine*. In addition, a number of arguments relevant to this ground have been considered and rejected under other grounds of appeal and will not be considered again in the present context.⁶²⁰

⁶¹⁹ Mr Ntaganda argues that the Trial Chamber 'failed to consider significant UPC/FPLC undertakings revealing the true UPC/FPLC policy to defend the population as a whole' ([Mr Ntaganda's Appeal Brief – Part II](#), para. 119, referring to [Conviction Decision](#), paras 325, 686; [Mr Ntaganda's Closing Brief](#), paras 163-171, 210, 260, 1036, 1038; P-0769: [T-122](#), p. 34; D-0300: [T-220](#), p. 12, line 25 to p. 13, line 11; p. 14, line 24 to p. 15, line 9. See also [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 35). The Appeals Chamber notes that, apart from two items of evidence that are alone insufficient to substantiate his arguments (P-0769: [T-122](#), p. 34 and his own testimony regarding the reorganisation of the UPC/FPLC), Mr Ntaganda refers only to his closing brief and attempts to incorporate by reference several pages of argumentation set out therein ([Mr Ntaganda's Appeal Brief – Part II](#), para. 119, referring to [Mr Ntaganda's Closing Brief](#), paras 163-171, 210, 260, 1036, 1038). He does not otherwise explain how these efforts at organising, establishing experienced command and training the troops were linked with or demonstrate a policy to defend the civilian population as a whole. Regarding the meeting in Kampala, Mr Ntaganda argues that P-0014's testimony was inconsistent, again attempting to incorporate by reference several paragraphs of argumentation set out in Mr Ntaganda's Closing Brief attacking the credibility of P-0014's observations on the presence and activities of child soldiers within the UPC/FPLC ([Mr Ntaganda's Appeal Brief – Part II](#), para. 111, referring to [Mr Ntaganda's Closing Brief](#), paras 1461-1466). Mr Ntaganda also submits that the Trial Chamber failed 'to consider the many punishments meted out to UPC/FPLC members who committed violations following Kahwa's speech' in Mandro before the First Operation ([Mr Ntaganda's Appeal Brief – Part II](#), para. 123), but fails to substantiate his argument by reference to any supporting evidence. Therefore, these arguments are dismissed *in limine*.

⁶²⁰ Mr Ntaganda argues that the Trial Chamber erred in its interpretation of the expression '*kupiga na kuchaji*', the seven orders relied upon by the Trial Chamber and the commission of crimes against civilians during certain operations which are rejected under the fifth, eighth and fourteenth grounds of appeal below ([Mr Ntaganda's Appeal Brief – Part II](#), paras 114, 121, referring to Ground 5, paras 76-102. See paragraphs 436-528, 739-745, 963-999 below). A number of arguments attacking the consistency of P-0014's testimony are set out and rejected in the Appeals Chamber's analysis of arguments raised under the thirteenth ground of Mr Ntaganda's appeal below ([Mr Ntaganda's Appeal Brief – Part II](#), para. 111. See paragraphs 892-902 below).

(i) *Arguments relating to the assessment of evidence supporting underlying factual findings*

(a) Testimony of P-0014 regarding meeting in Kampala

355. The Trial Chamber relied upon P-0014's testimony to the effect that, at a meeting in Kampala in June 2002 attended by the political leaders of the emerging UPC/FPLC, 'it was stated that one of the objectives of the emerging UPC/FPLC was to drive out the non-natives' and that 'targets were defined as first, the Nande and then, the Lendu'.⁶²¹

356. Mr Ntaganda argues that the Trial Chamber erred in relying on the uncorroborated testimony of P-0014 concerning this meeting 'that stands out and goes way beyond the content of contemporaneous documents in evidence'.⁶²² In particular, he contends that the Trial Chamber failed to consider the fact that 'P-0014 was a [REDACTED], but never occupied this position'.⁶²³ However, Mr Ntaganda does not explain the significance of the [REDACTED] and why or how the Trial Chamber should have considered this in assessing the witness's testimony. Therefore, the argument regarding P-0014's position [REDACTED] is dismissed.

357. Mr Ntaganda also argues that most of P-0014's testimony was hearsay evidence, referring generally to the transcripts covering two of the three days that the witness testified and, in particular, the witness's testimony that [REDACTED].⁶²⁴ The Appeals Chamber considers that the witness's [REDACTED] is of no relevance to whether he attended the meeting in Kampala, in June 2002, which is the central part of the witness's testimony relied upon by the Trial Chamber to support its finding regarding the organisational policy. The Trial Chamber found that P-0014 'provided first-hand evidence about the meeting'.⁶²⁵ Having reviewed the transcripts of P-0014's testimony referenced by Mr Ntaganda, the Appeals Chamber finds nothing to

⁶²¹ [Conviction Decision](#), para. 293. *See also* [Conviction Decision](#), paras 290, 684.

⁶²² [Mr Ntaganda's Appeal Brief – Part II](#), para. 111, referring to DRC-OTP-0066-0031; DRC-OTP-0066-0039; DRC-OTP-0066-0047; DRC-OTP-0066-0048.

⁶²³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 111, fn. 288, referring to DRC-OTP-2054-0429, at 0440, lines 9-11; at 0442, lines 8-17.

⁶²⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 111, referring to [T-136](#), [T-137](#), in particular [T-137](#) p. 16, line 20 to p. 17, line 1.

⁶²⁵ [Conviction Decision](#), para. 290, fn. 741.

contradict this statement. Indeed, in one of the cited transcripts, the witness twice clarified that he had been present during the meeting in Kampala in June 2002.⁶²⁶ Therefore, Mr Ntaganda's argument regarding the hearsay nature of P-0014's testimony is dismissed.

358. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber's reliance on the testimony of P-0014 concerning the meeting in Kampala in June 2002 was reasonable. Accordingly, Mr Ntaganda's argument is rejected.

(b) Evidence regarding multi-ethnic composition of the UPC/FPLC

359. Mr Ntaganda submits that the Trial Chamber 'failed to consider the relationship between the UPC/FPLC's policy and its multi-ethnic composition, political and military, which included Lendu civilians'.⁶²⁷ He contends that '[t]he record is replete with examples of non-Iturians who were either members of the UPC/FPLC or who were welcomed to remain in Ituri'.⁶²⁸ In particular, he mentions: (i) Denis Akobi and Shatchu Lilo, two Lendu civilians, who were National Secretaries of Transport and '*fonction publique, travail et prévoyances sociales*'; (ii) [REDACTED] and Lubanga's right hand man, chaired the meetings of National secretaries and replaced Lubanga as President *ad interim* in his absence'; (iii) Tinanzabo, a Bira citizen, who 'led the creation of the CTPR, was part of a UPC delegation also including a Logo and a Lendu in Ngongo, signed the CPI on behalf of the UPC and represented the UPC at a conference in Dar es Salam'; and (iv) '[t]he two Brigade commanders who led troops in the First Operation, the FPLC Deputy Chief of staff, the Rwampara commander, and the G2 [who] were also not Hema'.⁶²⁹

360. The Trial Chamber acknowledged that members of the UPC/FPLC executive were of diverse ethnic origin.⁶³⁰ However, it found that,

⁶²⁶ [T-137](#), p. 6, lines 14-18; p. 17, lines 7-10.

⁶²⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 118. *See also* [Mr Ntaganda's Appeal Brief – Part II](#), para. 112.

⁶²⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 112, *referring to* paras 116-120.

⁶²⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 118 (footnotes omitted). *See also* [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 36.

⁶³⁰ [Conviction Decision](#), para. 302 (footnotes omitted).

most non-Hema members were without real or substantive influence. Attendance of some meetings was restricted on an ethnic basis. The posts of defence and finance, which were of a sensitive nature, were held by ethnic Hema. The UPC leadership, and in particular Thomas Lubanga, maintained close ties with influential Hema/Gegere businessmen, who financed the organisation.⁶³¹

361. In this respect, the Trial Chamber relied upon the testimony of P-0005, P-0041 and P-0043, all of whom gave similar accounts supporting a view that [REDACTED].⁶³²

362. The Trial Chamber also dismissed Mr Ntaganda's argument that 'non-Hema secretaries nationaux were truly empowered by UPC/RP and Thomas Lubanga to accomplish and to rule and to run this effective administration' as it was not linked to any evidence other than the documents indicating the appointment of non-Hema members of the Executive.⁶³³ Regarding members of the General Staff, the Trial Chamber found that those 'who were not Hema or Tutsis were excluded from discussions concerning operations'.⁶³⁴ In this regard, the Trial Chamber relied on evidence from P-0016 that [REDACTED].⁶³⁵

363. The Appeals Chamber is of the view that Mr Ntaganda's argument regarding the multi-ethnic composition of the UPC/FPLC disregards important elements of the Trial Chamber's reasoning and, therefore, is alone not capable of establishing an error. As set out above, the Trial Chamber did consider the ethnic composition of the UPC/FPLC in reaching its conclusion as to the existence of an organisational policy. It found that the UPC/FPLC worked on an ethnic basis,⁶³⁶ that 'important positions in both the political and military branches were held by Hema and that individuals were excluded from certain discussions and meetings on an ethnic basis'.⁶³⁷ Other than emphasising the multi-ethnic composition of the UPC/FPLC, Mr Ntaganda has not challenged the Trial Chamber's assessment of the relevant evidence as to the power

⁶³¹ [Conviction Decision](#), para. 302.

⁶³² [Conviction Decision](#), para. 302, referring to P-0005: [T-184](#), p. 14; [T-185](#), p. 26; P-0041: DRC-OTP-0147-0002, at 0019, para. 103, 0026; P-0043: DRC-OTP-0126-0086, at 0090-0091, para. 26; [T-190](#), pp. 31-32.

⁶³³ [Conviction Decision](#), para. 302, fn. 777, referring to [T-263](#), p. 76.

⁶³⁴ [Conviction Decision](#), para. 319, referring to P-0014: DRC-OTP-2054-0961 from 0985 to 0986; P-0016: DRC-OTP-0126-0422, at 0439-0440.

⁶³⁵ [Conviction Decision](#), para. 319, referring to P-0016: DRC-OTP-0126-0422, at 0439-0440.

⁶³⁶ [Conviction Decision](#), para. 685.

⁶³⁷ [Conviction Decision](#), para. 685.

and influence of members of certain ethnic groups. Therefore, his argument is rejected.

**(c) Evidence regarding punishment of
UPC/FPLC members who committed
violations**

364. Mr Ntaganda argues that the Trial Chamber ‘failed to consider that the UPC/FPLC policy to, *inter alia*, protect the civilian population as a whole, was also communicated to the troops *via* punishments meted out against UPC/FPLC members who committed violations’.⁶³⁸ He challenges the Trial Chamber’s finding that the examples of punishment available on the evidence ‘do not affect its finding that some offenses were not considered punishable within the UPC/FPLC’.⁶³⁹ He submits that the Trial Chamber: (i) ignored the fact ‘that UPC/FPLC members received IHL training’;⁶⁴⁰ (ii) ‘failed to consider the impact of the two instances when the punishment of death [...] was imposed [...] when a UPC/FPLC member looted from the house of a Nande civilian in Bunia⁶⁴¹ and when a UPC/FPLC member named Liripa killed a Lendu civilian in Mongbwalu’;⁶⁴² and (iii) ‘rejected numerous examples of disciplinary measures imposed based on the purported “isolated character of these incidents”, thereby reversing the burden of proof, implying that the Defence should have provided evidence of punishment for all crimes committed’.⁶⁴³

⁶³⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 126.

⁶³⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 126, referring to [Conviction Decision](#), para. 332, fn. 893.

⁶⁴⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 126, referring to [Mr Ntaganda’s Closing Brief](#), para. 175, referring to P-0055: [T-71](#), p. 79, lines 8-21; P-0963: [T-81](#), p. 74, lines 14-18; P-0911: [T-157](#), p. 16, line 22 to p. 17, line 6.

⁶⁴¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 126, referring to D-0300: [T-215](#), p. 42, line 9 to p. 43, line 10; [T-227](#), p. 47, lines 7-13; p. 83, lines 7-25; [T-242](#), p. 84, line 17 to p. 86, line 11; D-0017: [T-252](#), p. 65, lines 10-25.

⁶⁴² [Mr Ntaganda’s Appeal Brief – Part II](#), paras 72, 126, referring to DRC-OTP-0017-0033, at 0097-0099 (DRC-OTP-2102-3854 at 3919-3921); Mr Ntaganda’s own testimony that Commander Liripa was a Hema Gegere and that the civilian he killed was a Lendu and the decision to execute him was taken by Kisembo, the chief of the general staff (D-0300: [T-222](#), p. 61, line 2 to p. 65, line 12); [Mr Ntaganda’s Closing Brief](#), paras 175, 290-291, 685. See also [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 28.

⁶⁴³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 126, referring to [Mr Ntaganda’s Closing Brief](#), paras 175, 1560. See also [Mr Ntaganda’s Appeal Brief – Part II](#), para. 70, referring to an operation to re-occupy Komanda in August 2002, during which soldiers who looted were publicly punished and the goods burned.

365. In the Conviction Decision, the Trial Chamber found that ‘UPC/FPLC soldiers [...] did not consider that [...] the killing of a Lendu, or the looting of Lendu property, were punishable offences’.⁶⁴⁴ This finding was supported by reference to: (i) the testimony of P-0907 who said that he was not aware of any soldier being punished for killing an enemy, soldier or civilian, or looting or burning down their houses during the attack on Komanda or the second operation in Mongbwalu;⁶⁴⁵ (ii) the testimony of P-0963 who stated that they were in the context of a tribal war and there were no sanctions for killing an ordinary Lendu;⁶⁴⁶ and (iii) the witness statement of P-0016 who indicated that [REDACTED].⁶⁴⁷

366. The Trial Chamber also took into account the testimony of three additional witnesses showing that members of the UPC/FPLC were not punished for looting and for killing Lendu persons during the First Operation: (i) the testimony of P-0017 who stated that he was not aware of any instance when Mr Ntaganda arrested or had arrested anyone within the UPC for crimes against Lendu persons;⁶⁴⁸ (ii) the testimony of P-0768 who stated that the war had become a war between the Hema and the Lendu and that he never saw a soldier or an officer being sanctioned for having killed a Lendu;⁶⁴⁹ and (iii) the testimony of P-0888 who stated that he did not see anyone punished for beating up or killing civilians.⁶⁵⁰ The Trial Chamber also considered evidence showing that rape and sexual violence were not considered punishable offences within the UPC/FPLC.⁶⁵¹ In sum, the Trial Chamber’s finding in this regard was supported by the testimony of numerous witnesses.

367. Against this evidence, the Trial Chamber considered Mr Ntaganda’s arguments regarding isolated instances when UPC/FPLC members were punished for crimes against civilians (the burning of looted goods by Mr Ntaganda on one instance in August 2002, as well as an execution in Ndromo meant to serve as an example and

⁶⁴⁴ [Conviction Decision](#), para. 332 (footnote omitted).

⁶⁴⁵ [Conviction Decision](#), para. 332, referring to P-0907: [T-89](#), p. 48; [T-90](#), pp. 51 to 52.

⁶⁴⁶ [Conviction Decision](#), para. 332, referring to [T-79](#), p. 22.

⁶⁴⁷ [Conviction Decision](#), fn. 893, referring to P-0016, DRC-OTP-0126-0422, p. 0461.

⁶⁴⁸ [Conviction Decision](#), fn. 893, referring to P-0017: [T-63](#), pp. 43, 54.

⁶⁴⁹ [Conviction Decision](#), fn. 893, referring to [T-34](#), p. 16.

⁶⁵⁰ [Conviction Decision](#), fn. 893, referring to P-0888: [T-105](#), p. 81.

⁶⁵¹ [Conviction Decision](#), para. 332, referring to P-0768: [T-34](#), p. 56; P-0963: [T-79](#), p. 36; [T-82](#), p. 19; P-0017: [T-59](#), pp. 33-34; P-0907: [T-90](#), p. 52. See also [Conviction Decision](#), para. 412.

the detention of Abelanga, Pigwa and Thomas Kasangaki for stealing).⁶⁵² The Trial Chamber noted ‘the isolated character of these incidents and, having further considered (i) the fact that looted items of high value were usually given to the commanders [...]; and (ii) the nature of the orders given to the troops before combat, [...] [it found] that these examples of punishment [did] not affect its finding that some offenses were not considered punishable within the UPC/FPLC’.⁶⁵³

368. The Trial Chamber found Mr Ntaganda to be not ‘credible when he affirms that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri and that this revolutionary ideology was governing the functioning of the UPC/FPLC’.⁶⁵⁴ It found that ‘this statement is clearly contradicted by the other available evidence on the record which shows that at least a part of the civilian population in Ituri, in particular the Lendu, was actually the target of violent acts by the UPC/FPLC in 2002 and 2003’.⁶⁵⁵

369. Regarding D-0017 (on whom Mr Ntaganda relies to argue that on one occasion a death sentence was imposed for looting),⁶⁵⁶ the Trial Chamber noted that this witness’s testimony reflected ‘a concern not to provide any incriminating evidence with regard to the accused’ and ‘included a number of assertions that the Chamber finds implausible, both in themselves and with regard to the overall evidence presented in this case’.⁶⁵⁷ Overall, it found that D-0017’s testimony lacked credibility and did not rely on it.⁶⁵⁸

⁶⁵² [Conviction Decision](#), para. 332, fn. 893, referring to [Mr Ntaganda’s Closing Brief](#), paras 175, 759-764; D-0300: [T-217](#), pp. 57 to 58; [T-222](#), pp. 66 to 69; [T-237](#), pp. 9-10.

⁶⁵³ [Conviction Decision](#), para. 332, fn. 893, referring to para. 415 (the Trial Chamber’s finding ‘that “*kupiga na kuchaji*” was an expression commonly used in UPC/FPLC commanders’ orders to soldiers, and that it was understood by the soldiers to mean attacking all the Lendu, including civilians, and to loot their property’); para. 515 (the Trial Chamber’s finding that ‘[w]ithin the UPC/FPLC, looted items which were considered of high quality or value were usually given to the commanders, including Salumu Mulenda, under threat of punishment, while the soldiers could keep other goods. Other items that the UPC/FPLC soldiers looted were either sold off for money or used by the soldiers themselves’.).

⁶⁵⁴ [Conviction Decision](#), para. 261.

⁶⁵⁵ [Conviction Decision](#), para. 261.

⁶⁵⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 126, fn. 348.

⁶⁵⁷ [Conviction Decision](#), paras 252-253.

⁶⁵⁸ [Conviction Decision](#), para. 255.

370. Regarding the execution of Liripa after the Fist Operation, the Trial Chamber noted: (i) ‘the reasons why the victim could apparently return to Mongbwalu’,⁶⁵⁹ and (ii) that Liripa’s ‘execution was based on a number of reasons, *inter alia*, non-authorised exit, premeditation, failure to observe instructions, abusive use of a weapon, waste of war ammunitions, public drunkenness, in addition to killings’.⁶⁶⁰ It also found that Mr Ntaganda’s testimony regarding this matter lacked credibility considering the way the First Operation was found to have unfolded.⁶⁶¹

371. From the foregoing, the Appeals Chamber notes that the Trial Chamber took into account various considerations in determining that some offences were not considered punishable within the UPC/FPLC, including: (i) the testimony of numerous witnesses that troops were not punished for crimes committed against Lendu civilians; (ii) the manner in which the First Operation unfolded; (iii) the fact that looted items of high value were usually given to commanders; and (iv) the orders given to the troops before combat to attack indiscriminately.⁶⁶² It weighed this evidence against the arguments and evidence in relation to isolated instances of punishment highlighted by Mr Ntaganda. In so doing, the Appeals Chamber considers that the Trial Chamber did not reverse the burden of proof. Rather, it established, on the basis of the evidence before it, that certain offences were not considered punishable within the UPC/FPLC and found that this conclusion was not affected by evidence of isolated instances where soldiers were punished for various reasons.

372. Having considered the Trial Chamber’s overall assessment of the relevant evidence against the arguments and evidence advanced by Mr Ntaganda, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that some offenses were not considered punishable within the UPC/FPLC, notwithstanding the examples of punishment Mr Ntaganda highlighted. Accordingly, his argument in this regard is rejected.

⁶⁵⁹ [Conviction Decision](#), para. 332, fn. 893.

⁶⁶⁰ [Conviction Decision](#), para. 332, fn. 893, *referring to* logbook DRC-OTP-2102-3854, from 3919 to 3920; P-0859: [T-51](#), p. 43.

⁶⁶¹ [Conviction Decision](#), para. 332, fn. 893, *referring to* D-0300: [T-222](#), pp. 62-64.

⁶⁶² [Conviction Decision](#), para. 332, fn. 893.

(d) Evidence regarding training of troops

373. In his response to the victims’ observations, Mr Ntaganda argues that the Trial Chamber failed to consider P-0769’s testimony that ‘he was told during his training that “the UPC was not a tribal militia, that its aim was to “take over the Congo in its entirety”, and that they weren’t just fighting “enemies, be they Bahema or Balendu” but the government”’.⁶⁶³ The Appeals Chamber notes that the Trial Chamber did in fact consider this aspect of the witness’s testimony in finding that recruits were taught that the Lendu and Ngiti were the enemy, and having weighed this against the testimony of P-0963, P-0888, P-0907, and P-0758, found that P-0769’s testimony did not contradict the evidence provided by these witnesses, given that, just after this statement, ‘P-0769 testified that songs calling for violence against the Lendu were sung’.⁶⁶⁴ Mr Ntaganda has not shown any error in the Trial Chamber’s reasoning in this regard.

374. Mr Ntaganda also appears to challenge the credibility of P-0016, on whose testimony the Trial Chamber relied in finding that songs inciting soldiers to attack or kill the Lendu were taught to troops as part of their training.⁶⁶⁵ However, Mr Ntaganda does not identify any error in the Trial Chamber’s finding and only argues that P-0016 was ‘never a recruit in Mandro’.⁶⁶⁶ The Appeals Chamber notes that the witness [REDACTED].⁶⁶⁷ Accordingly, Mr Ntaganda’s argument regarding the reliability of this witness and the relevance of his evidence is rejected.

(ii) Whether the Trial Chamber’s overall conclusion regarding the existence of an organisational policy was reasonable

375. The Trial Chamber gave the following legal interpretation of the ‘policy’ requirement under article 7(2)(a) of the Statute:

673. The Elements of Crimes specify that the concept of ‘policy’ requires the active promotion or encouragement of an attack against a civilian population by a State or organisation. In exceptional circumstances, such a policy may be

⁶⁶³ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 35 (emphasis in original).

⁶⁶⁴ [Conviction Decision](#), para. 373, fn. 1053.

⁶⁶⁵ [Conviction Decision](#), para. 373.

⁶⁶⁶ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 35.

⁶⁶⁷ DRC-OTP-0126-0422-R03, at 0430, para. 47.

implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attacks, but the existence of such a policy cannot be inferred solely from the absence of governmental or organisational action.

674. A policy may consist of a pre-established design or plan, but it may also crystallise and develop only as actions are undertaken by the perpetrators. The existence of a policy may be inferred from a number of factors, including: (i) the fact that the attack was planned or directed; (ii) the existence of a recurrent pattern of violence, for example, repeated actions occurring according to a same sequence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the State or organisational forces in the commission of crimes; (v) statements, instructions, or documentation attributable to the State or the organisation condoning or encouraging the commission of crimes; (vi) an underlying motivation; and (vii) the existence of preparations or collective mobilisation orchestrated and coordinated by that State or organisation.⁶⁶⁸

The Trial Chamber also found that the crimes committed against civilians in the present case ‘were not the result of an uncoordinated and spontaneous decision of individual perpetrators acting in isolation, but were the intended outcome of the implementation of a policy which was actively promoted’.⁶⁶⁹

376. The Trial Chamber’s legal definition or interpretation of the ‘policy’ requirement has not been challenged by Mr Ntaganda.⁶⁷⁰ Rather, he argues that the Trial Chamber erred *in fact* by inferring the existence of an organisational policy based on the evidence in this case.⁶⁷¹

377. The Appeals Chamber notes that the Trial Chamber’s factual finding on the existence of an ‘organizational policy’ was principally supported by its analysis of the political context and ethnic conflict in which the UPC/FPLC emerged, its objectives and organisation along ethnic lines, and the planning and execution of the military operations during which crimes were committed. In this regard, it found:

683. In June 2002, the political leaders of the emerging UPC/FPLC indicated in written communications that Ituri must be saved, including by shedding ‘our’ blood. In the context of the perceived so-called ‘ethnic conflict’ between the

⁶⁶⁸ [Conviction Decision](#), paras 673-674 (footnotes omitted).

⁶⁶⁹ [Conviction Decision](#), para. 689.

⁶⁷⁰ Judge Ibáñez Carranza has included her views on the legal interpretation of the contextual elements for crimes against humanity in her separate opinion (*see* [Annex 3](#), Separate opinion of Judge Luz del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal). Judge Eboe-Osuji has written separately on the legal interpretation of ‘organizational policy’ within the meaning of article 7(2)(a) of the Statute (*see* [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji).

⁶⁷¹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 104-105, 127-128.

Hema and the Lendu, where plans for genocide or control of the territory by a competing ethnic group were recurrent fears, the enemy, the RCD-K/ML, was criticised by the emerging UPC/FPLC for putting in place discriminatory policies and for failing to properly represent the interests of the ‘Iturians’, which were opposed to the ‘Kivu citizens’, designated as ‘negative forces’. [...]

684. Furthermore, as expressed in the relevant documents, certain ethnic groups were perceived by political leaders of the emerging UPC/FPLC as associated with political and military enemy group. [...] In June 2002, in Kampala, it was stated that one of the objectives of the emerging UPC/FPLC was to drive out the non-natives; targets were defined as being first, the Nande, and then, the Lendu.

685. Although the UPC/FPLC denounced the RCD-K/ML’s political and administrative management of Ituri as being ethnically biased, it also worked on an ethnic basis. The Chamber found that following the formalisation of the UPC/FPLC in September 2002, important positions in both the political and military branches were held by Hema and that individuals were excluded from certain discussions and meetings on an ethnic basis. Furthermore, the political leaders of the UPC/FPLC, by opposing the Iturians to the non-Iturians (the so called ‘Kivu Holding’), as indicated above, also contributed to setting certain parts of the population against each other.⁶⁷²

378. The Trial Chamber noted that ‘some of the documents produced by the UPC/FPLC indeed promoted peace, or denounced the crimes committed against the local population of Ituri’ and that its stated ambition was to ‘defend the population’ as a whole, but found ‘that the internal communications and documents as well as military actions undertaken by the UPC/FPLC show that in parallel its goal was to actively chase away the RCD-K/ML, and those who were perceived as non-Iturians’.⁶⁷³ It based this primarily on the following:

687. UPC/FPLC recruits, during their training, were taught that the Lendu as such were the enemy. A song inciting recruits to kill the Lendu was recited during training.

688. Further, the expression ‘*kupiga na kuchaji*’ was commonly used within the UPC/FPLC, and was understood by the soldiers to mean attacking all the Lendu, including civilians, and to loot their property. UPC/FPLC troops generally acted following a certain *modus operandi*, characterised by an initial assault and the taking of control over the town or village, followed by a *ratissage* operation, extending up to several days after the initial assault, aimed at eliminating any survivors, including civilians, as well as looting. It was found that ‘*kupiga na kuchaji*’ orders were given before the First and Second Operation and that the troops behaved as instructed; indeed, they committed

⁶⁷² [Conviction Decision](#), paras 683-685 (footnotes omitted).

⁶⁷³ [Conviction Decision](#), paras 686-687.

different types of violent acts targeting the civilians specifically. In sum, the unfolding of its military operations demonstrates how the UPC/FPLC was not only attempting to chase away the RCD-K/ML, but also the Lendu.⁶⁷⁴

379. Mr Ntaganda argues that the Trial Chamber's finding regarding the existence of an organisational policy was unreasonable because the Trial Chamber failed to: (i) give sufficient weight to the legitimate aim of the UPC/FPLC military operations it considered and to consider 'the aim and purpose of [other] UPC/FPLC military operations';⁶⁷⁵ and (ii) consider evidence and arguments regarding the peace-building efforts of the UPC/FPLC⁶⁷⁶ and to 'explain why [these events] were, or were not, relevant to the existence of a UPC/FPLC policy and, if so, what weight they were attributed'.⁶⁷⁷

380. Essentially, Mr Ntaganda's submission is that the purpose and conduct of all military operations of the UPC/FPLC over the time-frame of the charges, as well as its peace-building initiatives, should have been considered in determining whether the attack was carried out pursuant to or in furtherance of an organisational policy. In so arguing, he seems to equate the policy required under article 7 of the Statute to the overarching political or military goals of the organisation or to the military purpose of particular operations.

⁶⁷⁴ [Conviction Decision](#), paras 687-688 (footnotes omitted).

⁶⁷⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 114, referring to Ground 5, [Mr Ntaganda's Appeal Brief – Part II](#), paras 60-74.

⁶⁷⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 116-117. Mr Ntaganda argues that the Trial Chamber failed to consider evidence and his arguments regarding: (i) 'the creation of the CTPR [Commission of Truth, Peace and Reconciliation] composed of representatives of all ethnic groups including Lendu civilians'; (ii) 'pacification missions conducted by the CTPR as well as the reports it produced on its activities'; (iii) 'the Arua peace negotiations, convened by Uganda, in the presence of Lendu representatives and attended by a multi-ethnic UPC/FPLC delegation led by P-0005'; (iv) 'Lubanga's order transmitted through Mr. Ntaganda not to shoot down the plane that transported the Lendu representatives to this meeting'; (v) 'Lubanga's speech in Bunia at the *pères blancs* congregation, clearly illustrating the UPC/FPLC's policy towards Lendu civilians and reconciliation'; (vi) 'the Ngongo negotiations attended by a multi-ethnic UPC delegation (sent by Lubanga) and Lendu notables to achieve peace, which resulted in the secondary road between Bunia and Lipri being reopened for the benefit and [*sic*] all civilians regardless of ethnicity'; (vii) 'the implementation of the UPC/FPLC's plan to provide weapons to Lendu combatants for the purpose of joining forces with the aim of chasing the UPDF from Ituri'; and (viii) 'the UPC/FPLC's continued willingness to cooperate with the CPI and the Sun City negotiations'. Most importantly, in Mr Ntaganda's view, the Trial Chamber failed to consider the 'UPC/FPLC's greatest achievement, the conclusion of an Ituri-wide peace agreement promoted by the UPC/FPLC', referring to a meeting that took place in early February 2003 in Bunia. See also [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 27.

⁶⁷⁷ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 24.

381. The Appeals Chamber notes that, according to article 7(2) of the Statute, the required ‘State or organizational policy’ is a policy to commit an attack, being ‘a course of conduct involving the multiple commission of [criminal] acts [...] against any civilian population’. Therefore, in the present case, the focus of the Trial Chamber’s enquiry was whether the alleged attack (carried out during the specific operations that were the subject of the charges and established by the Trial Chamber) was committed pursuant to or in furtherance of a policy.⁶⁷⁸ The Trial Chamber was not required to establish that all the activities of the UPC/FPLC could be explained by reference to a policy to attack the civilian population or to exhaustively define the objectives, aims or policies of the UPC/FPLC as an organisation. Indeed, a single incident or operation in which multiple crimes are committed could amount to a crime against humanity provided that the relevant contextual elements are met, irrespective of the wider activities of the state or organisation concerned.

382. In the present case, the Trial Chamber’s finding that the crimes committed were the intended outcome of the implementation of a policy which was actively promoted was largely based on the planning and unfolding of the military operations during which crimes were committed.⁶⁷⁹ It found that: (i) recruits were taught that the Lendu as such were the enemy; (ii) orders were given to attack the Lendu, civilian or combatant, including by Mr Ntaganda as Deputy Chief of Staff; and (iii) during the operations considered by the Trial Chamber, civilians were attacked, including after the initial assault when the area was under the control of the UPC/FPLC.⁶⁸⁰ The Trial Chamber appears to have accepted that the UPC/FPLC had a *parallel interest* in achieving peace, and recognised ‘that some of the documents produced by the UPC/FPLC [...] promoted peace, or denounced the crimes committed against the local population of Ituri’.⁶⁸¹ However, it considered that this did not displace its

⁶⁷⁸ In the present case, the Trial Chamber found that the attack was carried out during the First Operation, the Second Operation, the assault on Songolo at the end of August 2002, the assault and *ratissage* operation in Zumbe in October 2002, the assault and *ratissage* operation in Komanda in November 2002 and the assault on Bunia in May 2003. See [Conviction Decision](#), paras 664-665.

⁶⁷⁹ [Conviction Decision](#), paras 687-689.

⁶⁸⁰ [Conviction Decision](#), paras 687-688. See also [Conviction Decision](#), paras 373, 415, 484, 488, 561.

⁶⁸¹ [Conviction Decision](#), para. 686 (emphasis added). Furthermore, the Trial Chamber noted, in another context, official UPC/FPLC documents addressing how to ‘re-create a climate of trust between the peoples of the north-east’, pronouncing ‘adherence to the spirit of the Luanda accords concerning the setting up of a pacification commission in Ituri, subject to certain conditions’, and stating the intent to bring peace and reconciliation to Ituri ([Conviction Decision](#), paras 297, 299). The Trial Chamber also

finding regarding the existence of a UPC/FPLC policy to ‘actively chase away the RCD-K/ML, and those who were perceived as non-Iturians’.⁶⁸² It also noted Mr Ntaganda’s arguments that UPC/FPLC operations solely served a military purpose and conducted operations during which civilians were not attacked, but found that this had ‘no bearing on the validity of the factual findings of the Chamber that during several specific assaults, on which evidence has been presented to the Chamber, civilians were deliberately attacked’.⁶⁸³

383. In view of the foregoing, the Appeals Chamber is not persuaded that the Trial Chamber failed to properly consider evidence relating to the UPC/FPLC’s multiple peace-building initiatives, other operations during which crimes against the civilian population were not committed, and the legitimate military aims of its operations. It finds that the Trial Chamber properly evaluated these factors in light of the entirety of the relevant evidence, especially evidence regarding the manner in which the attack in the present case was carried out, the training of the troops and the orders to attack civilians. Accordingly, Mr Ntaganda’s arguments are rejected.

384. Mr Ntaganda also argues that the documentary evidence cited by the Trial Chamber did not mention Lendu civilians or demonstrate an intention to target civilians of any ethnicity,⁶⁸⁴ and that the Trial Chamber itself recognised that some of them ‘indeed “promoted peace, or denounced the crimes committed against the local population of Ituri” and that it was the UPC/FPLC’s stated ambition / aim to defend the population as a whole’.⁶⁸⁵

385. The Trial Chamber relied upon the documentary evidence to which Mr Ntaganda refers to find that political leaders of the emerging UPC/FPLC perceived certain ethnic groups as being associated with political and military enemy groups – the Nande people with the RCD-K/ML and the Lendu combatants with the

noted that, following the conclusion of the Luanda Accords between the governments of Uganda and the DRC in early September 2002, ‘[f]urther initiatives for achieving pacification in Ituri in the second half of 2002 and beginning of 2003 did not yield any effective results’ ([Conviction Decision](#), para. 417, fn. 1198).

⁶⁸² [Conviction Decision](#), para. 686.

⁶⁸³ [Conviction Decision](#), para. 665.

⁶⁸⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 110, referring *inter alia* to [Conviction Decision](#), paras 682-686.

⁶⁸⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 109, referring to [Conviction Decision](#), paras 686-687.

APC.⁶⁸⁶ The Appeals Chamber accepts Mr Ntaganda's argument that the documents referred to by the Trial Chamber do not demonstrate any intention to target civilians, but notes that the Trial Chamber did not rely on them for this purpose. Rather the Trial Chamber's analysis of this evidence was relied upon together with other evidence to support its findings regarding the context and background against which the UPC/FPLC's policy to attack the civilian population was formulated.⁶⁸⁷ It considered the context provided by this documentary evidence together with P-0014's testimony that 'one of the objectives of the emerging UPC/FPLC was to drive out the non-natives' and that the Nande and the Lendu were defined as targets.⁶⁸⁸

386. The Appeals Chamber is not persuaded that Mr Ntaganda's arguments demonstrate that the Trial Chamber's finding was unreasonable. The fact that the official documents issued by the UPC/FPLC did not expressly articulate a policy to attack the civilian population does not negate the existence of such a policy. The absence of such documentary evidence does not appear to be significant when weighed against the Trial Chamber's findings regarding the training of the troops, the orders given, and the manner in which the attack was carried out over the course of several different military operations as set out above.

387. Finally, Mr Ntaganda argues that the Trial Chamber erred in its consideration of speeches to the troops by Chief Kahwa in Mandro before the First Operation, in which he emphasised the importance of discipline and protecting the civilian population,⁶⁸⁹ and Thomas Lubanga in Rwampara before the Second Operation, in which he spoke of the UPC's aim to ensure the security of citizens and the fact that

⁶⁸⁶ [Conviction Decision](#), para. 684.

⁶⁸⁷ The Trial Chamber derived the following conclusions from its analysis of the documentary evidence in question: (i) that the 'emerging UPC/FPLC took steps to put an end to the power exercised by the RCD-K/ML' in Ituri; (ii) that, from a military perspective, the strategy was to liberate Bunia and take control of key locations; (iii) that '[i]n the context of the perceived so-called "ethnic conflict" between the Hema and the Lendu, where plans for genocide or control of the territory by a competing ethnic group were recurrent fears, the enemy, the RCD-K/ML, was criticised by the emerging UPC/FPLC for putting in place discriminatory policies and for failing to properly represent the interests of the "Iturians"'; and (iv) that the emerging UPC/FPLC opposed 'Iturians' to 'Kivu citizens', who were 'designated as "negative forces" [and] considered to be over-represented within the RCD-K/ML' and, in so doing, the political leaders of the UPC/FPLC contributed to setting parts of the population against one another ([Conviction Decision](#), paras 682-683, 685).

⁶⁸⁸ [Conviction Decision](#), para. 684.

⁶⁸⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 123, referring to [Conviction Decision](#), para. 305, fn. 790. See also [Mr Ntaganda's Appeal Brief – Part II](#), para. 299.

the army did not have one tribal enemy.⁶⁹⁰ Mr Ntaganda also argues that the Trial Chamber failed to consider the evidence of P-0005, who testified that the issue of non-Iturians, referred to as Kivu Holding, was political and did not involve attacking or chasing away non-Iturians’ and that he was not aware of any UPC/FPLC policy regarding non-Iturians.⁶⁹¹ He submits that, setting aside the Trial Chamber’s finding regarding the orders issued, ‘there is no evidence showing how the implied UPC/FPLC policy to attack Lendu civilians was communicated to its members’.⁶⁹²

388. The Trial Chamber noted that, in an address by Chief Kahwa in Mandro, he ‘explained that the UPC/FPLC decided to launch a “new revolution” because armies like the FAC or the APC only harassed the population, whereas the UPC/FPLC army would be one without discrimination, for all Congolese, and that it was not intended to be an ethnic one, but one that protects all ethnicities, people and their belongings, and that there was no “tribalism” in the army’.⁶⁹³ It also noted that during the speech Chief Kahwa ‘told soldiers that any soldier who stole from inhabitants or raped women or girls would be shot’.⁶⁹⁴

389. However, the Trial Chamber did ‘not consider the statements in [Chief Kahwa’s] speech to reflect the reality of the disciplinary system within the UPC/FPLC as regards looting and rape of civilians associated with the enemy, during UPC/FPLC operations’.⁶⁹⁵ The Trial Chamber referred in this regard to its findings on how the operations during which the crimes were committed unfolded and ‘the looting and rapes which occurred without punishment’.⁶⁹⁶ It did not further refer to this speech in determining whether there was an organisational policy to attack civilians.

390. In view of the Trial Chamber’s assessment of the relevant evidence regarding the offences considered punishable within the UPC/FPLC, the Appeals Chamber is not persuaded by Mr Ntaganda’s argument that the Trial Chamber erred in finding

⁶⁹⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 125.

⁶⁹¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 112, referring to P-0005: [T-185](#), p. 28, lines 6-23. See also [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 38.

⁶⁹² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 121.

⁶⁹³ [Conviction Decision](#), para. 305, referring to DRC-OTP-0082-0016, from 00:11:30 to 00:18:15 (transcript DRC-OTP-0164-0567; translation DRC-OTP-0164-0710, at 0719).

⁶⁹⁴ [Conviction Decision](#), para. 305, fn. 790, referring to DRC-OTP-0082-0016, from 00:25:17 to 00:26:47 (translation DRC-OTP-0164-0710, at 0723, lines 375 to 387).

⁶⁹⁵ [Conviction Decision](#), para. 305, fn. 790.

⁶⁹⁶ [Conviction Decision](#), para. 305, fn. 790.

that ‘the statements in [Chief Kahwa’s] speech [did not] reflect the reality of the disciplinary system within the UPC/FPLC as regards looting and rape of civilians associated with the enemy, during UPC/FPLC operations’.⁶⁹⁷ Accordingly, the Appeals Chamber rejects Mr Ntaganda’s argument that the Trial Chamber should have expressly considered Chief Kahwa’s address to the troops in determining whether the attack was carried out pursuant to an organisational policy.

391. Regarding the speech given by Thomas Lubanga to the troops in Rwampara, the Appeals Chamber notes that the content of this speech was similar to that of Chief Kahwa’s and was inconsistent with other evidence supporting the Trial Chamber’s findings, in particular, its findings that the troops were taught, including by means of a song inciting recruits to kill the Lendu, that the Lendu as such were the enemy, that orders were given to attack the Lendu, including civilians, that the troops behaved as instructed and that UPC/FPLC soldiers did not consider such attacks against the Lendu to be punishable.⁶⁹⁸

392. The Trial Chamber expressly noted Mr Ntaganda’s visit on 12 February 2003 to the training camp, together with Thomas Lubanga and other commanders but did not specifically note Mr Lubanga’s speech.⁶⁹⁹ Nevertheless, having considered the careful evaluation of the evidence relied upon by the Trial Chamber to support its findings, the Appeals Chamber concludes that it was reasonable for it to disregard the contents of Thomas Lubanga’s speech. The events subsequent to these speeches and the testimony of various witnesses show that the UPC/FPLC soldiers understood that the policy *vis-à-vis* the civilian population was not that ostensibly conveyed in these speeches.⁷⁰⁰ The evidence considered by the Trial Chamber shows that the policy to attack the civilian population was communicated directly, through orders to attack the Lendu, combatants and civilians, and that, contrary to Mr Ntaganda’s argument,

⁶⁹⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 123, referring to [Conviction Decision](#), para. 305, fn. 790.

⁶⁹⁸ [Conviction Decision](#), paras 687-688; 800.

⁶⁹⁹ [Conviction Decision](#), para. 369, referring to P-0010: [T-47](#), p. 53.

⁷⁰⁰ [Conviction Decision](#), paras 688, 800.

crimes committed against civilians in the course of the military operations were not punished.⁷⁰¹

393. Regarding P-0005's testimony to the effect that he was unaware of any UPC/FPLC policy regarding non-Iturians,⁷⁰² the Appeals Chamber notes that the witness clarified in this regard that he didn't 'know whether their thoughts were kept secret and held in their hearts', but that he 'didn't notice anything openly'.⁷⁰³ The Prosecutor also refers to P-0005's testimony as 'to the limited influence of the few Lendu and other ethnicities within the UPC Executive'.⁷⁰⁴ In view of this testimony, the Appeals Chamber considers that P-0005's lack of awareness of a UPC/FPLC policy regarding non-Iturians does not impact on the Trial Chamber's finding as to the existence of this policy, which manifested itself through the military activities of the organisation.

394. In sum, the Appeals Chamber has considered Mr Ntaganda's arguments regarding the peace-building activities of the UPC/FPLC, the legitimate military aims pursued in its military operations, its wider military operations, the documents it produced, the content of speeches given by Thomas Lubanga and Chief Kahwa and the testimony of P-0005 that he was unaware of a UPC/FPLC policy regarding non-Iturians. However, it is not persuaded that these arguments show that the Trial Chamber erred in concluding that a policy to attack civilians existed. As set out above, the Trial Chamber's conclusion was based on factual findings regarding the context of inter-ethnic war in which the UPC/FPLC was created and operated, the meeting in Kampala where political leaders of the UPC/FPLC discussed the objective of driving out the non-natives, the training of recruits who understood that the Lendu as such were the enemy, the orders given by military commanders at all levels to attack the Lendu, civilian or combatant, and the manner in which the crimes were committed, including in circumstances when the areas attacked were under the control of the UPC/FPLC.⁷⁰⁵ In view of these considerations, the Appeals Chamber finds that

⁷⁰¹ [Conviction Decision](#), paras 688, 800.

⁷⁰² [Mr Ntaganda's Appeal Brief – Part II](#), para. 112, referring to P-0005: [T-185](#), p. 28, lines 6-23. See also [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 38.

⁷⁰³ P-0005: [T-185](#), p. 28, lines 7-9.

⁷⁰⁴ [Prosecutor's Response to Appeal – Part II](#), para. 104, fn. 469, referring to P-0005: [T-185](#), p. 25, line 21 to p. 26, line 25.

⁷⁰⁵ [Conviction Decision](#), paras 687-688.

the Trial Chamber's conclusion regarding the existence of an organisational policy was reasonable.⁷⁰⁶

3. *Overall conclusion*

395. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's finding that the 'course of conduct took place pursuant to a policy of the UPC/FPLC to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians', the Appeals Chamber rejects this ground of appeal.

E. Fifth ground of appeal: Whether an attack was directed against a civilian population

396. Under the fifth ground of appeal, Mr Ntaganda argues that '[t]he Trial Chamber erred in law and in fact in finding that the multiple commission of acts [...] by the UPC/FPLC' constituted an attack directed against a civilian population within the meaning of article 7(1) of the Statute.⁷⁰⁷ To support this argument, Mr Ntaganda alleges that the Trial Chamber: (i) failed to find that a civilian population was the primary object of the attack; (ii) erred by limiting its analysis of the evidence to six military operations; (iii) failed to accord sufficient weight to the legitimate purpose of the six military operations it considered; (iv) failed to consider relevant evidence regarding other UPC/FPLC operations; and (v) erred in finding that orders to attack civilians were issued.⁷⁰⁸

397. The Appeals Chamber will address arguments (i)-(iv) together as they collectively challenge the Trial Chamber's approach to establishing that an attack was directed against any civilian population. To a large extent, these arguments depend on the legal interpretation of this contextual element of crimes against humanity and the manner in which it can be established. Thereafter, the Appeals Chamber shall address the alleged errors in the Trial Chamber's assessment of the evidence relevant to its finding that orders to attack civilians were issued.

⁷⁰⁶ [Conviction Decision](#), para. 689.

⁷⁰⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 58.

⁷⁰⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 59-103.

1. *Alleged errors in the Trial Chamber's approach to finding that there was an attack directed against the civilian population*

(a) Mr Ntaganda's submissions

398. Mr Ntaganda submits that the Trial Chamber failed to find that the primary object of the attack was a civilian population.⁷⁰⁹ In his view, this invalidates all findings of guilt entered in respect of crimes against humanity.⁷¹⁰ Mr Ntaganda contends that the Trial Chamber's own findings and the evidence concerning the six operations relied upon 'show that civilians were *not* the UPC/FPLC's primary object and even less so a civilian population'.⁷¹¹ To support his position, Mr Ntaganda highlights the legitimate military and strategic aim of each of these operations.⁷¹²

399. Mr Ntaganda contends that, in determining the existence of an attack against a civilian population, the Trial Chamber limited its analysis to six military operations, namely the First and Second Operations, and the alleged assaults on Songolo, Zumbe, Komanda and Bunia.⁷¹³ He further submits that the Trial Chamber erred in finding that the fact that the UPC/FPLC may have also conducted operations during which civilians were not attacked did not impact its legal finding.⁷¹⁴ According to Mr Ntaganda, the Trial Chamber was 'required to direct its inquiry to all UPC/FPLC military operations during the relevant period'.⁷¹⁵ He argues that the Trial Chamber failed 'to consider relevant evidence regarding other UPC/FPLC operations, which shows that the Lendu civilian population was not their primary object'.⁷¹⁶

(b) The Prosecutor's submissions

400. The Prosecutor argues that Mr Ntaganda 'selectively reads the Judgment when he argues that the Trial Chamber failed to determine whether the civilian population was the *primary* object of the attack'.⁷¹⁷ She submits that 'the attack need only be *primarily* and not *exclusively* directed against the civilian population'.⁷¹⁸ In addition,

⁷⁰⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 59.

⁷¹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 59.

⁷¹¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 61 (emphasis in original).

⁷¹² [Mr Ntaganda's Appeal Brief – Part II](#), paras 62-67.

⁷¹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 60.

⁷¹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 60.

⁷¹⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 60.

⁷¹⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 69. *See also* paras 70-74.

⁷¹⁷ [Prosecutor's Response to Appeal – Part II](#), para. 75. *See also* para. 76.

⁷¹⁸ [Prosecutor's Response to Appeal – Part II](#), para. 71 (emphasis in original).

the Prosecutor contends that ‘the civilian population must be the primary *target* and not the primary *purpose* or *motive* of the attack’.⁷¹⁹ She suggests that the purpose of the attack, including any military purpose, is immaterial.⁷²⁰ The Prosecutor argues that the Trial Chamber ‘reasonably weighed the evidence related to the UPC military objectives in general and the context and purpose of the six military operations in particular’.⁷²¹ She contends that Mr Ntaganda fails to show an error in the Trial Chamber’s conclusion that the UPC deliberately targeted civilians.⁷²²

401. In relation to whether the Trial Chamber should have taken all of the UPC/FPLC’s military operations during the relevant period into account, the Prosecutor submits that ‘[t]he existence of legitimate military operations is immaterial’.⁷²³ She argues that the Trial Chamber considered Mr Ntaganda’s arguments that the UPC/FPLC did not target civilians.⁷²⁴ She contends that it did not err in its conclusion that the fact that the UPC/FPLC may have carried out operations during which civilians were not attacked had no bearing on its finding that during specific assaults civilians were deliberately attacked.⁷²⁵

(c) The victims’ observations

402. Victims Group 2 submit that Mr Ntaganda ‘misrepresents’ the Conviction Decision.⁷²⁶ In their view, there is nothing to suggest that the Trial Chamber ‘did not find beyond reasonable doubt that the civilian population was targeted as such’.⁷²⁷ They argue that the Trial Chamber ‘was guided by the correct legal standard and [...] applied it to the facts before it’.⁷²⁸

403. As to the alleged failure to accord sufficient weight to the legitimate purpose of the six military operations considered by the Trial Chamber, Victims Group 2 submit that Mr Ntaganda ‘simply disagrees with the Trial Chamber’s reasoning without demonstrating any error in the exercise of its discretion in the assessment of the

⁷¹⁹ [Prosecutor’s Response to Appeal – Part II](#), para. 71 (emphasis in original).

⁷²⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 71.

⁷²¹ [Prosecutor’s Response to Appeal – Part II](#), para. 72. *See also* paras 73-74.

⁷²² [Prosecutor’s Response to Appeal – Part II](#), para. 72.

⁷²³ [Prosecutor’s Response to Appeal – Part II](#), para. 71.

⁷²⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 78.

⁷²⁵ [Prosecutor’s Response to Appeal – Part II](#), paras 78-79.

⁷²⁶ [Observations of Victims Group 2 on Appeal – Part II](#), para. 39.

⁷²⁷ [Observations of Victims Group 2 on Appeal – Part II](#), para. 40.

⁷²⁸ [Observations of Victims Group 2 on Appeal – Part II](#), para. 40.

evidence'.⁷²⁹ They contend that Mr Ntaganda repeats arguments that were rejected at trial without demonstrating an error warranting the intervention of the Appeals Chamber.⁷³⁰ Victims Group 2 argue that '[w]hether an attack could have a legitimate military advantage or objective is irrelevant where, due to its nature, it was unlawfully directed against a civilian population'.⁷³¹ They submit that the issue is whether the way the military action was carried out was criminal and that the Trial Chamber found that it was.⁷³²

404. In relation to whether the Trial Chamber should have taken all of the UPC/FPLC's military operations during the relevant period into account, Victims Group 2 argue that Mr Ntaganda fails to demonstrate that the Trial Chamber took into account irrelevant factors or otherwise failed to take into consideration relevant ones.⁷³³ They further submit that the Trial Chamber had a 'duty to remain within the boundaries of the charges and to consider the evidence submitted to support the same'.⁷³⁴ Victims Group 2 aver that it is improper to suggest that the Trial Chamber erred by not venturing out of these parameters.⁷³⁵ They contend that Mr Ntaganda's argument regarding other UPC/FPLC operations is based on his own testimony and/or the testimony of D-0017, and the fact that the Trial Chamber ignored this evidence does not establish a 'clear error of reasoning' given its concerns regarding the credibility and trustworthiness of D-0017.⁷³⁶

(d) Mr Ntaganda's reply to the Prosecutor and response to the victims

405. Mr Ntaganda maintains that when assessing whether a civilian population is the primary object of an attack, 'the words target, purpose and objective have a similar meaning' and in this case 'the UPC/FPLC's primary aim/target/object was well identified and it was not a civilian population'.⁷³⁷ Mr Ntaganda argues that replacing the inquiry of whether the civilian population was the primary object of the attack

⁷²⁹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 42.

⁷³⁰ [Observations of Victims Group 2 on Appeal – Part II](#), para. 42.

⁷³¹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 42.

⁷³² [Observations of Victims Group 2 on Appeal – Part II](#), para. 42.

⁷³³ [Observations of Victims Group 2 on Appeal – Part II](#), para. 41.

⁷³⁴ [Observations of Victims Group 2 on Appeal – Part II](#), para. 44.

⁷³⁵ [Observations of Victims Group 2 on Appeal – Part II](#), para. 44.

⁷³⁶ [Observations of Victims Group 2 on Appeal – Part II](#), para. 45.

⁷³⁷ [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), para. 33.

with the question of whether the civilian population was intentionally targeted is unconvincing.⁷³⁸

406. In response to the observations of Victims Group 2, Mr Ntaganda submits that the Trial Chamber ‘placed undue weight on the legality of certain military operations to the detriment of the **primary object** criteria, yet failed to consider relevant factors’.⁷³⁹ He further submits that ‘the existence of a common plan and whether the civilian population was the **primary object** of an “article 7 attack” are two distinct issues’.⁷⁴⁰ In his view, Victims Group 2 confuse ‘IHL with the law applicable to crimes against humanity and ignor[e] the difference between an “article 7 attack” and the war crime of intentionally directing attacks against the civilian population’.⁷⁴¹

(e) Relevant part of the Conviction Decision

407. In the section containing the Trial Chamber’s legal findings on the contextual elements of crimes against humanity, the Trial Chamber established ‘an attack directed against any civilian population’ by determining that: (i) there was a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute; (ii) it was directed against any civilian population; and (iii) it was pursuant to or in furtherance of a State or organizational policy to commit such attack.⁷⁴²

408. In determining the existence of a course of conduct involving the multiple commission of acts referred to in article 7(1) of the Statute, the Trial Chamber referred to its findings concerning the commission of ‘several acts constituting murder, rape, sexual slavery, persecution, and forcible transfer of civilians, during the First and Second Operation’.⁷⁴³ It further referred to crimes committed during the assaults on Songolo (killing of civilians and looting of houses and shops), Zumbe (killing of civilians and burning of houses), Komanda (killing of civilians, looting of

⁷³⁸ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 34.

⁷³⁹ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 11 (emphasis in original).

⁷⁴⁰ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 13 (emphasis in original).

⁷⁴¹ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 14.

⁷⁴² [Conviction Decision](#), paras 661-690.

⁷⁴³ [Conviction Decision](#), para. 664.

goods and rape), and Bunia (killing of civilians, burning of houses and looting of goods).⁷⁴⁴

409. The Trial Chamber noted Mr Ntaganda's argument that the UPC/FPLC conducted military operations during which no attacks were directed at civilians.⁷⁴⁵ It stated:

The Defence does not refer to specific events, and the Chamber has not made factual findings going beyond the allegations of the Prosecution. In any case, the fact that the UPC/FPLC may have also conducted operations that were solely serving a military purpose and during which civilians were not attacked has no bearing on the validity of the factual findings of the Chamber that during several specific assaults, on which evidence has been presented to the Chamber, civilians were deliberately attacked.⁷⁴⁶

410. On the basis of its findings, the Trial Chamber was 'satisfied beyond reasonable doubt of the existence of a course of conduct which involved the multiple commission of acts referred to in Article 7(1)'.⁷⁴⁷

411. The Trial Chamber found that '[t]he requirement that the attack be directed against the civilian population [...] means that the civilian population must be the *primary*, as opposed to an incidental, object of the attack'.⁷⁴⁸ The Trial Chamber found that it may 'consider whether a military operation, alleged to form part of the alleged attack against a civilian population, complied with the requirements of IHL, including the principle of distinction between legitimate targets and protected persons or objects and the duty to take precautionary measures'.⁷⁴⁹ In its assessment of whether the attack was directed against a civilian population, the Trial Chamber considered several factors, including the training of the troops, the orders that were given to them, and the manner in which the crimes were committed.⁷⁵⁰ The Trial Chamber concluded 'beyond reasonable doubt that the attack was directed against a civilian population'.⁷⁵¹

⁷⁴⁴ [Conviction Decision](#), para. 665.

⁷⁴⁵ [Conviction Decision](#), para. 665.

⁷⁴⁶ [Conviction Decision](#), para. 665.

⁷⁴⁷ [Conviction Decision](#), para. 666.

⁷⁴⁸ [Conviction Decision](#), para. 668 (emphasis in original).

⁷⁴⁹ [Conviction Decision](#), para. 668.

⁷⁵⁰ [Conviction Decision](#), para. 671.

⁷⁵¹ [Conviction Decision](#), para. 672.

(f) Determination by the Appeals Chamber

(i) Introduction

412. The first four arguments raised under this ground of appeal primarily challenge the Trial Chamber's approach to the assessment of whether an attack was directed against any civilian population. The Appeals Chamber will first address alleged errors in the manner in which the Trial Chamber interpreted this contextual element as a matter of law, and will thereafter address any remaining arguments challenging the Trial Chamber's factual conclusions.

413. Article 7(1) of the Statute states in relevant part:

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]

414. Article 7(2)(a) of the Statute provides:

For the purpose of paragraph 1:

(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

415. Furthermore, paragraph 3 of the introduction to article 7 in the Elements of the Crimes states in relevant part:

'Attack directed against a civilian population' in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack.[...]

416. Article 7(1) of the Statute requires, *inter alia*, the relevant criminal acts to be committed as part of a widespread or systematic attack. An attack is further defined in article 7(2)(a) of the Statute as: (i) a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1; (ii) directed against any civilian population; and (iii) pursuant to or in furtherance of a State or organizational policy to commit such attack. These contextual elements set a threshold that exclude

‘isolated and random acts, and ordinary crimes under national law, from the ambit of the Court’s jurisdiction over crimes against humanity’.⁷⁵²

(ii) *Whether the Trial Chamber erred by failing to find that a civilian population was the primary object of the attack*

417. Mr Ntaganda argues that the Trial Chamber failed to make the ‘necessary determination’ that the civilian population was ‘the primary, as opposed to incidental, object of the attack’.⁷⁵³

418. The Appeals Chamber notes that article 7 of the Statute requires a finding that the attack was ‘directed against any civilian population’ and does not require a separate finding that the civilian population was the primary object of the attack. The Trial Chamber used this language to interpret or explain the circumstances in which an attack may be considered to be directed against the civilian population.⁷⁵⁴ It did not establish an additional legal requirement that must be satisfied. Accordingly, Mr Ntaganda’s argument is rejected.

(iii) *Whether the Trial Chamber erred by failing to attach sufficient weight to the legitimate aim and purpose of the six military operations it considered*

419. The Trial Chamber found that ‘[t]he requirement that the attack be directed against the civilian population [...] means that the civilian population must be the *primary*, as opposed to an incidental, object of the attack’.⁷⁵⁵ The Trial Chamber based its understanding on the conviction decisions in the cases of *Bemba* and *Katanga*.⁷⁵⁶

420. Mr Ntaganda argues that the ‘[Trial] Chamber erred by failing to attach sufficient weight to the legitimate aim and purpose of the six military operations it considered’.⁷⁵⁷ He suggests that, had the evidence related to these aims and purposes been considered, it would have shown ‘that civilians were not the UPC/FPLC’s

⁷⁵² C. K. Hall and K. Ambos, ‘Article 7: Crimes Against Humanity’, in Triffterer, p. 156.

⁷⁵³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 59.

⁷⁵⁴ See paragraph 411 above.

⁷⁵⁵ [Conviction Decision](#), para. 668 (emphasis in original).

⁷⁵⁶ [Conviction Decision](#), para. 668, referring to [Bemba Conviction Decision](#), para. 154; [Katanga Conviction Decision](#), para. 1105.

⁷⁵⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 61.

primary object’.⁷⁵⁸ The logic of his argument appears to be that an attack cannot be considered to be directed against the civilian population if the military operation during which the attack occurred was *primarily aimed* at a legitimate military or strategic goal.

421. The Appeals Chamber considers that this argument is based on an erroneous interpretation of the Trial Chamber’s statement that the civilian population must be the ‘primary object’ of the attack. It accepts that the phrase, read in isolation, may be susceptible to misinterpretation, specifically in the sense that it may suggest that an attack on civilians must be the primary purpose or aim of the military operation(s) during which the attack was carried out in order to satisfy the requirements of article 7 of the Statute. However, the Appeals Chamber underlines that this is not how the phrase ‘primary object’ has been understood or applied in the relevant jurisprudence.

422. In particular, the Appeals Chamber notes that, in the appeal judgment in the case of *Kunarac et al.* the ICTY Appeals Chamber set out a number of factual considerations relevant to establishing whether the civilian population is the primary object of an attack. It found:

As stated by the Trial Chamber, the expression ‘directed against’ is an expression which ‘specifies that in the context of a crime against humanity the civilian population is the primary object of the attack’. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.⁷⁵⁹

423. The Appeals Chamber further notes that, in adjudicating arguments similar to those raised by Mr Ntaganda in this case, the Appeals Chamber of the SCSL in the case of *Fofana and Kondewa* provided a similar clarification. In that case, the Trial Chamber had found that it was not established beyond reasonable doubt that the

⁷⁵⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 61 (emphasis in original omitted). *See also* paras 62-67.

⁷⁵⁹ [Kunarac et al. Appeal Judgment](#), para. 91 (footnote omitted).

civilian population was the primary object of the attack because the military operations ‘were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone’.⁷⁶⁰ The Appeals Chamber concluded that the trial chamber appeared ‘to have misdirected itself’ when applying the principle it had already stated, and found that the purpose pursued by the armed group ‘is immaterial’ in assessing whether the civilian population is the primary object of the attack.⁷⁶¹

424. In the view of the Appeals Chamber, this jurisprudence correctly outlines the analysis applicable to determining whether an attack has been directed against a civilian population. While this requirement is sometimes described in terms of whether the civilian population is the ‘primary object’ of the attack, the Appeals Chamber understands this to mean no more than that the attack targeted the civilian population.⁷⁶² Although the phrase suggests otherwise, it does not establish a legal requirement that the *main* aim or object of the relevant acts was to attack civilians. An attack directed against a civilian population may also serve other objectives or motives. The question of whether an attack was directed against a civilian population is essentially a factual issue that may be assessed by considering, *inter alia*, the criteria set out by the ICTY Appeals Chamber in the *Kunarac et al.* case.⁷⁶³

425. In the present case, the Appeals Chamber considers that the Trial Chamber properly directed itself as to the relevant considerations. It noted that: (i) ‘at the training camps, UPC/FPLC recruits were taught that the Lendu as such, including civilians, were the enemy’ and ‘sang songs inciting them to attack and kill the Lendu’; (ii) ‘[d]uring deployment, the expression ‘*kupiga na kuchaji*’, which was understood to mean attacking all the Lendu, including civilians, and to loot their property, was

⁷⁶⁰ [Fofana and Kondewa Trial Judgment](#), para. 693.

⁷⁶¹ [Fofana and Kondewa Appeal Judgment](#), paras 299-300: ‘[t]he Appeals Chamber approves the opinion of the Trial Chamber that the expression ‘directed against’ a civilian population requires that ‘the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack.’ The Appeals Chamber emphasizes that what must be primary is the civilian population as a target and not the purpose or the objective of the attack. [...] The Appeals Chamber is of the view that the Trial Chamber appears to have misdirected itself when applying the principle it had already stated, by confusing the target of the attack with the purpose of the attack. When the target of the attack is the civilian population, the purpose of that attack is immaterial’.

⁷⁶² See C. Eboe-Osuji, *Crimes Against Humanity: Directing Attacks Against A Civilian Population*, African Journal of Legal Studies 2 (2008), pp. 118-129 at p. 122.

⁷⁶³ [Kunarac et al. Appeal Judgment](#), para. 91.

commonly used in UPC/FPLC commanders' orders to soldiers'; (iii) orders were given to direct fire at civilians and forcibly transfer the civilian population; and (iv) '[d]uring the assaults that followed these orders, civilians were murdered and raped' and UPC/FPLC soldiers 'looted items belonging to civilians and destroyed their houses' in acts that 'formed part of a planned and coordinated military campaign'.⁷⁶⁴ In these circumstances, the Trial Chamber reasonably concluded that the attack was directed against a civilian population.

426. Therefore, Mr Ntaganda's argument that the '[Trial] Chamber erred by failing to attach sufficient weight to the legitimate aim and purpose of the six military operations it considered' is rejected.⁷⁶⁵

(iv) Whether the Trial Chamber erred by limiting its analysis to six military operations and failing to consider other UPC/FPLC operations and activities in determining whether an attack was directed against a civilian population

427. The Trial Chamber found that '[t]he requirement that the acts form part of a "course of conduct" indicates that Article 7 is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts'.⁷⁶⁶ It held that the criminal acts committed by the UPC/FPLC during six of the operations presented by the Prosecutor⁷⁶⁷ – the First Operation, Second Operation, as well as the assaults on Songolo, Zumbe, Komanda and Bunia – demonstrated the existence of a 'course of conduct' within the meaning of article 7 of the Statute.⁷⁶⁸ It found beyond reasonable doubt that the attack perpetrated during these operations was 'directed against a civilian population'.⁷⁶⁹

⁷⁶⁴ [Conviction Decision](#), para. 671.

⁷⁶⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 61.

⁷⁶⁶ [Conviction Decision](#), para. 662.

⁷⁶⁷ The Prosecutor had alleged that the attack against the civilian population occurred during eight military operations carried out by the UPC/FPLC (*See* [Pre-Trial Brief](#), paras 37, 40-72).

⁷⁶⁸ [Conviction Decision](#), paras 664-666. In relation to the two remaining military operations presented by the Prosecutor, the Trial Chamber found that it could not establish that acts referred to in article 7(1) of the Statute were committed ([Conviction Decision](#), sections IV.B.3; IV.B.4; IV.B.5; IV.B.6; IV.B.7; IV.B.8; IV.B.9; IV.B.10; paras 443-449 (Bunia on or about 6 to 9 August 2002) and paras 647-653 (Bunia on 6 March 2003)).

⁷⁶⁹ [Conviction Decision](#), para. 672.

428. In reaching its findings, the Trial Chamber indicated that it had not taken into account arguments raised by Mr Ntaganda ‘that the UPC/FPLC conducted its military operations on a quasi-daily basis in 2002-2003, during which no attacks were directed at civilians’.⁷⁷⁰ It found that ‘the fact that the UPC/FPLC may have also conducted [such] operations [...] has no bearing on the validity of the factual findings of the Chamber that during several specific assaults, on which evidence has been presented to the Chamber, civilians were deliberately attacked’.⁷⁷¹

429. Mr Ntaganda argues that the Trial Chamber was ‘required to direct its inquiry to all UPC/FPLC military operations during the relevant period’.⁷⁷² He suggests that the Trial Chamber erred in dismissing as irrelevant his arguments and the associated evidence regarding other UPC/FPLC operations that allegedly solely served a military purpose and during which civilians were not attacked and measures taken to prevent or repress the commission of crimes elsewhere.⁷⁷³ In his view, the Trial Chamber’s error affected its conclusion relating to two of the legal requirements for crimes against humanity, namely: (i) that the acts form part of a ‘course of conduct’; and (ii) that the attack be directed against any civilian population.⁷⁷⁴ He submits that a reasonable trier of fact could not have ‘reached the conclusion that a civilian population was the primary object of UPC/FPLC military operations during the period from August 2002 to May 2003’ based on the full record of events.⁷⁷⁵

430. The Appeals Chamber concurs with the Trial Chamber’s view that ‘[t]he requirement that the acts form part of a “course of conduct” indicates that Article 7 is

⁷⁷⁰ [Conviction Decision](#), para. 665.

⁷⁷¹ [Conviction Decision](#), para. 665.

⁷⁷² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 60.

⁷⁷³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 60, referring to [Conviction Decision](#), para. 665. See also paras 69-74, referring to an operation conducted by UPC/FPLC forces in Loga before the First Operation; an operation to re-occupy Komanda in August 2002 led by Mr Ntaganda; operations conducted in September and October 2002 in Chai/Marabo and in Kunda; numerous lawful military operations following the First Operation, conducted on three fronts, namely: between Mongbwalu and Mahagi involving mainly 505 Bde; on the Mongbwalu-Kilo-Nyangaray-Bunia axis involving mostly 409 Bde; as well as on the Bunia-Komanda-Beni axis involving mainly 201 Bde in Komanda and 9 Bn in Boga; and a two-week period of heavy fighting between the UPC/FPLC and UPDF forces / APC / and Lendu fighters around 6 March 2003. He also argues that the Trial Chamber ignored ‘the prevailing situation in Mongbwalu involving 401 Bde commanded by Emmanuel Ndugetse’ and that it was unable to conclude that crimes were committed by emerging UPC/FPLC forces during the events in Bunia from 6 to 9 August 2002.

⁷⁷⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 60 referring to [Conviction Decision](#), paras 662, 665; [Mr Ntaganda’s Appeal Brief – Part II](#), paras 69, 74.

⁷⁷⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para.74.

meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts'.⁷⁷⁶ As indicated above, this is the necessary implication of the objective criteria necessary to establish an 'attack' within the meaning of article 7 of the Statute, namely that the multiple criminal acts constituted a course of conduct amounting to a widespread or systematic attack directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack. An aggregate of random or isolated acts could not fulfil these criteria.

431. However, this does not mean that a trial chamber must have regard to the totality of the activities and military operations of a state or organisation for the purposes of establishing that there was a 'course of conduct involving the multiple commission of acts referred to in [article 7,] paragraph 1' or that the attack *targeted a civilian population* as suggested by Mr Ntaganda. The Appeals Chamber considers that these determinations can be made through an examination of the circumstances and manner in which the criminal acts were carried out. It is not necessary for this purpose to have regard to other military operations or the wider activities of the state or organisation in question, including activities that did not involve the commission of crimes. As previously stated, a single incident or operation in which multiple crimes are committed could amount to a crime against humanity provided that the relevant contextual elements are met.⁷⁷⁷

432. In the present case, the Trial Chamber found that multiple 'acts constituting murder, rape, sexual slavery, persecution, and forcible transfer of civilians' were committed during the First and Second Operations, noting, *inter alia*: (i) the killing of people during assaults and *ratissage* operations in Mongbwalu, Sayo, Nzebi, Kilo, Sangi and Kobu, and hospital patients in Bambu;⁷⁷⁸ (ii) the rape of men, women and girls in Mongbwalu, Kilo, Kobu, Sangi and Buli;⁷⁷⁹ (iii) the sexual slavery of women and girls, including an 11-year old, captured in Kobu, Sangi, Buli, and Jitchu;⁷⁸⁰ (iv) the 'crimes committed during and in the aftermath of the UPC/FPLC takeover of Mongbwalu, Sayo, Nzebi, Kilo, Nyangaray, Kobu, Sangi, Bambu, Lipri, Tsili, Jitchu,

⁷⁷⁶ [Conviction Decision](#), para. 662.

⁷⁷⁷ See paragraph 381 above.

⁷⁷⁸ [Conviction Decision](#), paras 664, 873.

⁷⁷⁹ [Conviction Decision](#), paras 664, 940.

⁷⁸⁰ [Conviction Decision](#), paras 664, 954.

Buli, and Gola, as well as following the capture of persons at the “pacification meeting” in Sangi and during related events during the “Kobu massacre”, which it found to have effectively targeted the Lendu ethnic group and constituted persecution;⁷⁸¹ and (v) the forcible transfer of persons from Mongbwalu, Lipri, Tsili, Kobu, and Bambu.⁷⁸² As set out above, the Trial Chamber also relied on its findings that: (i) recruits were taught that the Lendu as such were the enemy;⁷⁸³ (ii) the expression *kupiga na kuchaji*, understood to mean attack all Lendu, was commonly used in commanders’ orders, including those given by Mr Ntaganda, Deputy Chief of Staff in charge of Operations and Organisation, prior to the First Operation, and Salumu Mulenda, brigade commander, prior to the attacks on Mongbwalu and Kobu;⁷⁸⁴ (iii) senior commanders ordered the troops to forcibly transfer the civilian population (including Floribert Kisembo, the UPC/FPLC Chief of Staff, who instructed troops ‘to drive out all the Lendu’ prior to the Second Operation);⁷⁸⁵ and (iv) Mr Ntaganda ordered Salumu Mulenda’s brigade to fire with a grenade launcher at civilians in Sayo.⁷⁸⁶

433. The Trial Chamber also noted its findings regarding the following events: (i) in Songolo, soldiers, following orders of their commanders, including Mr Ntaganda, searched for survivors, killed or beat them regardless of whether they were combatants, killed elderly people and children, including babies, looted items from homes and shops (keeping some items for themselves but handing over more valuable items to their superiors), and burned the houses;⁷⁸⁷ (ii) in Zumbe, troops who had been informed prior to the attack that everyone was an enemy and that they should strike hard and show no mercy, killed everyone, including elderly people and women, burned down some houses, and were told that they could take only one item of the goods that had been looted;⁷⁸⁸ (iii) in Komanda, troops, who had been ordered not to kill, loot or burn houses, still carried out such acts and raped women because they believed that everyone before them was an enemy and the witness who testified to

⁷⁸¹ [Conviction Decision](#), paras 664, 1022.

⁷⁸² [Conviction Decision](#), paras 664, 1050-1051.

⁷⁸³ [Conviction Decision](#), paras 373, 671.

⁷⁸⁴ [Conviction Decision](#), paras 415, 484, 488, 561, 671.

⁷⁸⁵ [Conviction Decision](#), paras 560, 671.

⁷⁸⁶ [Conviction Decision](#), paras 508, 671.

⁷⁸⁷ [Conviction Decision](#), paras 453-454, 665.

⁷⁸⁸ [Conviction Decision](#), paras 456-457, 665.

these events was not aware of anyone being punished for them;⁷⁸⁹ and (iv) in Bunia, troops carrying out orders to kill anyone who remained behind including civilians, killed fleeing civilians, burned down houses and looted goods.⁷⁹⁰

434. Against this background and assuming the UPC/FPLC carried out several military operations during which crimes against civilians did not occur and punished crimes against civilians elsewhere, the Appeals Chamber is satisfied that this would not affect the Trial Chamber's conclusions that separately there was a course of conduct involving the multiple commission of criminal acts, which targeted civilians.

435. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in finding that 'the fact that the UPC/FPLC may also have conducted operations that were solely serving a military purpose and during which civilians were not attacked has no bearing on the validity of the factual findings of the Chamber that during several specific assaults [...] civilians were deliberately attacked'.⁷⁹¹ Mr Ntaganda's arguments are therefore rejected.⁷⁹²

(v) *Whether the Trial Chamber erred in fact in determining that an attack was directed against the civilian population*

436. Mr Ntaganda argues that the Trial Chamber erred in fact in finding that orders were issued and civilians were attacked during the First Operation, as well as during the operations in Songolo, Zumbe and Komanda.⁷⁹³ The Appeals Chamber will address these arguments below.

437. In relation to Songolo, Mr Ntaganda contends that the Trial Chamber erred 'by relying exclusively on the uncorroborated evidence of P-0088' to find that civilians were killed in the aftermath of this operation.⁷⁹⁴

438. In the relevant part of the Conviction Decision, the Trial Chamber found that orders were given 'to P-0888 to search each house for survivors', that the troops

⁷⁸⁹ [Conviction Decision](#), paras 464-465, 665.

⁷⁹⁰ [Conviction Decision](#), paras 656-657, 665.

⁷⁹¹ [Conviction Decision](#), para. 665.

⁷⁹² [Mr Ntaganda's Appeal Brief – Part II](#), paras 60, 69-74.

⁷⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 63-65.

⁷⁹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 63.

obeyed and ‘went from house to house looking for people, and survivors found hiding were beaten or killed, regardless of whether or [not] they were “combatants”’.⁷⁹⁵ It further found that ‘[s]oldiers killed both men and women, as well as the elderly and children, including babies’, ‘took items from the houses and shops’ and ‘were ordered to burn the houses which were made of straw’.⁷⁹⁶

439. In order to reach these findings, the Trial Chamber relied primarily on the testimony of P-0888 and the prior recorded statement of P-0012. The Trial Chamber relied on several aspects of P-0888’s testimony, including that soldiers ‘were told that [they] had to check each house to see if anyone was hiding in there’, and were ordered to kill civilians that were not of their ethnic group, such as the Lendu and Ngiti.⁷⁹⁷ According to P-0888, the victims included men, women, elderly persons, children, and babies.⁷⁹⁸ The Trial Chamber further relied on his testimony that all items of value were removed from the houses which were subsequently torched,⁷⁹⁹ and that the soldiers were told that the houses belonged to their enemies and that they should destroy everything that they found, all the possessions of their enemies.⁸⁰⁰ The witness further explained that they ‘were ordered to chase out civilians who did not belong to [their] tribe, namely the Lendus and Ngitis’ and they ‘beat up some of them and [...] killed others’.⁸⁰¹

440. Mr Ntaganda questions the Trial Chamber’s reliance on P-0888 on the basis that his testimony was uncorroborated and that he was a witness ‘subject of serious credibility and reliability concerns’.⁸⁰² In the latter regard, he highlights that the Trial Chamber generally treated P-0888’s testimony with caution, largely because it could not ‘exclude that P-0190 and P-0888 discussed their respective involvement with the

⁷⁹⁵ [Conviction Decision](#), para. 454.

⁷⁹⁶ [Conviction Decision](#), para. 454 (footnote omitted).

⁷⁹⁷ P-0888: [T-105](#), p. 47, lines 6-7; p. 51, lines 1-3; p. 56, lines 6-9.

⁷⁹⁸ P-0888: [T-105](#), p. 47, lines 3-4; p. 54, lines 19-25.

⁷⁹⁹ P-0888: [T-105](#), p. 47, lines 10-12.

⁸⁰⁰ P-0888: [T-105](#), p. 58, lines 11-14.

⁸⁰¹ P-0888: [T-105](#), p. 61, lines 5-6.

⁸⁰² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 63, referring to [Conviction Decision](#), paras 196-199, 137.

Court, including certain aspects of their testimony, and that those aspects may be affected by their potential interaction'.⁸⁰³

441. Despite the caution with which the Trial Chamber approached P-0088's testimony generally, it observed that he

provided detailed and mostly coherent information about many aspects related to his involvement with the UPC/FPLC, notably his training and his participation in certain operations, which are, furthermore, largely consistent with the testimony of other former UPC/FPLC soldiers who testified before the Chamber. He also clarified the basis of his knowledge, and admitted when he did not remember certain details. Recalling that, on certain aspects, the witness's testimony in this regard departed from that of P-0190, the Chamber finds that this part of his testimony is unaffected by any interaction with P-0190 and can generally be relied upon.⁸⁰⁴

In particular, the Appeals Chamber notes that the Trial Chamber found P-0888's 'testimony on the preparation and the unfolding of the assault on Songolo [...] to be detailed and credible'.⁸⁰⁵ It further noted 'that the witness appeared open and honest about his own role in the attack, as well as the limits of his, at-times incomplete, recollection of the events'.⁸⁰⁶

442. The Appeals Chamber also notes that, contrary to Mr Ntaganda's argument, the testimony of P-0888 regarding the assault on Songolo was not uncorroborated in its entirety. Together with the testimony of P-0888, the Trial Chamber relied upon the prior recorded statement of P-0012 to support its findings that soldiers went from house to house and beat or killed survivors found hiding, killing men, women and elderly persons.⁸⁰⁷ Mr Ntaganda does not refer to this additional item of evidence that indeed corroborates P-0888's testimony.

443. Mr Ntaganda also argues that the Trial Chamber erred in relying on the testimony of P-0888 to find that civilians were killed during the search for survivors after the Songolo operation, given that D-0017 and D-0300 had testified that the

⁸⁰³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 63, fn 155, quoting [Conviction Decision](#), paras 196-199, 137.

⁸⁰⁴ [Conviction Decision](#), para. 198 (footnote omitted).

⁸⁰⁵ [Conviction Decision](#), para. 452, fn. 1277.

⁸⁰⁶ [Conviction Decision](#), para. 452, fn. 1277.

⁸⁰⁷ [Conviction Decision](#), para. 454, fns 1288-1289, referring to DRC-OTP-0105-0085, at 0148, para. 347.

assault on Songolo was unsuccessful.⁸⁰⁸ The Appeals Chamber notes that the Trial Chamber found that D-0017 was at times evasive and uncooperative, gave inconsistent testimony on crucial issues, ‘displayed a tendency to negate knowledge of any potentially incriminating facts’, and generally denied the commission of crimes by the UPC/FPLC in contrast to the consistent evidence provided by a number of credible witnesses.⁸⁰⁹ It concluded that D-0017’s testimony lacked credibility and determined that it would not rely on it.⁸¹⁰ As to the credibility assessment of D-0300 (Mr Ntaganda), the Trial Chamber stated that it did not ‘find Mr Ntaganda credible when he affirms that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri and that this revolutionary ideology was governing the functioning of the UPC/FPLC’.⁸¹¹ The Trial Chamber observed that ‘this statement is clearly contradicted by the other available evidence on the record which shows that at least a part of the civilian population in Ituri, in particular the Lendu, was actually the target of violent acts by the UPC/FPLC in 2002 and 2003’.⁸¹²

444. The Trial Chamber considered the testimony of D-0017 and D-0300 in relation to the attack on Songolo but recalled that ‘it does not rely on the testimony of D-0017’ and stated that it had ‘reservations as to the credibility and reliability of this part of Mr Ntaganda’s testimony, which tends to diminish his involvement in the Songolo operation’.⁸¹³ The Trial Chamber considered that, even if, as Mr Ntaganda testified, ‘an unsuccessful assault on Songolo took place mid-2002, there is also credible and reliable evidence which shows that, around the end of August 2002, the UPC/FPLC was successful in taking control of Songolo’.⁸¹⁴ As a result, the Trial Chamber ‘mainly consider[ed] the testimony of P-0888 in relation to the successful attack on Songolo’, given its assessment that ‘P-0888 provided a credible narrative on this

⁸⁰⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 63, referring to D-0017: [T-252](#), p. 85, lines 2-7; D-0300: [T-215](#), p. 27, lines 9-18.

⁸⁰⁹ [Conviction Decision](#), paras 251-254.

⁸¹⁰ [Conviction Decision](#), para. 255.

⁸¹¹ [Conviction Decision](#), para. 261.

⁸¹² [Conviction Decision](#), para. 261.

⁸¹³ [Conviction Decision](#), para. 452, fn. 1277.

⁸¹⁴ [Conviction Decision](#), para. 452, fn. 1277.

incident, based on what he could observe and on what he personally did' during the assault.⁸¹⁵

445. In light of the evidence and reasoning provided by the Trial Chamber, the Appeals Chamber does not consider its finding that acts referred to in article 7(1) of the Statute were committed during the operation in Songolo to be unreasonable.

446. In relation to the operations in Zumbe and Komanda, Mr Ntaganda challenges the Trial Chamber's reliance on the uncorroborated testimony of P-0907 to find that crimes were committed in the aftermath of these operations.⁸¹⁶ He further submits that the Trial Chamber erred by rejecting the evidence of D-0017 in relation to both operations, referring to the testimony of D-0017 that the civilians had fled Zumbe and Komanda prior to the fighting and that he did not see civilians being killed.⁸¹⁷

447. In relation to the operation in Zumbe, the Trial Chamber found that '[t]he soldiers "killed everyone", including elderly people and women, and burned down some houses'.⁸¹⁸ It further found that '[t]he soldiers were told that they could only take one item of the goods that had been looted, and placed anti-personnel mines on paths and roads – including those leading to the river and to the market and the church'.⁸¹⁹ In order to reach these findings, the Trial Chamber relied exclusively on the testimony of P-0907.⁸²⁰

448. In relation to the assault on Komanda, the Trial Chamber found that civilians were killed, some of them 'while they were fleeing'.⁸²¹ It further found that during the *ratissage* operation carried out after the taking over of the town, civilians 'were also taken captive, while others were killed, some of them inside their homes'.⁸²² The Trial Chamber found that houses 'were burned down', 'UPC/FPLC soldiers also looted

⁸¹⁵ [Conviction Decision](#), para. 452, fn. 1277.

⁸¹⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 64. Although Mr Ntaganda refers to the operations in Zumbe and Komanda, paragraph 457 of the Conviction Decision referred to by Mr Ntaganda concerns only the operation in Zumbe.

⁸¹⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 64, referring to D-0017: [T-253](#), p. 18, lines 3-24; p. 19, lines 3-12; [T-254](#), p. 72, lines 14-20.

⁸¹⁸ [Conviction Decision](#), para. 457.

⁸¹⁹ [Conviction Decision](#), para. 457.

⁸²⁰ [Conviction Decision](#), para. 457, fns 1305-1309.

⁸²¹ [Conviction Decision](#), para. 463.

⁸²² [Conviction Decision](#), para. 464.

houses in Komanda’ and ‘raped women during the *ratissage* operation’.⁸²³ In order to reach these findings, the Trial Chamber relied on the testimony of P-0907.⁸²⁴

449. In its credibility assessment of P-0907, the Trial Chamber considered ‘P-0907 to be a credible witness’ and determined that it would ‘fully rely on his testimony’.⁸²⁵ As noted in paragraph 443 above, the Trial Chamber found that the testimony of D-0017 lacked credibility and decided not to rely on it.⁸²⁶ It did not refer to D-0017’s testimony that no civilians were killed during the assault on Zumbe. In relation to the assault on Komanda, the Trial Chamber noted that Mr Ntaganda had challenged the credibility of P-0907’s account of events arguing that it was implausible and that D-0017 had testified that he did not remember that P-0907 was there.⁸²⁷ It noted however that ‘P-0907’s account [...] [was] rich in details, notably regarding the conduct of UPC/FPLC troops towards what he referred to as “civilians”, and that the witness clearly differentiated between information he was in a position to provide and information he was not in a position to provide’.⁸²⁸ After recalling its conclusion concerning the credibility of D-0017 and P-0907, the Trial Chamber found ‘that P-0907’s evidence concerning the November 2002 UPC/FPLC assault on Komanda [was] credible and [...] relied on his account of its unfolding’.⁸²⁹

450. Considering the foregoing and in the absence of further specific arguments from Mr Ntaganda, the Appeals Chamber does not consider the Trial Chamber’s reliance on P-0907’s testimony to find that crimes were committed in the aftermath of the operations in Zumbe and Komanda to be unreasonable.

451. Finally, Mr Ntaganda challenges the Trial Chamber’s finding that crimes were committed during the First Operation.⁸³⁰ The arguments raised by Mr Ntaganda in this regard are addressed and rejected under the eighth ground of appeal.

⁸²³ [Conviction Decision](#), para. 464.

⁸²⁴ [Conviction Decision](#), paras 463-464, fns 1322, 1325-1328.

⁸²⁵ [Conviction Decision](#), para. 224.

⁸²⁶ [Conviction Decision](#), para. 255.

⁸²⁷ [Conviction Decision](#), para. 461, fn. 1314.

⁸²⁸ [Conviction Decision](#), para. 461, fn. 1314.

⁸²⁹ [Conviction Decision](#), para. 461, fn. 1314.

⁸³⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 65.

452. Considering the above, the Appeals Chamber rejects Mr Ntaganda's arguments that the Trial Chamber erred in finding that civilians were attacked during the First Operation, as well as during the operations in Songolo, Zumbe and Komanda.

2. *Alleged error in finding that orders to attack civilians were issued*

453. Mr Ntaganda contends that the Trial Chamber's finding that the course of conduct was directed against a civilian population is based on seven orders, three of which relate to the phrase *kupiga na kuchaji*.⁸³¹ Mr Ntaganda first challenges the Trial Chamber's interpretation of the phrase *kupiga na kuchaji* and thereafter raises specific errors in relation to each of the seven orders.⁸³² The Appeals Chamber will address these alleged errors below.

(a) **Alleged error regarding the meaning of the phrase *kupiga na kuchaji***

(i) *Mr Ntaganda's submissions*

454. Mr Ntaganda challenges the Trial Chamber's finding that the expression *kupiga na kuchaji* was an instruction to attack all Lendu.⁸³³ He argues that the Trial Chamber erred by relying on two witnesses – P-0907 and P-0963 – to support its finding, although nine other witnesses stated that they understood the phrase differently, generally linking it 'to military combat and seizing property after defeating the enemy'.⁸³⁴

(ii) *The Prosecutor's submissions*

455. The Prosecutor submits that Mr Ntaganda's challenge lacks merit.⁸³⁵ In her view, the Trial Chamber correctly found that the UPC/FPLC issued orders to attack all the Lendu, including civilians.⁸³⁶ She also notes that the 'orders to attack civilians were only one of several factors considered [...] to find that there was an attack against the civilian population'.⁸³⁷ The Prosecutor submits that Mr Ntaganda's 'portrayal of the phrase as a legitimate military order limited to looting enemy

⁸³¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 75.

⁸³² [Mr Ntaganda's Appeal Brief – Part II](#), paras 75-102.

⁸³³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 76-90.

⁸³⁴ [Mr Ntaganda's Appeal Brief – Part II](#), paras 78-80, *referring to* the testimony of D-0300, P-0010, P-0055, P-0016, P-0017, P-0888, P-0901, P-0768 and D-0038.

⁸³⁵ [Prosecutor's Response to Appeal – Part II](#), para. 81.

⁸³⁶ [Prosecutor's Response to Appeal – Part II](#), para. 81.

⁸³⁷ [Prosecutor's Response to Appeal – Part II](#), para. 81.

military goods is implausible given the evidence in the record, which the Chamber reasonably considered'.⁸³⁸

(iii) *The victims' observations*

456. Victims Group 2 submit that Mr Ntaganda misrepresents the Conviction Decision and the relevant testimony underpinning the finding of the Trial Chamber regarding the meaning of the expression *kupiga na kuchaji*.⁸³⁹ In their view, Mr Ntaganda misconstrues the testimony of P-0963 and P-0901 and takes the relevant portions out of context.⁸⁴⁰ Victims Group 2 submit that the Trial Chamber properly 'viewed the evidence in its entirety and in light of all the evidence in the case'.⁸⁴¹ They further contend that Mr Ntaganda does not point to any evidence that the Trial Chamber disregarded and that his 'submissions do not go beyond a disagreement with the Trial Chamber's assessment of the evidence'.⁸⁴²

(iv) *Relevant part of the Conviction Decision*

457. In the section setting out the Trial Chamber's factual findings concerning the participation of the UPC/FPLC in military operations, the Trial Chamber found that "*kupiga na kuchaji*" was an expression commonly used in UPC/FPLC commanders' orders to soldiers, and that it was understood by the soldiers to mean attacking all the Lendu, including civilians, and to loot their property'.⁸⁴³ The Trial Chamber relied on this finding to determine that the attack was directed against a civilian population.⁸⁴⁴

458. The Trial Chamber derived its interpretation of *kupiga na kuchaji* from the testimony of the following witnesses: (i) P-0010, P-0016, P-0017, P-0888, P-0901, P-0963 and D-0251, insider witnesses whom the Trial Chamber found to have 'indicated that [*kupiga na kuchaji*] was an order which meant to attack and to loot'; (ii) P-0017, P-0055, P-0901, P-0768 and P-0963, insider witnesses whom the Trial Chamber found to have 'explained that this expression was understood to mean taking possession of the opponent's belongings, but also any kind of property, including that

⁸³⁸ [Prosecutor's Response to Appeal – Part II](#), para. 82.

⁸³⁹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 47.

⁸⁴⁰ [Observations of Victims Group 2 on Appeal – Part II](#), para. 47.

⁸⁴¹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 47.

⁸⁴² [Observations of Victims Group 2 on Appeal – Part II](#), para. 48.

⁸⁴³ [Conviction Decision](#), para. 415.

⁸⁴⁴ [Conviction Decision](#), para. 671. *See also* para. 672.

belonging to “civilians”; and (iii) P-0907 and P-0963 (also referring to P-0768 in this context), insider witnesses whom the Trial Chamber found to have ‘explained that this order was understood to mean also get rid of everyone and everything, referring to all the Lendu, including civilians and their possessions’.⁸⁴⁵

(v) *Determination by the Appeals Chamber*

459. According to Mr Ntaganda, eleven witnesses testified that “*kupiga*” and “*na kuchaji*” referred respectively to the general ideas of “attack the enemy” and “take property”.⁸⁴⁶ He avers that “[d]ivergences arose as to whether taking property meant seizing the military equipment of the enemy following their defeat, or more generally referred to pillaging or looting property, including of civilians”.⁸⁴⁷ In his assessment, P-0055, D-0300 and D-0038 testified that *kupiga na kuchaji* was a military term meaning to attack and disarm the enemy, P-0010, P-0017, P-0888, P-0907, and P-0963 testified that it meant to loot, pillage or plunder, while only P-0901 and P-0768 testified that this could extend to the taking of civilian property.⁸⁴⁸ In his view, the Trial Chamber’s finding that this phrase meant to attack all the Lendu, including civilians was based only on the testimony of P-0907 and P-0963 and that this was based on a misinterpretation of their testimony.⁸⁴⁹

460. The Appeals Chamber is not persuaded by Mr Ntaganda’s argument that the evidence relied upon by the Trial Chamber was generally uniform ‘in linking the phrase to military combat and seizing property after defeating the enemy’.⁸⁵⁰ To the contrary, only two witnesses, whose evidence the Trial Chamber deemed not to be credible (D-0300 and D-0038),⁸⁵¹ testified that the phrase was limited to attacking and seizing property of only enemy combatants.

461. The remaining witnesses relied upon by the Trial Chamber broadly agreed that the phrase *kupiga na kuchaji* was an order to attack (*kupiga*) and loot (*kuchaji*).⁸⁵²

⁸⁴⁵ [Conviction Decision](#), para. 415.

⁸⁴⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 78.

⁸⁴⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 78.

⁸⁴⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 79.

⁸⁴⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 80-82.

⁸⁵⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 80.

⁸⁵¹ [Conviction Decision](#), para. 415, referring to D-0300, [T-213](#), p. 9; D-0038, [T-249](#), pp. 18-19.

⁸⁵² On this point Mr Ntaganda appears to agree with the Trial Chamber’s assessment of the evidence. [Mr Ntaganda’s Appeal Brief – Part II](#), para. 78; [Conviction Decision](#), para. 415.

When further questioned on the type of property that could be looted when this order was given, three of the witnesses, P-0017, P-0901 and P-0055 (whose evidence Mr Ntaganda seems to take out of context⁸⁵³) further explained that it was understood as an order to take possession of any kind of property, *including that of civilians*.⁸⁵⁴ D-0251, a defence witness, also indicated that the expression meant looting after a battle, although she denied ever having seen anything related to this and stated that it was not allowed.⁸⁵⁵ Based on this assessment, the Appeals Chamber cannot accept the premise of Mr Ntaganda's argument that the evidence generally linked the phrase *kupiga na kuchaji* 'to military combat and seizing property after defeating the enemy'.⁸⁵⁶

462. Mr Ntaganda also challenges the Trial Chamber's interpretation of the testimony of two 'two "key insider" witnesses', P-0907 and P-0963.⁸⁵⁷ According to the Trial Chamber, these witnesses 'explained that this order was understood to mean also get rid of everyone and everything, referring to all the Lendu, including civilians and their possessions'.⁸⁵⁸ Mr Ntaganda argues that the Trial Chamber took their testimony out of context and that 'neither witness discussed the meaning of the phrase, let alone what it meant **to other soldiers**' in the cited testimony.⁸⁵⁹

463. The Appeals Chamber accepts Mr Ntaganda's argument that the testimony of P-0907 and P-0963 regarding the meaning of *kupiga na kuchaji* arose in the context of questioning regarding instructions generally received prior to the assault on Mongbwalu.⁸⁶⁰ It further notes that, as argued by Mr Ntaganda, neither witness stated in the direct and express terms articulated by the Trial Chamber that *kupiga na kuchaji* meant to get rid of everyone and everything.⁸⁶¹ Nevertheless, the Appeals

⁸⁵³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 79, submitting that P-0055 confirmed that the term 'was a "military expression" "used in the army" which meant "attack the enemy and then pillage by taking away his weapon and all his whatever he has, uniform, military attire, bayonets and whatever they possess, in fact meaning that the enemy should be disarmed"' (emphasis in original omitted), and quoting P-0055, [T-72](#), p. 10, lines 6-13.

⁸⁵⁴ P-0017: [T-58](#), p. 56; P-0901: [T-29](#), p. 20.

⁸⁵⁵ [Conviction Decision](#), para. 415, fn. 1186, referring to D-0251: [T-260](#), pp. 27, 99-100.

⁸⁵⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 80.

⁸⁵⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 80-82.

⁸⁵⁸ [Conviction Decision](#), para. 415, fn. 1188, referring to P-0907: [T-90](#), p. 8; P-0963: [T-78](#), pp. 72-73, line 9.

⁸⁵⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 81 (emphasis in original).

⁸⁶⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 81.

⁸⁶¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 82.

Chamber considers that the Trial Chamber's interpretation of the explanation given by the two witnesses does not appear to be unreasonable when the witnesses' testimony on this point is assessed as a whole.

464. P-0907 testified that the phrase *kupiga na kuchaji* was used in instructions given prior to the operation in Mongbwalu, and that this meant that 'each one can help himself, can serve himself'.⁸⁶² When further questioned as to whether specific instructions were given regarding civilians in Mongbwalu, the witness stated that they were told that

all the people there were enemies, [...] we were told to spare no one. [...] During the first planning meeting we met in Nizi during a general parade. There was Commander Salumu, Commander Americain, Tango Romeo and many other commanders. They were all saying the same thing, "Go to Mongbwalu, strike the enemy. And all the people there in Mongbwalu are your enemies. We must strike. You must loot. You must take advantage of the situation [...] it was the same message that we received from various commanders; the brigade commanders, Commander Salumu, Christ, or other commanders. They all told us the same thing, "Piga na kuchaji, attack and loot." [...] We were told that, once again, *kupiga na kuchaji*, strike, loot, hit the enemy. And that was the same message from the very beginning right to the very end."⁸⁶³

465. P-0963 gave similar testimony to the effect that the phrase *kupiga na kuchaji* was used in instructions given prior to the attack on Mongbwalu and that this meant to 'fight and regain the place or the town and then pillage and loot'.⁸⁶⁴ The witness explained that they were expected to pillage 'material possessions'.⁸⁶⁵ When questioned as to whether instructions were issued regarding the civilian population of Mongbwalu, the witness indicated that the aim 'was to drive everyone out--well, to drive all the Lendus out' because 'it was a tribal war, and the purpose was to drive out the Lendu or eliminate all of them, loot their possessions, their various goods, possessions, financial means, occupy their houses'.⁸⁶⁶ In discussing instructions given prior to a subsequent attack during the Second Operation, the witness testified that,

⁸⁶² P-0907: [T-90](#), p. 8, lines 4-9.

⁸⁶³ P-0907: [T-90](#), p. 8, line 16 to p. 9, line 19.

⁸⁶⁴ P-0963: [T-78](#), p. 70, lines 13-17.

⁸⁶⁵ P-0963: [T-78](#), p. 73, lines 1-2.

⁸⁶⁶ P-0963: [T-78](#), p. 73, lines 3-9.

it was the same operation *piga na kuchaji*. And we were fighting the Lendu. The orders were clear: Shoot at everyone.⁸⁶⁷

466. In light of the evidence given by P-0907 and P-0963, the Appeals Chamber considers that the Trial Chamber reasonably concluded that ‘this order was understood to mean also get rid of everyone and everything, referring to all the Lendu, including civilians and their possessions’.⁸⁶⁸

467. The Trial Chamber further referred to the testimony of P-0768, an insider witness, who explained that the expression *kuchaji* was used to mean ‘attack civilians and loot the property that belonged to civilians’.⁸⁶⁹ The Appeals Chamber considers that the Trial Chamber properly evaluated this testimony together with the evidence of P-0010, P-0016, P-0888, P-0901, and P-0055 that *kupiga na kuchaji* meant to attack and loot, and in light of the clarification provided by P-0017, P-0055 and P-0901 that all property was encompassed by this order, including the property of civilians.⁸⁷⁰

468. The Appeals Chamber finds no merit in Mr Ntaganda’s submission that the evidence of P-0907 and P-0963 does not support ‘a finding that *kupiga na kuchaji* was understood **by all soldiers** as an instruction to attack “all the Lendu”’.⁸⁷¹ Both witnesses, UPC/FPLC soldiers at the relevant time, were questioned on their own understanding of the meaning of the phrase. Given that their evidence, as explained above, is largely consistent with that provided by other witnesses, the Appeals Chamber considers the Trial Chamber’s finding that the phrase ‘was understood by the soldiers to mean attacking all the Lendu, including civilians, and to loot their property’ to be reasonable.⁸⁷²

469. The Appeals Chamber further notes that the Trial Chamber’s analysis took account of contradictory evidence. It noted that D-0300 testified that the expression *kupiga na kuchaji* ‘only meant to charge at the fleeing enemy after having beaten

⁸⁶⁷ Although the Trial Chamber did not refer to this part of the witness’s testimony, the Prosecutor highlighted it in her response. See [Prosecutor’s Response to Appeal – Part II](#), para. 83, quoting P-0963: [T-79](#), p. 47, lines 7-8.

⁸⁶⁸ [Conviction Decision](#), para. 415.

⁸⁶⁹ [Conviction Decision](#), para. 415, fn. 1188, quoting P-0768: [T-33](#), pp. 64-65.

⁸⁷⁰ [Conviction Decision](#), para. 415.

⁸⁷¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 82 (emphasis in original).

⁸⁷² [Conviction Decision](#), para. 415.

them, and to take all their equipment’ and that this was confirmed by D-0038.⁸⁷³ The Trial Chamber also noted that D-0300 stated that this ‘did not involve looting, because it was forbidden to steal from the civilian population’⁸⁷⁴ and ‘that he ‘did not use the expression “*kupiga na kuchaji*” because he wanted his army to be exemplary’.⁸⁷⁵ However, after considering all the other evidence on this matter, the Trial Chamber did not find D-0300’s testimony to be credible.⁸⁷⁶

470. In light of the Trial Chamber’s analysis and the content of the evidence relied upon, the Appeals Chamber finds no merit in Mr Ntaganda’s submission that the Trial Chamber erred in its assessment of this evidence.⁸⁷⁷ The Trial Chamber assessed the relevant evidence on the matter and provided reasoning in support of its ultimate conclusion. In light of the evidence relied upon by the Trial Chamber, the Appeals Chamber deems this conclusion to be reasonable.

471. The reasonableness of the Trial Chamber’s finding is further confirmed when considered in light of other factual findings reached by the Trial Chamber relevant to the manner in which the UPC/FPLC soldiers were trained, whom they perceived the enemy to be and how they conducted attacks. The Appeals Chamber notes in particular the findings that: UPC/FPLC recruits were taught that the Lendu and Ngiti ethnic groups were the enemy;⁸⁷⁸ songs were taught to recruits as part of their training inciting soldiers to attack or kill the Lendu and that recruits would get everything, including women;⁸⁷⁹ orders were given in other terms before and during battle to fight the enemy, including Lendu civilians;⁸⁸⁰ and the UPC/FPLC committed crimes against Lendu civilians.⁸⁸¹

472. Considering the above, the Appeals Chamber rejects Mr Ntaganda’s arguments raised in paragraphs 76-90 of the appeal brief. It finds that the Trial Chamber’s conclusion that the phrase *kupiga na kuchaji* ‘was an expression commonly used in

⁸⁷³ [Conviction Decision](#), para. 415, fn. 1189, referring to D-0300: [T-213](#), p. 9; D-0038: [T-249](#), pp. 18-19.

⁸⁷⁴ [Conviction Decision](#), para. 415, fn. 1190, referring to D-0300: [T-213](#), p. 10.

⁸⁷⁵ [Conviction Decision](#), para. 415, referring to D-0300: [T-235](#), p. 57.

⁸⁷⁶ [Conviction Decision](#), para. 415.

⁸⁷⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 89.

⁸⁷⁸ [Conviction Decision](#), para. 800.

⁸⁷⁹ [Conviction Decision](#), para. 373.

⁸⁸⁰ See e.g. [Conviction Decision](#), paras 656-657.

⁸⁸¹ [Conviction Decision](#), section V.C.4.

UPC/FPLC commanders' orders to soldiers, and that it was understood by the soldiers to mean attacking all the Lendu, including civilians, and to loot their property' was reasonable.⁸⁸²

473. Mr Ntaganda also challenges the credibility of P-0963's testimony regarding the order given, suggesting that he 'lied about having travelled from Mabanga to Mongbwalu to take part in the first operation'⁸⁸³ and arguing that '[n]o reasonable Trial Chamber [...] could have found beyond reasonable doubt [...] that P-0963 was present when Salumu issued instructions prior to the fighting in Mongbwalu'.⁸⁸⁴ He argues that the Trial Chamber should not have relied on P-0963 and P-0017 as corroborating each other's testimony regarding this meeting given the divergences between their accounts as to the location of the attendees and other details of the gathering.⁸⁸⁵

474. In the Conviction Decision, the Trial Chamber found, based on the testimony of P-0017 and P-0963, that '[w]hile *en route* to Mongbwalu, the brigade led by Salumu Mulenda stopped in or near Mabanga, where Salumu Mulenda addressed the soldiers at a gathering'.⁸⁸⁶ It noted that during this gathering the soldiers received instructions and Salumu Mulenda used the expression *kupiga na kuchaji*.⁸⁸⁷ The Trial Chamber acknowledged that these witnesses gave different accounts of where the meeting took place – while P-0963 referred to the meeting taking place in Mabanga, P-0017 indicated that Lalu was the place where the gathering occurred.⁸⁸⁸ However, the Trial Chamber also noted that P-0017 did refer to Mabanga as a location where the troops stopped before arriving in Lalu.⁸⁸⁹

475. The Trial Chamber noted that P-0963 placed Mr Ntaganda at the gathering, while P-0017 did not, and accordingly made 'no finding on this matter'.⁸⁹⁰ However, '[n]oting the time passed since the events and the overall similarities between the

⁸⁸² [Conviction Decision](#), para. 415.

⁸⁸³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 83.

⁸⁸⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 87.

⁸⁸⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 83-87.

⁸⁸⁶ [Conviction Decision](#), para. 488.

⁸⁸⁷ [Conviction Decision](#), para. 488.

⁸⁸⁸ [Conviction Decision](#), para. 488, fn. 1401.

⁸⁸⁹ [Conviction Decision](#), para. 488, fn. 1401.

⁸⁹⁰ [Conviction Decision](#), para. 488, fn. 1401.

witnesses in relation to the gathering as discussed above, the [Trial] Chamber [did] not consider this inconsistency to affect the overall credibility or reliability of P-0963'.⁸⁹¹ The Appeals Chamber does not consider this conclusion to be unreasonable, particularly in light of the similarities in the witnesses' description of the gathering as explained below.

476. In concluding that P-0017 and P-0963 referred to the same gathering, the Trial Chamber noted that both witnesses: (i) placed Salumu Mulenda at the gathering as the person using the expression *kupiga na kuchaji*; (ii) testified that the soldiers were told during this meeting that the purpose of the operation was to regain Mongbwalu, a strategically important mining region that had been taken over by the APC and the Lendu, and that one of the objectives 'was to cut off the supplies to the Lendu and their headquarters, and to drive out the Lendu'; (iii) testified that they were 'briefed on the two axis nature of the planned assault'; (iv) referred to singing at the gathering; and (v) referred to Hema civilians accompanying them from the place of the meeting to Mongbwalu and helping them to transport ammunition.⁸⁹²

477. Mr Ntaganda argues that the Trial Chamber failed to consider a number of contradictions between the testimony of P-0963 and P-0017 on this issue and failed to explain why these contradictions did not impact on P-0963's credibility.⁸⁹³ For the reasons set out below, the Appeals Chamber finds that the contradictions alleged by Mr Ntaganda are not borne out by reference to the evidence that he cites.

478. First, he argues that P-0017 'identified all members of the Salumu Bde [REDACTED] he was with in Lalu [...] and did not include P-0963 as being one of them', and that he 'recalled seeing P-0963 for the first time in the context of the Second Operation when the latter arrived along with reinforcements'.⁸⁹⁴

479. The Appeals Chamber notes that P-0017 did not mention P-0963 as being part of the group in the excerpts of the testimony relied upon by Mr Ntaganda.⁸⁹⁵

⁸⁹¹ [Conviction Decision](#), para. 488, fn. 1401.

⁸⁹² [Conviction Decision](#), para. 488, fns 1402-1403.

⁸⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 85-86.

⁸⁹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 85.

⁸⁹⁵ P-0017: [T-60](#), p. 83, lines 5-10; p. 84, line 15 to p. 85, line 13; [T-61](#), p. 5, lines 6-12; p. 23, lines 5-25; [T-59](#), p. 63, line 12 to p. 64, line 9.

However, while P-0017 mentioned [REDACTED].⁸⁹⁶ P-0017 testified that [REDACTED].⁸⁹⁷ Given the context in which this question was asked, the lapse of time since the witness named the other [REDACTED] the Appeals Chamber concludes that the witness's answer to this question cannot be understood as confirming that the [REDACTED] individuals he named were the *only* members of the [REDACTED]. The Appeals Chamber therefore rejects Mr Ntaganda's argument that P-0017 'identified all members of the Salumu Bde [REDACTED] he was with in Lalu'.⁸⁹⁸ Finally, the Appeals Chamber notes that the excerpt of P-0017's testimony referred to by Mr Ntaganda related to the [REDACTED] the Second Operation does not bear out his argument that P-0017 'recalled seeing P-0963 for the first time' there.⁸⁹⁹ Rather, the witness indicated that P-0963 [REDACTED] for the purposes of that operation.⁹⁰⁰

480. Second, Mr Ntaganda refers to P-0963's inability to recall [REDACTED], according to P-0017.⁹⁰¹ The Appeals Chamber notes that P-0963 was not specifically asked about [REDACTED] in the part of the testimony referred to by Mr Ntaganda and, in any event, he expressly indicated that he did not remember [REDACTED].⁹⁰² In addition, Mr Ntaganda highlights the fact that P-0963 claimed that the [REDACTED] section did not have a commander, while P-0017 referred to [REDACTED] as a person [REDACTED].⁹⁰³ The Appeals Chamber finds that the parts of the testimony of P-0963 referred to by Mr Ntaganda were not conclusive regarding the question of whether the section had a commander. His response was that [REDACTED].⁹⁰⁴ Similarly, P-0017's response was to a question as to whether [REDACTED].⁹⁰⁵ In these circumstances, the Appeals Chamber does not find any contradiction between the witnesses' testimony on this point.

⁸⁹⁶ P-0017: [T-60](#), p. 85, lines 12-13.

⁸⁹⁷ P-0017: [T-61](#), p. 23, lines 5-25.

⁸⁹⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 85.

⁸⁹⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 85.

⁹⁰⁰ P-0017: [T-59](#), p. 63, line 12 to p. 64, line 9.

⁹⁰¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 86, fn. 227, referring to P-0963: [T-78](#), p. 68, lines 3-19;

P-0017: [T-61](#), p. 23, lines 5-25.

⁹⁰² P-0963: [T-78](#), p. 68, lines 3-19.

⁹⁰³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 86, fns 226-227, referring to P-0963: [T-82](#), p. 18, lines 9-15; p. 19, lines 3-5; P-0017, [T-61](#), p. 23, lines 5-25.

⁹⁰⁴ P-0963: [T-82](#), p. 18, lines 13-15 (emphasis added).

⁹⁰⁵ P-0017: [T-61](#), p. 23, lines 9-13.

481. Third, Mr Ntaganda submits that P-0963 ‘had no knowledge of the exchange of ammunition between Salumu’s brigade and Seyi’s forces that P-0017 described in detail’.⁹⁰⁶ The Appeals Chamber again finds that P-0963’s testimony was not as conclusive on this issue as Mr Ntaganda has portrayed it to be.⁹⁰⁷ In response to the question of whether he had information concerning the exchange, the witness’s response was [REDACTED].⁹⁰⁸ In the Appeals Chamber’s view, the witnesses’ testimony on this point does not contradict the testimony of P-0017.

482. Fourth, Mr Ntaganda argues that P-0963 referred to a [REDACTED], while P-0017 stated that they did not have these [REDACTED].⁹⁰⁹ However, the Appeals Chamber notes that, contrary to Mr Ntaganda’s assertion, P-0017 did not expressly deny that they had a [REDACTED],⁹¹⁰ and thus does not contradict P-0963’s testimony.⁹¹¹

483. Fifth, Mr Ntaganda argues that P-0963 testified that they only made one stop in Mabanga while P-0017 stated that they spent one night in Mabanga before moving to Lalu and then to Mongbwalu.⁹¹² The Appeals Chamber notes that the excerpts of P-0963’s testimony referred to by Mr Ntaganda do not bear out his argument; the witness did not testify that the troops made only one stop but rather stated that Mabanga was the first stop.⁹¹³

484. In view of the foregoing, the Appeals Chamber rejects Mr Ntaganda’s argument that the Trial Chamber should have referred to these specific aspects of P-0963’s testimony and explained why they did not impair his reliability on this issue.

485. Mr Ntaganda also argues that P-0963 testified that the [REDACTED] section travelled to Mongbwalu by vehicle while P-0017, D-0300 and P-0901 described the [REDACTED] section moving to Mongbwalu on foot.⁹¹⁴ This apparent contradiction

⁹⁰⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 86, fn. 228, referring *inter alia* to P-0017: [T-61](#), p. 24, lines 20-22.

⁹⁰⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 86.

⁹⁰⁸ P-0963: [T-82](#), p. 24, lines 10-14.

⁹⁰⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 86, fns 230, 233.

⁹¹⁰ P-0017: [T-58](#), p. 62, lines 2-10.

⁹¹¹ P-0963: [T-78](#), p. 69, lines 2-5.

⁹¹² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 86, fns 234-235.

⁹¹³ P-0963: [T-81](#), p. 82, lines 6-10.

⁹¹⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 86.

was addressed by the Trial Chamber. It noted that P-0963 had initially ‘testified that he travelled from Bunia to Mongbwalu in a vehicle [...], [but] later clarified that the group advanced on foot with vehicles travelling behind them’.⁹¹⁵ It also found that there were inconsistencies in the evidence on the question of whether it was possible for vehicles to navigate the road to Mongbwalu.⁹¹⁶ It concluded that it was ‘unable to make a finding on the use of vehicles in this context’, but did ‘not consider this issue to affect the overall credibility of P-0963’.⁹¹⁷ The Appeals Chamber notes that all of the witnesses to whose testimony Mr Ntaganda refers, including the testimony of P-0963, are consistent on the point that the troops advanced on foot to Mongbwalu, and differ only on the question of where the vehicles were left or whether they took another route.⁹¹⁸ In these circumstances, the Appeals Chamber considers that the Trial Chamber reasonably concluded that the divergence in the various accounts of how weapons were transported to Mongbwalu does not impact on P-0963’s credibility.

486. Finally, Mr Ntaganda argues that the Trial Chamber failed to address the most important contradiction between the testimony of P-0017 and P-0963 regarding the meeting prior to the attack on Mongbwalu, which is that, ‘according to P-0017’s version of what was said at the meeting, nobody suggested that civilians were to be attacked’.⁹¹⁹ The Appeals Chamber considers that Mr Ntaganda’s argument is without merit. As explained above, P-0017’s testimony was reasonably relied upon to determine that the phrase *kupiga na kuchaji* was understood as an order to take possession of any kind of property, including that of civilians in the context in which it was used in the UPC/FPLC.⁹²⁰ Specifically when discussing instructions received during this gathering, P-0017 referred to capturing Mongbwalu, receiving money, sleeping on mattresses, having food, having women and forgetting ‘all the suffering

⁹¹⁵ [Conviction Decision](#), para. 487, fn. 1400.

⁹¹⁶ [Conviction Decision](#), para. 487, fn. 1400, *referring to* P-0017, [T-61](#), pp. 44-45; P-0901, [T-31](#), p. 63.

⁹¹⁷ [Conviction Decision](#), para. 487, fn. 1400.

⁹¹⁸ P-0963: [T-78](#), p. 69, lines 16-17; [T-82](#), p. 4, line 16 to p. 6, line 13; P-0017: [T-61](#), p. 32, line 25 to p. 33, line 1; P-0901: [T-31](#), p. 62, line 15 to p. 63, line 3; D-0300: [T-217](#), p. 24, line 12 to p. 26, line; p. 32 line 19 to p. 33, line 4; [T-217](#), p. 32, line 19 to p. 33, line 4.

⁹¹⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 87.

⁹²⁰ [Conviction Decision](#), para. 415, fn.1187, *referring to* P-0017: [T-58](#), p. 56.

that they had endured'.⁹²¹ It was in this context that P-0017 referred to the expression *kupiga na kuchaji* being used by Salumu Mulenda.⁹²²

487. The Appeals Chamber notes that both P-0963 and P-0017 referred to the phrase *kupiga na kuchaji* being used by Salumu Mulenda prior to the attack on Mongbwalu and their testimony was relied upon by the Trial Chamber to support its finding that this order meant that they should attack and loot.⁹²³ The testimony of both witnesses was relied upon to support the Trial Chamber's finding that the order related to 'the opponent's belongings, but also any kind of property, including that belonging to "civilians"'.⁹²⁴ The Appeals Chamber considers that P-0963's further clarification, in response to a question as to whether they had received any instructions regarding the civilian population, that they were instructed to drive all the Lendu out or eliminate all of them, and loot their possessions is not inconsistent with P-0017's testimony.

488. In view of the foregoing, the Appeals Chamber rejects Mr Ntaganda's argument that '[n]o reasonable Trial Chamber [...] could have found beyond reasonable doubt that P-0017 and P-0963 received instructions at the same meeting and that P-0963 was present when Salumu issued instructions prior to the fighting in Mongbwalu'.⁹²⁵

(b) Alleged errors in the Trial Chamber's consideration of the orders/instructions

489. Mr Ntaganda argues that the Trial Chamber erred in finding that seven orders to attack civilians were issued.⁹²⁶ He submits generally that the Trial Chamber erroneously assessed the evidence and then raises specific errors in relation to each of the seven orders.⁹²⁷ His arguments in relation to three of these orders are set out in detail elsewhere in his appeal brief and they are addressed by the Appeals Chamber in conjunction with those (sub)grounds of appeal.⁹²⁸ The Appeals Chamber will address

⁹²¹ [Conviction Decision](#), para. 488, fn. 1403, quoting P-0017: [T-58](#), p. 54.

⁹²² [Conviction Decision](#), para. 488, fn. 1405, referring to P-0017: [T-58](#), p. 54.

⁹²³ [Conviction Decision](#), para. 415, fn. 1186, referring to P-0017: [T-58](#), pp. 54-55; P-0963: [T-78](#), p. 70.

⁹²⁴ [Conviction Decision](#), para. 415, fn. 1187, referring to P-0017: [T-58](#), pp. 56; P-0963: [T-78](#), pp. 72-73; [T-79](#), pp. 19, 79.

⁹²⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 87.

⁹²⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 91-102.

⁹²⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 91-102.

⁹²⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 93-95, challenging the Trial Chamber's findings that: (i) Mr Ntaganda ordered the troops to attack using the phrase *kupiga na kuchaji* the night before leaving Bunia for Mongbwalu; (ii) Salumu Mulenda gave an order to attack all the Lendu using the phrase *kupiga na kuchaji* while *en route* to Mongbwalu; and (iii) Mr Ntaganda gave an order to attack

the remaining arguments below, beginning with general arguments on evidentiary matters that concern all of the orders before moving on to the arguments that are specific to each of the challenged orders.

(i) *Alleged erroneous assessment of the evidence*

490. Mr Ntaganda submits that the '[Trial] Chamber's reliance on seven orders/instructions is infected by its erroneous assessment of the evidence'.⁹²⁹ He maintains that the Trial Chamber failed to consider: (i) its own finding concerning the difficulty in identifying Lendu combatants as they did not have a common military uniform and included women and children; and (ii) 'evidence provided by both P-0017 and P-0963 concerning the firing procedure during the fighting in Mongbwalu, which demonstrates that orders were issued to target military objectives and enemy forces, which is inconsistent with attacking civilians'.⁹³⁰ The Prosecutor responds that any difficulty in distinguishing combatants and non-combatants 'does not justify ignoring the principle of distinction and targeting *all* Lendu'.⁹³¹ She further submits that the fact that orders were issued to target military objectives does not negate that orders to attack civilians were also issued.⁹³²

491. The Appeals Chamber considers that the difficulty in distinguishing combatants from civilians may be indeed a relevant consideration when determining whether the civilian population as such was the object of the attack. At the same time, it accepts the Prosecutor's submission that such difficulties cannot justify the targeting of an entire ethnic group without distinction between civilians and combatants. The relevance of this consideration to each of the specific factual findings relied upon by

the Lendu without distinguishing between civilians and militia at Camp Goli. The first challenge relates to paragraph 484 of the Conviction Decision and the relevant arguments are addressed by the Appeals Chamber in the section on the meaning of the phrase *kupiga na kuchaji* above and in the fourteenth ground of appeal below. The second challenge relates to paragraph 488 of the Conviction Decision and the relevant arguments are addressed by the Appeals Chamber in the section on the meaning of the phrase *kupiga na kuchaji* above. Mr Ntaganda adds that 'P-0017 and P-0963's evidence concerning the [REDACTED] firing procedure during the fighting in Mongbwalu demonstrates the opposite' and references arguments made under the eighth ground of appeal. However, he does not explain how the arguments under the eighth ground of appeal relate to the instructions given *en route* to Mongbwalu. Therefore, this aspect of his argument is dismissed *in limine*. The third challenge relates to paragraph 493 of the Conviction Decision and the relevant arguments are addressed by the Appeals Chamber in the section on the fourteenth ground of appeal below.

⁹²⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 91.

⁹³⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 91.

⁹³¹ [Prosecutor's Response to Appeal – Part II](#), para. 89 (emphasis in original).

⁹³² [Prosecutor's Response to Appeal – Part II](#), para. 89.

the Trial Chamber is assessed on a case-by-case basis where it is specifically raised by Mr Ntaganda below.

492. As to Mr Ntaganda's second argument that the Trial Chamber ignored evidence that orders were issued to target military objectives and enemy forces,⁹³³ the Appeals Chamber considers that, as argued by the Prosecutor,⁹³⁴ the fact that such orders may have been issued has no bearing on the question of whether orders to attack civilians were issued during the course of the attack.

(ii) Order to fire a grenade launcher in Sayo

493. Mr Ntaganda challenges the Trial Chamber's finding that he gave an order to Salumu Mulenda's brigade '[a]s the operation in Sayo was nearing its end'⁹³⁵ to 'fire with a grenade launcher at the slope of the mountain where a number of men and women wearing civilian clothing were walking in a single file' and that the order was executed.⁹³⁶

(a) Mr Ntaganda's submissions

494. Mr Ntaganda refers to the arguments raised under the eighth ground of appeal to submit that the Trial Chamber erred in finding that he ordered that a grenade launcher be fired at a slope where people were walking in single file.⁹³⁷ He contends that the '[Trial] Chamber failed to consider the exceptionality of this order' in the sense that '[i]f there had been an attack directed against the civilian population at the time, it can be presumed that many such orders to fire on civilians would have been issued'.⁹³⁸ Mr Ntaganda submits that the '[Trial] Chamber also erred by failing to consider P-0017's evidence related to the [REDACTED] firing procedure and the orders issued before this order was given'.⁹³⁹

⁹³³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 91.

⁹³⁴ [Prosecutor's Response to Appeal – Part II](#), para. 89.

⁹³⁵ [Conviction Decision](#), para. 507.

⁹³⁶ [Conviction Decision](#), para. 508.

⁹³⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 96.

⁹³⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 96.

⁹³⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 96.

(b) The Prosecutor’s submissions

495. The Prosecutor refers to her submissions raised in response to arguments advanced under the eighth ground of appeal on which Mr Ntaganda relies.⁹⁴⁰ In addition, she maintains that the Trial Chamber reasonably found that Mr Ntaganda ordered soldiers to fire a grenade launcher at fleeing civilians.⁹⁴¹ In this regard, she refers to the evidence of P-0010, P-0963, P-0768 and P-0017 on the issuance of orders to attack civilians during the First Operation to show that such an order was not exceptional.⁹⁴²

(c) Relevant part of the Conviction Decision

496. In the context of discussing the operation in Sayo, the Trial Chamber found that ‘Mr Ntaganda issued an order to Salumu Mulenda’s brigade to fire with a grenade launcher at the slope of the mountain where a number of men and women wearing civilian clothing were walking in a single file’.⁹⁴³ The Trial Chamber relied upon this finding to determine that ‘orders were given to direct fire at civilians’.⁹⁴⁴ This was one of the factors relied upon by the Trial Chamber to determine that an attack was directed against a civilian population.⁹⁴⁵

(d) Determination by the Appeals Chamber

497. The Appeals Chamber notes that Mr Ntaganda refers to arguments raised under the eighth ground of appeal in relation to this order.⁹⁴⁶ These arguments together with his arguments on the [REDACTED] firing procedure are addressed and rejected in the determination of the eighth ground of appeal.⁹⁴⁷ Regarding the orders issued before the order to fire a grenade launcher in Sayo was given, Mr Ntaganda does not explain what orders he is referring to or their significance in this context. Therefore, the Appeals Chamber dismisses these arguments *in limine*.

⁹⁴⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 89, fn. 386.

⁹⁴¹ [Prosecutor’s Response to Appeal – Part II](#), para. 89.

⁹⁴² [Prosecutor’s Response to Appeal – Part II](#), para. 89, fn. 387.

⁹⁴³ [Conviction Decision](#), para. 508 (footnote omitted).

⁹⁴⁴ [Conviction Decision](#), para. 671.

⁹⁴⁵ [Conviction Decision](#), paras 671-672.

⁹⁴⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 96.

⁹⁴⁷ See paragraphs 739-745 below.

498. As to Mr Ntaganda's argument concerning the alleged exceptionality of the order, the Appeals Chamber notes that the evidence and related findings of the Trial Chamber do not support Mr Ntaganda's contention that an order to attack civilians was exceptional. The Appeals Chamber notes that the Trial Chamber also relied on its finding that the phrase *kupiga na kuchaji* 'was commonly used in UPC/FPLC commanders' orders to soldiers' to support its finding that an attack was directed against the civilian population.⁹⁴⁸ The Appeals Chamber therefore rejects Mr Ntaganda's argument that the Trial Chamber should have considered the exceptionality of this order.

(iii) Alleged error in relation to Floribert Kisembo's briefing in Mongbwalu on or about 17 February 2003

499. Mr Ntaganda challenges the Trial Chamber's finding that Floribert Kisembo gave a briefing in Mongbwalu on or about 17 February 2003 concerning the 'objectives of the upcoming UPC/FPLC assault on Kobu' during which he stated that they were to '[d]rive out all the Lendu'.⁹⁴⁹

(a) Mr Ntaganda's submissions

500. Mr Ntaganda submits that the '[Trial] Chamber erred in relying on P-0963's understanding of this order, in support of the proposition that civilians were to be targeted'.⁹⁵⁰ He contends that the Trial Chamber erred in relying on P-0963's testimony because: (i) it 'omitted to consider the reliability of P-0963's evidence on this issue, which is directly related to his lie about the instructions he claimed were given by Mr. Ntaganda in Mabanga'; (ii) 'on its face, the order reveals a military operation directed at lawful military objectives'; and (iii) it was unreasonable to 'conclude simply on the basis of the omission of the word "combatant" in Kisembo's instructions' that Lendu civilians were to be targeted.⁹⁵¹ He submits that '[a]nother reasonable and plausible interpretation is that Kisembo was referring to the Lendu

⁹⁴⁸ [Conviction Decision](#), para. 671.

⁹⁴⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 97, referring to [Conviction Decision](#), paras 560, 671, 1066.

⁹⁵⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 98.

⁹⁵¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 98.

taking part in the hostilities’, referring in this regard to the testimony of P-0963, P-0017, D-0017, and P-0758.⁹⁵²

(b) The Prosecutor’s submissions

501. The Prosecutor responds that the Trial Chamber carefully assessed the testimony of P-0963 on Kisembo’s briefing.⁹⁵³ The Prosecutor further contends that the order ‘does not on its face reveal a legitimate military objective’ and that Mr Ntaganda’s interpretation that Kisembo meant all Lendu *combatants* is not supported by the evidence’.⁹⁵⁴ She finally submits that ‘the testimony of UPC insiders (that they fought some UPC combatants) does not undermine the Chamber’s finding that Kisembo ordered his troops to attack *all* Lendu and that crimes were indeed committed against civilians as a result’.⁹⁵⁵

(c) Relevant part of the Conviction Decision

502. In the section of the Conviction Decision describing the planning of the Second Operation, the Trial Chamber found that ‘Floribert Kisembo spoke to troops about the objectives of the upcoming UPC/FPLC assault on Kobu’ during a briefing in Mongbwalu, on or about 17 February 2003, and ‘said that they were going to Kobu to destroy Lendu headquarters, bring back the lost weapons system, open the road, and that they were to drive out all the Lendu’.⁹⁵⁶ The Trial Chamber relied upon this finding, *inter alia*, to determine that orders to attack all the Lendu, including civilians, were commonly used during the deployment of the troops.⁹⁵⁷ This was one of the factors relied upon by the Trial Chamber to determine that an attack was directed against a civilian population.⁹⁵⁸

(d) Determination by the Appeals Chamber

503. The Appeals Chamber notes that the Trial Chamber relied exclusively on the testimony of P-0963 to reach its finding that Kisembo issued an order to attack the

⁹⁵² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 98.

⁹⁵³ [Prosecutor’s Response to Appeal – Part II](#), para. 90.

⁹⁵⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 90 (emphasis in original).

⁹⁵⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 90 (emphasis in original).

⁹⁵⁶ [Conviction Decision](#), para. 560.

⁹⁵⁷ [Conviction Decision](#), para. 671, fn. 2124.

⁹⁵⁸ [Conviction Decision](#), paras 671-672.

Lendu, including civilians.⁹⁵⁹ The Trial Chamber referred to P-0963's understanding 'that the Lendu "civilians" at Kobu, Bambu, and Lipri were to be driven out by the UPC/FPLC, and that it was up to the UPC/FPLC to "occupy" the location, and for "civilians" to either leave or be killed'.⁹⁶⁰ In its assessment of the evidence of P-0963, the Trial Chamber noted that the witness 'had a solid basis of knowledge in relation to the briefing and gave detailed testimony on this point'.⁹⁶¹

504. With respect to the argument that P-0963 lied about an order given by Mr Ntaganda while *en route* to Mongbwalu,⁹⁶² the Appeals Chamber notes that it has addressed and rejected these arguments in the context of determining the reasonableness of the Trial Chamber's finding on the meaning of the phrase *kupiga na kuchaji*.⁹⁶³

505. In relation to Mr Ntaganda's argument that 'on its face, the order reveals a military operation directed at lawful military objectives' and that Kisembo was referring to driving out the Lendu combatants rather than civilians,⁹⁶⁴ the Appeals Chamber considers that the alleged order, examined in isolation, could be interpreted in this way. However, the order must be interpreted in context, taking into account other relevant findings of the Trial Chamber. In this regard, the Appeals Chamber notes, in particular, the Trial Chamber's findings that UPC/FPLC recruits were taught that the Lendu and Ngiti ethnic groups were the enemy;⁹⁶⁵ songs were taught to recruits as part of their training inciting soldiers to attack or kill the Lendu;⁹⁶⁶ and the UPC/FPLC committed crimes against Lendu civilians.⁹⁶⁷ Specifically in relation to this order, the Appeals Chamber considers it relevant that the Trial Chamber found that crimes against civilians were subsequently committed during the assault on

⁹⁵⁹ [Conviction Decision](#), para. 560, fns 1701-1703.

⁹⁶⁰ [Conviction Decision](#), para. 560.

⁹⁶¹ [Conviction Decision](#), para. 560, fn. 1701.

⁹⁶² [Mr Ntaganda's Appeal Brief – Part II](#), para. 98.

⁹⁶³ See paragraphs **Error! Reference source not found.** 479-484 above.

⁹⁶⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 98.

⁹⁶⁵ [Conviction Decision](#), para. 800.

⁹⁶⁶ [Conviction Decision](#), para. 373.

⁹⁶⁷ [Conviction Decision](#), section V.C.4.

Kobu.⁹⁶⁸ Viewed in this context, the Appeals Chamber finds that the Trial Chamber's interpretation of this order was reasonable.

506. Finally, as noted by the Prosecutor,⁹⁶⁹ Mr Ntaganda's reference to insider witnesses who testified that they fought combatants does not *per se* undermine the Trial Chamber's findings that Kisembo ordered the troops to attack civilians and that these orders were executed with the resulting commission of crimes against Lendu civilians.

507. In view of the foregoing, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that 'Floribert Kisembo spoke to troops about the objectives of the upcoming UPC/FPLC assault on Kobu', during a briefing in Mongbwalu on or about 17 February 2003, and 'said that [...] they were to drive out all the Lendu'.⁹⁷⁰

(iv) Alleged error in relation to Salumu Mulenda's briefing to the troops in Kilo in the context of the Second Operation

508. Mr Ntaganda challenges the Trial Chamber's finding regarding a briefing that Salumu Mulenda gave to UPC/FPLC troops in Kilo, in the context of the Second Operation, in which he explained that they would have 'an operation in Kobu and at the same time in Lipri and Bambu in order to destroy that triangle which was a pocket of resistance to the UPC'.⁹⁷¹ The Trial Chamber found that this was understood by P-0017 as an instruction to attack the enemy, including civilians.⁹⁷²

(a) Mr Ntaganda's submissions

509. Mr Ntaganda contends that the Trial Chamber erred in relying on the testimony of P-0017's testimony to find that Salumu Mulenda issued an order to attack civilians during a briefing in Kilo in the context of the Second Operation in respect of this order.⁹⁷³ He submits that the Trial Chamber failed to assess 'P-0017's understanding

⁹⁶⁸ See e.g. [Conviction Decision](#), paras 577-579, 1199.

⁹⁶⁹ [Prosecutor's Response to Appeal – Part II](#), para. 90.

⁹⁷⁰ [Conviction Decision](#), para. 560.

⁹⁷¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 99, referring to [Conviction Decision](#), paras 558, 671, 1065.

⁹⁷² [Conviction Decision](#), paras 558, 1065.

⁹⁷³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 99.

of this order in the light of’: (i) ‘his testimony concerning the instructions issued by Salumu in Lalu before the First Operation’ (considered above and under the eight ground of appeal); (ii) ‘his evidence on the [REDACTED] firing procedure and the orders issued to him during the fighting in Mongbwalu’; and (iii) ‘his knowledge that Lendu combatants included women and children and that they did not wear uniforms’.⁹⁷⁴ He further submits that the Trial Chamber failed to consider that P-0017 is an accomplice witness and that, ‘it was only when pushed to provide more detail on who was viewed as the enemy that [he] provided his own subjective interpretation’ without providing evidence of ‘any express order [...] to attack Lendu civilians’.⁹⁷⁵

(b) The Prosecutor’s submissions

510. The Prosecutor responds that the ‘[Trial] Chamber reasonably relied on P-0017 to conclude that prior to the Second Operation, Mulenda ordered the UPC troops to attack civilians’.⁹⁷⁶ She submits that the fact that the witness ‘began his answer from his own perspective, and later testified that the UPC understood that all Lendu were enemies, does not diminish the reliability of his testimony’.⁹⁷⁷

(c) Relevant part of the Conviction Decision

511. In the section describing the planning of the Second Operation, the Trial Chamber found that ‘[i]n a briefing to UPC/FPLC troops in Kilo prior to the Second Operation, Salumu Mulenda explained that the objective of the operation in Kobu, Lipri, and Bambu was to “destroy that triangle which was a pocket of resistance to the UPC”’.⁹⁷⁸ It noted that this order was understood by P-0017, a UPC/FPLC soldier present during the briefing, to mean destroying the enemy force occupying these three places, including ‘all individuals belonging to the Lendu ethnic group, whether a child, a woman or a man’.⁹⁷⁹ The Trial Chamber relied upon this finding to determine that ‘Salumu Mulenda instructed the troops to perform acts as a result of which the displacement of a significant proportion of the civilian population [...] would

⁹⁷⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 100.

⁹⁷⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 101.

⁹⁷⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 91.

⁹⁷⁷ [Prosecutor’s Response to Appeal – Part II](#), para. 91.

⁹⁷⁸ [Conviction Decision](#), para. 558.

⁹⁷⁹ [Conviction Decision](#), para. 558.

necessarily occur.⁹⁸⁰ This was one of the factors relied upon by the Trial Chamber to determine that an attack was directed against a civilian population.⁹⁸¹

(d) Determination by the Appeals Chamber

512. The Appeals Chamber notes that the Trial Chamber's finding concerning the challenged order was solely based on P-0017's testimony.⁹⁸² Mr Ntaganda argues that 'P-0017's subjective interpretation of otherwise legitimate military orders' should not have been relied upon by the Trial Chamber to make this finding.⁹⁸³

513. The Appeals Chamber notes that, when asked what he understood by the word 'destroy', P-0017 referred to destroying the enemy force that occupied Kobu, Lipri and Bambu.⁹⁸⁴ When asked who were the Lendu that were viewed as the enemy, the witness responded that, for him, 'all the Lendu, whether man or woman [...] [w]hen they were part of the ethnic group called Lendu it was considered as an enemy of the UPC, including children'.⁹⁸⁵ This understanding was reiterated by the witness when he was asked who were considered to be the enemies in the context of discussing orders given to shoot at fleeing persons.⁹⁸⁶ In response, he stated, '[i]n that region we are referring simply to the Lendu' and no distinction was made between civilians or fighters.⁹⁸⁷

514. The Appeals Chamber notes that P-0017 was not alone in his understanding that the Lendu, including Lendu civilians, were the 'enemy'. The Trial Chamber found that 'recruits were taught that the Lendu and the Ngiti were the enemy' during their training and that songs inciting the soldiers to attack and kill the Lendu were taught to the recruits.⁹⁸⁸ These findings were based on the evidence of P-0963, P-0769, P-0888,

⁹⁸⁰ [Conviction Decision](#), para. 1094.

⁹⁸¹ [Conviction Decision](#), para. 671, fn. 2126.

⁹⁸² [Conviction Decision](#), para. 558, fns 1695-1699. The Trial Chamber also refers to the testimony of P-0901 in footnote 1695 to support the finding concerning the objective as explained by Salumu Mulenda during the briefing: P-0901: [T-29](#), p. 17.

⁹⁸³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 99.

⁹⁸⁴ P-0017: [T-59](#), p. 61, lines 20-22.

⁹⁸⁵ P-0017: [T-59](#), p. 62, lines 24-25.

⁹⁸⁶ P-0017: [T-63](#), p. 41, lines 7-13.

⁹⁸⁷ P-0017: [T-63](#), p. 41, lines 7-17.

⁹⁸⁸ [Conviction Decision](#), para. 373, where the Trial Chamber held that '[s]ongs were taught to recruits as part of their training,[...] [including] songs [which] incited soldiers to attack or kill the Lendu [...]'. The lyrics in another song suggested that soldiers would "get" everything, including women, "for free"

P-0907, P-0758, P-0016 and P-0016.⁹⁸⁹ The Trial Chamber also found that ‘the unfolding of its military operations demonstrates how the UPC/FPLC was not only attempting to chase away the RCD-K/ML, but also the Lendu’.⁹⁹⁰ When interpreted in context, the Appeals Chamber considers the Trial Chamber’s finding on the significance of the order to be reasonable and rejects Mr Ntaganda’s argument in this regard.⁹⁹¹

515. The Appeals Chamber considers that Mr Ntaganda’s argument that the Trial Chamber failed to consider P-0017’s testimony in light of his testimony concerning the instructions issued by Salumu Mulenda in or near Mabanga before the First Operation (the second order) is without merit.⁹⁹² The Appeals Chamber notes that it has rejected Mr Ntaganda’s interpretation of P-0017’s testimony regarding the instruction given in or near Mabanga.⁹⁹³ Given that P-0017’s understanding of the order given in Kilo corresponds to his understanding of the order given in or near Mabanga, the Appeals Chamber cannot see how consideration of one in light of the other would have altered the Trial Chamber’s conclusion.

516. Mr Ntaganda’s arguments regarding P-0017’s testimony on the firing procedure of [REDACTED] during the fighting in Mongbwalu and his challenges to the Trial Chamber’s reliance on the evidence of an accomplice witness are addressed and rejected below under the eighth ground of appeal.⁹⁹⁴

517. Finally, the Appeals Chamber is not persuaded by Mr Ntaganda’s submission that the Trial Chamber should have assessed P-0017’s understanding of the order in light of ‘his knowledge that Lendu combatants included women and children and that they did not wear uniforms’.⁹⁹⁵ The witness clearly stated that his understanding was that the Lendu ethnic group as such, without distinction between civilians or fighters,

in the UPC/FPLC. During their training, recruits were taught that the Lendu and the Ngiti were the enemy’ (footnotes omitted).

⁹⁸⁹ [Conviction Decision](#), para. 373.

⁹⁹⁰ [Conviction Decision](#), para. 688.

⁹⁹¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 101.

⁹⁹² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 100.

⁹⁹³ See paragraphs 486-488/480 above.

⁹⁹⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 100-101. See paragraphs 732-736, 743-745 below.

⁹⁹⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 100.

was the enemy.⁹⁹⁶ Whether Lendu combatants could have been easily distinguished from the civilians has no bearing on this understanding.

518. In view of the foregoing, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that ‘[i]n a briefing to UPC/FPLC troops in Kilo prior to the Second Operation, Salumu Mulenda explained that the objective of the operation in Kobu Lipri, and Bambu was to “destroy that triangle which was a pocket of resistance to the UPC”’⁹⁹⁷ and that this was understood by P-0017 to mean ‘destroying [the] enemy’, which ‘included [...] all individuals belonging to the Lendu ethnic group, whether a child, a woman or a man’.⁹⁹⁸

(v) *Alleged error in relation to Salumu Mulenda’s instructions in Kilo prior to the assault on Kobu*

519. The Appeals Chamber notes that Mr Ntaganda’s appeal brief does not specifically identify the factual finding challenged with reference to the Conviction Decision.⁹⁹⁹ However, from the description he provides, the Appeals Chamber understands his arguments to concern the Trial Chamber’s finding that Salumu Mulenda gave orders including the phrase *kupiga na kuchaji* in Kilo on or about the morning of 18 February 2003 before the assault on Kobu, and that these orders were understood by P-0963 as orders to ‘[s]hoot at everyone’.¹⁰⁰⁰

(a) Mr Ntaganda’s submissions

520. Mr Ntaganda challenges the Trial Chamber’s reliance on P-0963’s testimony to find that instructions using the phrase *kupiga na kuchaji* were issued on or about 18 February 2003 during a briefing to the troops in Kilo.¹⁰⁰¹ He submits that the ‘[Trial] Chamber failed to consider the reliability of P-0963’s evidence on this issue which is directly related to his lie about the instructions he claimed were given by Mr. Ntaganda in Mabanga’.¹⁰⁰² Mr Ntaganda further contends that the ‘[Trial] Chamber erred in relying on P-0963’s subjective understanding of the expression’ and

⁹⁹⁶ P-0017: [T-63](#), p. 41, lines 10-17; [T-59](#), p. 62, lines 24-25.

⁹⁹⁷ [Conviction Decision](#), para. 558.

⁹⁹⁸ [Conviction Decision](#), paras 558, 1065.

⁹⁹⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

¹⁰⁰⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102; [Conviction Decision](#), para. 561.

¹⁰⁰¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

¹⁰⁰² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

in failing ‘to consider P-0963’s evidence about the [REDACTED] firing procedure and the orders supposedly issued to him during the fighting in Mongbwalu’.¹⁰⁰³ Finally, Mr Ntaganda contends that the ‘[Trial] Chamber failed to consider P-0963’s knowledge that Lendu combatants included women and children and that they did not wear uniforms’, as well as his status as an accomplice witness.¹⁰⁰⁴

(b) The Prosecutor’s submissions

521. The Prosecutor responds that the Trial Chamber correctly found that Salumu Mulenda ordered UPC/FPLC troops to attack civilians during a briefing in Kilo on or about 18 February 2003.¹⁰⁰⁵ She responds that the Trial Chamber reasonably relied on P-0963’s testimony to make this finding and that Mr Ntaganda ‘merely disagrees with the Chamber’s interpretation of the evidence’.¹⁰⁰⁶

(c) Relevant part of the Conviction Decision

522. In the section describing the planning of the Second Operation, the Trial Chamber found that Salumu Mulenda ‘gave orders, including “[ku]piga na kuchaji”’ during a briefing in Kilo on or about 18 February 2003, and that P-0963 understood these orders to mean ‘[s]hoot at everyone’.¹⁰⁰⁷ The Trial Chamber relied upon this finding to determine that ‘the expression “kupiga na kuchaji”, which was understood to mean attacking all the Lendu, including civilians, and to loot their property, was commonly used in UPC/FPLC commanders’ orders to soldiers’.¹⁰⁰⁸ This was one of the factors relied upon by the Trial Chamber to determine that an attack was directed against a civilian population.¹⁰⁰⁹

(d) Determination by the Appeals Chamber

523. The Appeals Chamber notes that the Trial Chamber’s finding concerning the orders allegedly issued by Salumu Mulenda is based primarily on the evidence of P-

¹⁰⁰³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

¹⁰⁰⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

¹⁰⁰⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 92.

¹⁰⁰⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 92.

¹⁰⁰⁷ [Conviction Decision](#), para. 561.

¹⁰⁰⁸ [Conviction Decision](#), para. 671, fn. 2124.

¹⁰⁰⁹ [Conviction Decision](#), paras 671-672.

0963.¹⁰¹⁰ When asked about the briefing, the witness stated that Salumu Mulenda ‘explained to [them] what the objective was [...] [and] talked about the position of each company, each unit, each platoon on the front’.¹⁰¹¹ When asked what the troops were to do when they encountered the civilian population, P-0963 responded ‘[i]t was the same operation piga na kuchaji. And we were fighting the Lendu. The orders were clear: Shoot at everyone’.¹⁰¹²

524. In relation to Mr Ntaganda’s argument that the Trial Chamber should have taken into account the fact that P-0963 lied in stating that Mr Ntaganda gave instructions in Mabanga,¹⁰¹³ the Appeals Chamber notes that the Trial Chamber made no finding that P-0963 lied in this context.¹⁰¹⁴ Rather, it found that it was unable to determine whether Mr Ntaganda was present in Mabanga given the inconsistency in P-0963 and P-0017’s testimony as to this point. It also found that this did not ‘affect the overall credibility or reliability of P-0963’ given ‘the time passed since the events and the overall similarities between the witnesses in relation to the gathering’.¹⁰¹⁵ Mr Ntaganda has not demonstrated any error in the Trial Chamber’s reasoning in this regard. Therefore, the Appeals Chamber rejects his argument that this aspect of the witness’s testimony should have been considered by the Trial Chamber in assessing his testimony on the order given in Kilo prior to the assault on Kobu.

525. Mr Ntaganda’s challenges to P-0963’s understanding of the phrase *kupiga na kuchaji*¹⁰¹⁶ have been addressed and rejected above¹⁰¹⁷ and his arguments regarding P-0963’s status as an accomplice witness are addressed and rejected under the eighth ground of appeal.¹⁰¹⁸ Regarding ‘P-0963’s evidence on the [REDACTED] firing procedure and the orders purportedly issued to him during the fighting in

¹⁰¹⁰ [Conviction Decision](#), para. 561, fns 1704-1707. The Trial Chamber also refers to P-0017’s testimony which mentions a briefing by Salumu Mulenda prior to the attack on Kobu: P-0017: [T-63](#), pp. 12-13.

¹⁰¹¹ P-0963: [T-79](#), p. 47, lines 2-4.

¹⁰¹² P-0963: [T-79](#), p. 47, lines 5-8.

¹⁰¹³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

¹⁰¹⁴ [Conviction Decision](#), para. 488, fn. 1401.

¹⁰¹⁵ [Conviction Decision](#), para. 488, fn. 1401.

¹⁰¹⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

¹⁰¹⁷ See paragraphs 462-468 above.

¹⁰¹⁸ See paragraphs 714-715 below.

Mongbwalu’, Mr Ntaganda does not explain the significance of this evidence in this context.¹⁰¹⁹ Therefore, the Appeals Chamber dismisses these arguments *in limine*.

526. Finally, the Appeals Chamber is not persuaded by Mr Ntaganda’s argument that the Trial Chamber should have considered ‘P-0963’s knowledge that Lendu combatants included women and children and that they did not wear uniforms’.¹⁰²⁰ The witness clearly stated that his understanding was that they were to shoot at everyone.¹⁰²¹ Whether Lendu combatants could have been easily distinguished from the civilians has no bearing on this understanding. His argument in this regard is without merit.

527. In view of the foregoing, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that Salumu Mulenda ‘gave orders, including “[*ku*]piga na kuchaji”’ during a briefing in Kilo on or about 18 February 2003, and that P-0963 understood these orders to mean ‘[s]hoot at everyone’.¹⁰²²

(c) *Conclusion on the issuance of orders to attack civilians*

528. Having rejected the totality of Mr Ntaganda’s arguments, the Appeals Chamber finds the Trial Chamber’s conclusion that orders to attack civilians were issued to be reasonable.¹⁰²³

3. *Overall conclusion*

529. Having rejected Mr Ntaganda’s arguments challenging the Trial Chamber’s finding that there was an attack directed against a civilian population, the Appeals Chamber rejects this ground of appeal.

F. Sixth ground of appeal: Whether the war crime of ordering displacement of the civilian population was committed

530. Under the sixth ground of appeal, Mr Ntaganda argues that the Trial Chamber erred in convicting him for the war crime of ordering the displacement of the civilian population under article 8(2)(e)(viii) of the Statute.¹⁰²⁴

¹⁰¹⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

¹⁰²⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 102.

¹⁰²¹ [Conviction Decision](#), para. 561, quoting P-0963: [T-79](#), p. 47.

¹⁰²² [Conviction Decision](#), para. 561.

¹⁰²³ [Conviction Decision](#), para. 671.

I. *Summary of submissions*

(a) **Mr Ntaganda's submissions**

531. Mr Ntaganda argues that territorial control is a condition of ordering displacement as a war crime and that the Trial Chamber therefore erred by relying 'on orders issued during the conduct of hostilities but *prior to* the relevant territory falling under the control of the UPC/FPLC to found the conviction' for this crime.¹⁰²⁵ He submits that article 8(2)(e)(viii) of the Statute is based on article 49 of the Fourth Geneva Convention, which prohibits '[i]ndividual or mass forcible transfers, as well as deportations of protected persons *from occupied territory* to the territory of the Occupying Power or to that of any other country'.¹⁰²⁶ He argues that article 17 of Additional Protocol II provides a similar prohibition in the context of armed conflicts not of an international character, and that the ICRC's Commentary on Additional Protocols 'establishes that article 17 similarly requires territorial control'.¹⁰²⁷

532. Mr Ntaganda argues that '[a]n order to displace can only be given if the person issuing it is in a position to give effect to the order, *i.e.*, the civilians are within that person's power and control'.¹⁰²⁸ In his view, 'ordering acts that might result in population movement, *i.e.*, indiscriminate shelling' does not amount to ordering the displacement of the civilian population under article 8(2)(e)(viii) of the Statute.¹⁰²⁹ He highlights that the limited protective purposes that would allow a military force to displace a population also shows 'that the relevant force must have responsibility for and control over that population'.¹⁰³⁰

¹⁰²⁴ [Mr Ntaganda's Appeal Brief – Part II](#), paras 129-135.

¹⁰²⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 130 (emphasis in original).

¹⁰²⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 130-131 (emphasis in original).

¹⁰²⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 131, *referring to* ICRC's Commentary on Additional Protocols, para. 4859, which concerns article 17(2) and provides: 'First, there is a question whether, within the meaning of this provision, the term "territory" is equivalent to country. The ICRC draft referred to "national territory". Some amendments proposed substituting the formula "across the frontiers of the country of origin". It is clear that there was never any doubt in anyone's mind that the phrase was intended to refer to the whole of the territory of a country. However, the text states that it is prohibited to compel civilians to leave "their own territory". In fact, this formula appears to be better suited to all the possible cases which might arise in a situation covered by Protocol II, and to take into account, in particular, situations where the insurgent party is in control of an extensive part of the territory. In this case the insurgents, too, should respect the obligation laid down here, and not compel civilians to leave the area under their authority'. (Footnotes omitted).

¹⁰²⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 132.

¹⁰²⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 132.

¹⁰³⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 132.

533. Mr Ntaganda also refers to his arguments under other grounds of appeal alleging errors in the Trial Chamber’s assessment of the orders relied upon to find that Mr Ntaganda, Salumu Mulenda and Floribert Kisembo ordered the displacement of the civilian population.¹⁰³¹ He contends that these errors invalidate the Trial Chamber’s finding that Mr Ntaganda ordered the displacement of the civilian population.¹⁰³²

(b) The Prosecutor’s submissions

534. The Prosecutor contends that ‘[t]erritorial control is not a legal element of article 8(2)(e)(viii)’ and that the Elements of Crimes require rather that the perpetrator ‘was in a position to effect such a displacement by giving such order’.¹⁰³³ Similarly, she argues that ‘[a]rticle 17 of [Additional Protocol] II, which inspired article 8(2)(e)(viii), [does not] contain [...] a precise analogue to the occupation regime in international armed conflict’.¹⁰³⁴ She submits that, in any event, article 8(2)(e)(viii) of the Statute is not ‘conditioned on the application of [Additional Protocol] II’.¹⁰³⁵

535. The Prosecutor notes that the Trial Chamber ‘did not find it necessary to make express findings concerning the degree of control exercised by UPC fighters over displaced civilians’, but suggests that this was ‘established by its other findings including under article 7(1)(d)(forcible transfer)’.¹⁰³⁶ According to the Prosecutor, ‘even if territorial control were to be a legal requirement, it was satisfied’.¹⁰³⁷

536. Finally, the Prosecutor submits that the Chamber ‘technically (but harmlessly) erred in law by concluding that, under article 8(2)(e)(viii)’: (i) ‘the perpetrator must “instruct *another person* in any form” either to displace “a civilian population” or to carry out an act or omission leading to that result — as opposed to merely “order[ing] a displacement” *including* by means of instructing (expressly or by implication) one or more civilians to leave the place where they were lawfully present’ and (ii) ‘the term “a civilian population” [...] means at least “a certain number of individuals”,

¹⁰³¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 134, referring, *inter alia*, to [Conviction Decision](#), paras 1085-1086, 1089-1091.

¹⁰³² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 134.

¹⁰³³ [Prosecutor’s Response to Appeal – Part II](#), p. 48, para. 110.

¹⁰³⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 111.

¹⁰³⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 111.

¹⁰³⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 112. *See also* paras 113-114.

¹⁰³⁷ [Prosecutor’s Response to Appeal – Part II](#), para. 112.

assessed on a case by case basis’ as opposed to one or more civilians provided there is a nexus to a non-international armed conflict.¹⁰³⁸ The Prosecutor suggests that the Appeals Chamber should not rule on these issues as they have no bearing on the arguments raised by Mr Ntaganda under this ground of appeal, and requests that the Appeals Chamber ‘neither endorse nor criticise’ the Trial Chamber’s analysis.¹⁰³⁹

(c) The victims’ observations

537. Victims Group 2 submit that article 8(2)(e)(viii) of the Statute contains no ‘requirement for the perpetrator to exercise territorial control over the area in which the civilians live whom he seeks to expel’ and that such a requirement ‘would run counter to the prohibition of using force to expel’.¹⁰⁴⁰ They argue that ‘[t]he fact that the perpetrator is in a position to order unlawful measures aimed at dispelling civilians, such as indiscriminate shelling, is the starting point’.¹⁰⁴¹ They argue that even if ‘there were such a requirement, [it] would still be fulfilled in the brief moment of the effected takeover of a specific place which results in the chasing away of the population’.¹⁰⁴²

538. Regarding the technical errors identified by the Prosecutor, Victims Group 2 submit that these issues should be resolved by the Appeals Chamber in the interests of fairness, judicial economy and legal certainty.¹⁰⁴³ They argue that the Trial Chamber correctly interpreted the law and properly applied the law to the facts.¹⁰⁴⁴

(d) The Prosecutor’s response to the victims

539. The Prosecutor underlines that the ‘implication of the Trial Chamber’s reasoning on article 8(2)(e)(viii) would seem to be that, in non-international armed conflict, it is *not* prohibited under the Statute—for example—for the perpetrator, without justification under international law, to *directly compel individual civilians* to leave their homes’.¹⁰⁴⁵ She submits that this would be inconsistent with the legal

¹⁰³⁸ [Prosecutor’s Response to Appeal – Part II](#), para. 116 (emphasis in original, footnote omitted).

¹⁰³⁹ [Prosecutor’s Response to Appeal – Part II](#), para. 117.

¹⁰⁴⁰ [Observations of Victims Group 2 on Appeal – Part II](#), para. 59.

¹⁰⁴¹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 59.

¹⁰⁴² [Observations of Victims Group 2 on Appeal – Part II](#), para. 60.

¹⁰⁴³ [Observations of Victims Group 2 on Appeal – Part II](#), para. 61.

¹⁰⁴⁴ [Observations of Victims Group 2 on Appeal – Part II](#), paras 63-65.

¹⁰⁴⁵ [Prosecutor’s Response to Observations of Victims on Appeal – Part II](#), para. 13 (emphasis in original).

protections in customary international law in relation to non-international armed conflicts ‘and thereby inconsistent with the *chapeau* of article 8(2)(e), and the context and object and purpose of the Statute’.¹⁰⁴⁶ However, she maintains her view that the Appeals Chamber should not address these issues and that it should refrain from endorsing or criticising the Trial Chamber’s reasoning.¹⁰⁴⁷

(e) Mr Ntaganda’s reply to the Prosecutor

540. Mr Ntaganda argues that the Prosecutor’s response shows that she agrees with his ‘contention that territorial control is required before a crime can be committed under article 8(2)(e)(viii) of the Statute’.¹⁰⁴⁸ He contends that the Prosecutor ‘concedes that some form of control over the victims is required for the *actus reus* of the crime to be committed, albeit that the “nature and degree of the perpetrators’ control over [the] victims” is a question of fact’.¹⁰⁴⁹ He argues that the Prosecutor ‘resorts to findings based on territorial control to try to satisfy [this] element of the crime’ and does not explain how else it could be established; in his view, ‘[t]he “nature and degree” of the required control must be territorial’.¹⁰⁵⁰

541. He further submits that the Trial Chamber failed to enter the requisite ‘findings on the degree of control exercised by UPC fighters over civilians’.¹⁰⁵¹ In his view, the evidence underlying the Trial Chamber’s findings made under count 12 in relation to the crime against humanity of forcible transfer would not suffice in this context because it ‘relates to civilians fleeing prior to the UPC taking control of a village or as the assault unfolded’ and does not support a conclusion that civilians were ‘displaced while within territory under the control of the UPC’.¹⁰⁵²

542. Mr Ntaganda submits that the ‘creation of a coercive environment’ cannot establish the ‘requisite degree of control’ for the purposes of the war crime of ordering the displacement of the civilian population because ‘this element is particular to the crime against humanity of deportation or forcible transfer’ and expressly

¹⁰⁴⁶ [Prosecutor’s Response to Observations of Victims on Appeal – Part II](#), para. 13.

¹⁰⁴⁷ [Prosecutor’s Response to Observations of Victims on Appeal – Part II](#), para. 14.

¹⁰⁴⁸ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 36.

¹⁰⁴⁹ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 37.

¹⁰⁵⁰ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 37.

¹⁰⁵¹ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 40.

¹⁰⁵² [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), paras 40-41.

mentioned in the Elements of Crimes specific to the latter crime.¹⁰⁵³ He argues that ‘[t]here is no evidence to show that any rape or pillage perpetrated once a location had fallen under the control of the UPC had the effect of displacing civilians’.¹⁰⁵⁴

2. *Relevant part of the Conviction Decision*

543. The Trial Chamber found that ‘the war crime of ordering the displacement of civilians [...] requires establishing the existence of an *order* to displace, and not of the resulting displacement as such’.¹⁰⁵⁵ It considered that ‘[t]he order itself needs only to instruct another person in any form to: (i) displace a civilian population; or (ii) perform an act or omission as a result of which such a displacement would occur’.¹⁰⁵⁶ It noted that ‘the order to displace must emanate from a person who was in a position to effect such displacement by giving such order’.¹⁰⁵⁷ According to the Trial Chamber, ‘[t]he reference to “a civilian population” [...] indicates that the displacement needs to cover a certain number of individuals’.¹⁰⁵⁸

544. The Trial Chamber considered a number of orders as establishing the existence of an order to displace in the present case. In relation to the First Operation, the Trial Chamber considered: (i) ‘the night before the UPC/FPLC troops left Bunia for Mongbwalu’, Mr Ntaganda ordered them to attack the Lendu without distinguishing between civilians and combatants and used the term *kupiga na kuchaji*;¹⁰⁵⁹ and (ii) on the way to Mongbwalu, Salumu Mulenda ordered the troops to ‘drive out the Lendu’ and used the term *kupiga na kuchaji*.¹⁰⁶⁰ The Trial Chamber found that, ‘by ordering the UPC/FPLC troops to indiscriminately attack the Lendu present in Mongbwalu, with the purpose of either eliminating them or driving them out, Mr Ntaganda instructed the troops to perform an act as a result of which the displacement of a significant proportion of the civilian population of Mongbwalu – the majority of which was Lendu – would necessarily occur’.¹⁰⁶¹

¹⁰⁵³ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 42.

¹⁰⁵⁴ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 42.

¹⁰⁵⁵ [Conviction Decision](#), para. 1080 (emphasis in original).

¹⁰⁵⁶ [Conviction Decision](#), para. 1081.

¹⁰⁵⁷ [Conviction Decision](#), para. 1082.

¹⁰⁵⁸ [Conviction Decision](#), para. 1083.

¹⁰⁵⁹ [Conviction Decision](#), para. 1085.

¹⁰⁶⁰ [Conviction Decision](#), para. 1086.

¹⁰⁶¹ [Conviction Decision](#), para. 1088.

545. In relation to the Second Operation, the Trial Chamber considered: (i) a briefing in Kilo, in which Salumu Mulenda instructed the troops to ‘destroy that triangle [in Kibu, Lipri, and Bambu] which was a pocket of resistance to the UPC’, which was understood by P-0017 who testified as to this briefing to mean that they should target the Lendu ethnic group as such;¹⁰⁶² (ii) a briefing in Mongbwalu, in which Floribert Kisembo instructed the troops to ‘drive out all the Lendu’, which was understood by P-0963 who testified as to this briefing to mean that the Lendu civilians must be driven out or killed;¹⁰⁶³ and (iii) a briefing in Kilo, in which Salumu Mulenda gave orders including the phrase *kupiga na kuchaji*, which was understood by P-0963 who testified as to this briefing to mean that they should attack the Lendu group as such.¹⁰⁶⁴ On this basis, the Trial Chamber was satisfied that ‘Floribert Kisembo and Salumu Mulenda instructed the troops to perform acts as a result of which the displacement of a significant proportion of the civilian population of Lipri, Tsili, Kibu, and Bambu’, which was predominantly Lendu ‘would necessarily occur’.¹⁰⁶⁵ It further found that Mr Ntaganda, Salumu Mulenda and Floribert Kisembo were in a position to effect the displacement by giving the above orders by virtue of their high positions within the UPC/FPLC and their specific duties and responsibilities in respect of the First Operation and Second Operation.¹⁰⁶⁶ Finally, it found that the orders were not justified by the security of the civilians or by military necessity.¹⁰⁶⁷

3. *Determination by the Appeals Chamber*

546. The question raised by Mr Ntaganda under this ground of appeal is whether territorial control is a prerequisite to ordering the displacement of the civilian population as a war crime under article 8(2)(e)(viii) of the Statute in the context of non-international armed conflicts.

547. Article 8(2)(e)(viii) of the Statute criminalises ‘[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand’. The legal elements

¹⁰⁶² [Conviction Decision](#), para. 1089.

¹⁰⁶³ [Conviction Decision](#), para. 1090.

¹⁰⁶⁴ [Conviction Decision](#), para. 1091.

¹⁰⁶⁵ [Conviction Decision](#), para. 1094. *See also* para. 1093.

¹⁰⁶⁶ [Conviction Decision](#), paras 1095-1097.

¹⁰⁶⁷ [Conviction Decision](#), paras 1098-1100.

particular to this war crime are the following: (i) ‘[t]he perpetrator ordered a displacement of a civilian population’; (ii) the ‘order was not justified by the security of the civilians involved or by military necessity’; and (iii) ‘[t]he perpetrator was in a position to effect such displacement by giving such order’.¹⁰⁶⁸ Neither the article itself nor the corresponding elements of crimes establish territorial control as a requirement for the war crime of displacement to take place.

548. The *chapeau* to article 8(2)(e)(viii) of the Statute characterises this crime as a serious violation ‘of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law’. The Elements of Crimes further specify that ‘war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict [...]’.¹⁰⁶⁹ In this respect, the Appeals Chamber has held that

the expression ‘the established framework of international law’ in the *chapeaux* of article 8 (2) (b) and (2) (e) as well as in the Introduction to the Elements of Crimes for article 8 of the Statute, when read together with article 21 of the Statute, requires the former to be interpreted in a manner that is ‘consistent with international law, and international humanitarian law in particular’.¹⁰⁷⁰

549. The relevant framework of the international law of armed conflict applicable to article 8(2)(e)(viii) of the Statute is provided by article 17 of Additional Protocol II and customary international humanitarian law. Article 17(1), first sentence, prohibits the displacement of civilians in non-international armed conflicts in terms that are almost identical to article 8(2)(e)(viii) of the Statute: ‘[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand’.¹⁰⁷¹ Article 17(2) provides that ‘[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict’. A similar prohibition exists under

¹⁰⁶⁸ Elements of Crimes, Article 8(2)(e)(viii): War crime of displacing civilians. In addition, the Elements of Crimes set out the contextual elements applicable to war crimes in armed conflicts not of an international character: (i) ‘[t]he conduct took place in the context of and was associated with an armed conflict not of an international character’; and (ii) ‘[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict’.

¹⁰⁶⁹ Elements of Crimes, Introduction to Article 8.

¹⁰⁷⁰ [Ntaganda OA5 Judgment](#), para. 53 (footnote omitted).

¹⁰⁷¹ Article 17(1) of Additional Protocol II continues: ‘Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition’.

customary law and is set out in rule 129(B) of the ICRC's compilation of customary rules of international humanitarian law, again in terms that are almost identical to those of article 17(1), first sentence, of Additional Protocol II and article 8(2)(e)(viii) of the Statute: '[p]arties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand'.¹⁰⁷²

550. From the foregoing, the Appeals Chamber derives that there is no explicit requirement in article 8(2)(e)(viii) of the Statute, the Elements of Crimes, article 17 of Additional Protocol II, or customary international humanitarian law that, to order the displacement of the civilian population in the context of a non-international armed conflict, the perpetrator must be in occupation of, or exercise territorial control over, the relevant area.

551. In contrast, the Appeals Chamber notes that article 8(2)(b)(viii) of the Statute, a similar provision applicable in international armed conflicts, explicitly includes such a requirement when it criminalises '[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it *occupies*, or the deportation or transfer of all or parts of the population of the *occupied territory* within or outside this territory'.¹⁰⁷³ Had the drafters intended to include a similar

¹⁰⁷² ICRC's Compilation of Customary Rules, p. 457.

¹⁰⁷³ Emphasis added. The legal elements of this crime are set out in the Elements of Crimes: (i) '[t]he perpetrator: (a) [t]ransferred, directly or indirectly, parts of its own population into the territory it occupies; or (b) [d]eported or transferred all or parts of the population of the occupied territory within or outside this territory'; (ii) '[t]he conduct took place in the context of and was associated with an international armed conflict'; and (iii) '[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict' (footnote omitted). The law of international armed conflict applicable in this context is article 85(4)(a) of Additional Protocol I, the wording of which is almost identical to article 8(2)(b)(viii): 'the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of article 49 of the Fourth Convention'. Article 49 of the Fourth Geneva Convention prohibits '[i]ndividual or mass forcible transfers, as well as deportations of protected persons from *occupied territory*' (emphasis added) and deportation or transfer of parts of the civilian population of the *occupying power* into the *occupied territory*. The relevant customary rule is set out in rule 129(A) of the ICRC study, which provides: '[p]arties to an international armed conflict may not deport or forcibly transfer the civilian population of an *occupied territory*, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand' (emphasis added). ICRC's Compilation of Customary Rules, p. 457.

requirement in relation to article 8(2)(e)(viii) of the Statute, the Appeals Chamber considers that it would have been explicitly set out in the Elements of Crimes.

552. Mr Ntaganda presents a number of arguments in support of his view that territorial control is a condition of ordering displacement as a war crime. These are addressed below.

553. First, Mr Ntaganda argues that article 8(2)(e)(viii) of the Statute is rooted in article 49 of the Fourth Geneva Convention, which prohibits ‘[i]ndividual or mass forcible transfers, as well as deportations of protected persons from *occupied territory* to the territory of the Occupying Power or to that of any other country, occupied or not, [...] regardless of their motive’.¹⁰⁷⁴ In his view, article 17 of Additional Protocol II ‘was intended to fill the gap in protection in non-international armed conflicts where forced population movements also arose’.¹⁰⁷⁵

554. The Appeals Chamber notes that article 17 of Additional Protocol II applicable to non-international armed conflicts is indeed inspired by and builds upon the prohibition contained in article 49 of the Fourth Geneva Convention applicable to international armed conflicts.¹⁰⁷⁶ While the Appeals Chamber accepts that article 49 of the Fourth Geneva Convention may provide useful guidance in interpreting article 17 of Additional Protocol II to the extent that similar language is used, the fundamental differences between the two provisions, as set out below, mean that the requirements for one cannot simply be transposed into the other.

555. The Appeals Chamber notes that the wording of the two provisions is different in many respects. First, while article 17(1) provides that ‘[t]he displacement of the

¹⁰⁷⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 130-131 (emphasis added).

¹⁰⁷⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 131.

¹⁰⁷⁶ ICRC’s Commentary on Additional Protocols, paras 4848-4850: ‘[t]he problem was raised in 1949. In fact, Article 49 of the fourth Convention already laid down some norms as protection against deportations, transfers and evacuations in or from occupied territories, and it was not considered necessary to supplement these rules in Protocol I. However common Article 3 is silent on this matter. And yet the problem is particularly acute in situations of non-international armed conflict in which there have been cases, for example, of the forced movement of ethnic groups and national groups opposed to the central government. Article 17 serves to fill this gap in the protection. The ICRC introduced this provision in its draft; it was based on a proposal put forward by experts in 1972 and inspired by the wording of Article 49 of the fourth Convention. The text which was adopted, with a few additions, has the same tenor as the original draft’. (Footnote omitted).

civilian population shall not be *ordered*,¹⁰⁷⁷ article 49 of the Fourth Geneva Convention does not include any reference to an order but rather to ‘[i]ndividual or mass forcible transfers, as well as deportations’ as such. Second, article 17(1) refers to ‘the displacement of *the civilian population*’, and article 49 speaks of ‘[i]ndividual or mass forcible transfers, as well as deportations of *protected persons*’.¹⁰⁷⁸ Third, to fall within the prohibition under article 17, the displacement must be ordered ‘for *reasons related to the conflict*’, whereas, under article 49, deportation and forcible transfer are prohibited ‘*regardless of their motive*’.¹⁰⁷⁹

556. While for present purposes the Appeals Chamber deems it unnecessary to engage in a comprehensive interpretation of article 17 of Additional Protocol II, it notes that its formulation differs from that of article 49 of the Fourth Geneva Convention. The most important distinction in this regard is that article 49 explicitly includes a reference to forcible transfers and deportations ‘from occupied territory’, while article 17 does not contain any analogous reference to territorial control. This may be explained by the fact that the Fourth Geneva Convention relevant to international armed conflicts distinguishes between prohibitions applicable to the conduct of hostilities and those applicable to a state of occupation. This distinction has not been replicated in Additional Protocol II for the purposes of non-international armed conflicts, nor has the concept of ‘occupied territory’ in international armed conflicts been substituted with ‘territorial control’ for the purposes of non-international armed conflicts.¹⁰⁸⁰

¹⁰⁷⁷ Emphasis added.

¹⁰⁷⁸ Emphasis added.

¹⁰⁷⁹ Emphasis added.

¹⁰⁸⁰ The Appeals Chamber notes that article 1 of Additional Protocol II refers to territorial control when defining the material field of application of the Protocol: ‘[t]his Protocol [...] shall apply to all armed conflicts which are not covered by [Additional Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, *exercise such control over a part of its territory* as to enable them to carry out sustained and concerted military operations and to implement this Protocol’ (emphasis added). However, this is not tantamount to affirming that territorial control is a legal requirement for all violations set out in Additional Protocol II. Indeed, the purpose of including territorial control in the definition of the non-international armed conflicts to which Additional Protocol II applies is properly explained by the ICRC in the following terms: ‘[t]he control must be sufficient to allow sustained and concerted military operations to be carried out and for the Protocol to be applied, i.e., for example, caring for the wounded and the sick, or detaining prisoners and treating them decently, as provided in Articles 4 (*Fundamental guarantees*) and 5 (*Persons whose liberty has been restricted*)’, ICRC’s Commentary on Additional Protocols, para. 4466 (footnote omitted).

557. Finally, the Appeals Chamber notes that the differences in language between article 17 of Additional Protocol II and article 49 of the Fourth Geneva Convention have been replicated in articles 8(2)(b)(viii) and 8(2)(e)(viii) of the Statute. These differences between the regime applicable in international armed conflict and non-international armed conflicts have led one commentator to describe article 8(2)(e)(viii) of the Statute as the only provision under article 8(2)(e) without a corresponding provision under article 8(2)(b) of the Statute.¹⁰⁸¹ In view of these differences, the Appeals Chamber cannot accept Mr Ntaganda's argument that article 8(2)(e)(viii) of the Statute should be interpreted as requiring territorial control in accordance with the requirements of article 49 of the Fourth Geneva Convention.

558. Second, Mr Ntaganda argues that 'the language used in article 8(2)(e)(viii), and its originating provisions, underlines that there must be territorial control before the crime can be committed'.¹⁰⁸² He submits that an order to displace is required and this 'can only be given if the person issuing it is in a position to give effect to the order, *i.e.*, the civilians are within that person's power and control'.¹⁰⁸³ Mr Ntaganda contends that 'ordering acts that might result in population movement, *i.e.*, indiscriminate shelling' would not amount to 'ordering the displacement of the civilian population' under article 8(2)(e)(viii) of the Statute.¹⁰⁸⁴ In his view, the limited protective purposes that would allow a military force to displace a population also shows 'that the relevant force must have responsibility for and control over that population'.¹⁰⁸⁵ The Appeals Chamber understands Mr Ntaganda to argue that to give effect to the order to displace, the civilians must be within the perpetrator's power and control and that therefore territorial control is a requirement under article 8(2)(e)(viii) of the Statute.

¹⁰⁸¹ E. La Haye, in Lee, p. 215: 'the elements for the crimes in article 8(2)(e) were, [subject to some exceptions where the formulation of the crime set out in the Statute deviated slightly from the corresponding provision in article 8(2)(b) of the Statute], simply transcribed from the elements for the crimes in article 8(2)(b)'. La Haye describes article 8(2)(e)(viii) as an exception, given that it was drawn directly from Additional Protocol II and did not have an equivalent in article 8(2)(b) of the Statute.

¹⁰⁸² [Mr Ntaganda's Appeal Brief – Part II](#), para. 132.

¹⁰⁸³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 132.

¹⁰⁸⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 132.

¹⁰⁸⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 132.

559. Article 8(2)(e)(viii) of the Statute requires that the perpetrator ordered the displacement of the civilian population. The third element of the corresponding Elements of Crimes requires that the perpetrator must have been ‘in a position to effect such displacement by giving such order’. The Appeals Chamber considers that the civilian population does not need to be under the perpetrator’s power and control in the sense suggested by Mr Ntaganda in order for the accused to be in such a position. Indeed, whether the person is in a position to give effect to an order to displace the civilian population is a question of fact that depends primarily on the position occupied by the accused person and his or her duties and responsibilities, including his or her ability to ensure compliance with his or her orders. This view is confirmed by reference to commentaries on the drafting history of the Elements of Crimes.¹⁰⁸⁶

560. In the Conviction Decision, the Trial Chamber did not expand on its understanding of this element,¹⁰⁸⁷ but it found that Mr Ntaganda, Floribert Kisembo and Salumu Mulenda were in a position to effect the displacement by giving orders to that effect based on their roles within the UPC/FPLC and their respective duties and responsibility for the planning and conduct of the First Operation and Second Operation.¹⁰⁸⁸ Its analysis of this element focused on the perpetrators’ positions of authority and power to ensure compliance with their orders. The Appeals Chamber can find no error in the approach adopted by the Trial Chamber.

561. Third, Mr Ntaganda relies on the ICRC’s Commentary on Additional Protocols and an academic article to support his argument.¹⁰⁸⁹ In his view, article 17 requires territorial control because the ICRC refers to ‘all the possible cases which might arise

¹⁰⁸⁶ In Dörmann’s view, the third element of article 8(2)(e)(viii): ‘addresses the question as to whether the perpetrator had the authority or power to carry out the displacement. The drafters agreed– and this view was not contested by the Working Group on EOC when the text proposal was introduced with that explanation– that the formulation “[t]he perpetrator was in a position to effect such displacement by giving such order” would cover both *de jure* and *de facto* authority to carry out the order, so that the definition would cover the individual who, for example, has effective control of a situation by sheer strength of force’. (K. Dörmann, p. 473). La Haye states that, ‘[s]imilar to article 8(2)(b)(xii), the war crime of denying quarter, element 3 was added in order to signal that only a serious order, by a person in a position to effect such displacement by giving such an order, will amount to the war crime of displacing civilians’. (Lee, pp. 215-216).

¹⁰⁸⁷ [Conviction Decision](#), para. 1082.

¹⁰⁸⁸ [Conviction Decision](#), paras 1095-1097.

¹⁰⁸⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 130-131.

in a situation covered by [Additional] Protocol II, [...] in particular, *situations where the insurgent party is in control of an extensive part of the territory*'.¹⁰⁹⁰

562. The Appeals Chamber considers that Mr Ntaganda takes the quotation from the ICRC's commentary out of context. The sentence he quotes appears in a discussion of article 17(2) of Additional Protocol II. This provision states that: '[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict'. Specifically, the issue under discussion in the relevant section of the ICRC's commentary was whether the word 'territory' should be interpreted as national territory or any territory in which the civilians live.¹⁰⁹¹ The ICRC concluded that the latter interpretation best suited all situations covered by Additional Protocol II, in particular those where a party is in control of an extensive part of the territory. The Appeals Chamber considers that this does not equate to a statement that territorial control is required under article 17 of Additional Protocol II. There is no reference to territorial control elsewhere in the commentary on article 17, which further suggests that it is not a requirement.

563. The academic article to which Mr Ntaganda refers appears to be based on the author's reading of article 49 of the Fourth Geneva Convention, article 17 of Additional Protocol II as interpreted by the ICRC's Commentary on Additional Protocols, article 85(4)(a) of Protocol I and rule 129 of the ICRC's Compilation of Customary Rules. For the reasons set out above, the Appeals Chamber has arrived at a different interpretation of the relevant provisions. The Appeals Chamber is not persuaded that its interpretation is incorrect having considered the ICRC's Commentary on Additional Protocols and the academic article to which Mr Ntaganda refers.

¹⁰⁹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 131 (emphasis in original), referring to ICRC's Commentary on Additional Protocols, para. 4859.

¹⁰⁹¹ ICRC's Commentary on Additional Protocols, paras 4858-4859: '[t]his paragraph prohibits compelling civilians to leave their own country for reasons connected with the conflict. First, there is a question whether, within the meaning of this provision, the term "territory" is equivalent to country. The ICRC draft referred to "national territory". Some amendments proposed substituting the formula "across the frontiers of the country of origin". It is clear that there was never any doubt in anyone's mind that the phrase was intended to refer to the whole of the territory of a country. However, the text states that it is prohibited to compel civilians to leave "their own territory". In fact, this formula appears to be better suited to all the possible cases which might arise in a situation covered by Protocol II, and to take into account, in particular, situations where the insurgent party is in control of an extensive part of the territory. In this case the insurgents, too, should respect the obligation laid down here, and not compel civilians to leave the area under their authority'. (Footnotes omitted).

564. In view of the foregoing, the Appeals Chamber rejects Mr Ntaganda’s argument that territorial control is a condition of ordering displacement as a war crime under article 8(2)(e)(viii) of the Statute.

565. As to Mr Ntaganda’s remaining argument that the Trial Chamber erred in ‘its assessment of the evidence’ of the six orders upon which it relied to enter a conviction under article 8(2)(e)(viii) of the Statute,¹⁰⁹² the Appeals Chamber recalls that it has rejected Mr Ntaganda’s arguments in this regard in its determination of the fifth and fourteenth grounds of appeal.¹⁰⁹³ Therefore, it will not consider Mr Ntaganda’s arguments further.

566. Finally, the Appeals Chamber notes that the Prosecutor argues that the Trial Chamber erred ‘technically (but harmlessly)’ in two other aspects of its interpretation of the war crime of displacement under article 8(2)(e)(viii) of the Statute, namely in finding that: (i) ‘the perpetrator must “instruct *another person* in any form” either to displace “a civilian population” or to carry out an act or omission leading to that result’; and (ii) ‘the term “a civilian population” [...] means at least “a certain number of individuals”, assessed on a case by case basis’.¹⁰⁹⁴ Victims Group 2 submit that the Trial Chamber’s interpretation was correct and that these issues should be resolved by the Appeals Chamber in the interests of fairness, judicial economy and legal certainty.¹⁰⁹⁵

567. The Appeals Chamber notes that the issues have not been raised as a subject for appeal by either the Prosecutor or Mr Ntaganda. The Prosecutor highlighted these issues in her response to Mr Ntaganda’s appeal brief only for the purpose of requesting the Appeals Chamber not to confirm the Trial Chamber’s general interpretation of the law relevant to article 8(2)(e)(viii) of the Statute.¹⁰⁹⁶ Indeed, she

¹⁰⁹² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 134.

¹⁰⁹³ See paragraphs 453-528 above and paragraphs 963-999 below.

¹⁰⁹⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 116 (emphasis in original). The Prosecutor argues that a correct interpretation of article 8(2)(e)(viii) of the Statute would show that ordering a displacement can also be committed ‘by means of instructing (expressly or by implication) one or more civilians to leave the place where they were lawfully present’, and that ‘the enforced displacement of even one or more civilians, with a nexus to a non-international armed conflict, is a war crime’.

¹⁰⁹⁵ [Observations of Victims Group 2 on Appeal – Part II](#), para. 61.

¹⁰⁹⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 117.

specifically requested the Appeals Chamber not to rule on the issues.¹⁰⁹⁷ In these circumstances, and in view of the fact that the alleged errors in legal interpretation would not materially affect the Conviction Decision (as the facts of this case would establish the crime irrespective of the interpretation adopted and these issues have no bearing on the legal issues raised on appeal by Mr Ntaganda),¹⁰⁹⁸ the Appeals Chamber considers it unnecessary to address the arguments raised by the Prosecutor. Therefore, the Appeals Chamber will not address the interpretation of ‘ordering’ or ‘civilian population’ under article 8(2)(e)(viii) of the Statute in the present judgment.

4. *Overall conclusion*

568. Having rejected the entirety of Mr Ntaganda’s arguments challenging the Trial Chamber’s finding that Mr Ntaganda is individually criminally responsible for the war crime of ordering the displacement of the civilian population under article 8(2)(e)(viii) of the Statute, the Appeals Chamber rejects this ground of appeal.¹⁰⁹⁹

G. Seventh ground of appeal: errors of law and fact in the Trial Chamber’s assessment of the evidence

569. Under the seventh ground of appeal, Mr Ntaganda challenges the Trial Chamber’s assessment of his testimony,¹¹⁰⁰ the dismissal of D-0017’s evidence (one of Mr Ntaganda’s bodyguards) in its entirety¹¹⁰¹ and the Trial Chamber’s reliance on ‘the untested and uncorroborated evidence’ of P-0022 and P-0027 to enter convictions against him.¹¹⁰² In essence, Mr Ntaganda seeks to impugn the Trial Chamber’s approach to fact finding with particular emphasis on the notions of witness credibility and corroboration.

1. *Mr Ntaganda’s testimony*

(a) **Summary of submissions**

(i) *Mr Ntaganda’s submissions*

570. Mr Ntaganda argues that the Trial Chamber assessed his testimony differently from that of prosecution witnesses when it included in its consideration an additional

¹⁰⁹⁷ [Prosecutor’s Response to Appeal – Part II](#), para. 117.

¹⁰⁹⁸ [Prosecutor’s Response to Appeal – Part II](#), para. 117.

¹⁰⁹⁹ [Conviction Decision](#), para. 1199, p. 529.

¹¹⁰⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 136-141.

¹¹⁰¹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 142-147.

¹¹⁰² [Mr Ntaganda’s Appeal Brief – Part II](#), paras 148-150.

criterion, namely, whether he ‘might lie in order to be acquitted’.¹¹⁰³ In his submission, unless his testimony that contradicted prosecution evidence was ‘patently implausible or untrustworthy’, it ‘should have been considered as raising reasonable doubt, just like any other evidence’.¹¹⁰⁴

571. Furthermore, Mr Ntaganda submits that, by first finding the prosecution evidence to be credible and then dismissing his contradictory testimony ‘on that basis alone’, the Trial Chamber shifted the burden of proof and required him to ‘present a more credible version of events in order to be acquitted’.¹¹⁰⁵ He argues that the Trial Chamber’s ‘either/or’ approach to fact finding or shifting of the burden of proof was ‘frequent and blatant’ and resulted in the Trial Chamber ‘systematically dismiss[ing] [his] testimony when it contradicted Prosecution evidence’.¹¹⁰⁶ In his view, given the importance of his testimony to his defence, the Trial Chamber’s error ‘had an incalculable impact on the fairness of the trial’.¹¹⁰⁷ In addition, Mr Ntaganda asserts that the Trial Chamber erred in failing to afford appropriate consideration to the timing of his testimony which preceded other defence witnesses.¹¹⁰⁸ In sum, he submits that the Trial Chamber’s assessment of his testimony affected ‘its overall assessment of the totality of the evidence adduced’ and ‘the only appropriate remedy is an acquittal or a new trial’.¹¹⁰⁹

(ii) *The Prosecutor’s submissions*

572. The Prosecutor submits that the Trial Chamber applied the same approach to the assessment of Mr Ntaganda’s testimony as to that of other witnesses.¹¹¹⁰ She submits that it is well within a Trial Chamber’s remit to consider ‘the accused’s interest in being acquitted’ as a factor when weighing his testimony.¹¹¹¹ In addition, the Prosecutor avers that the Trial Chamber did not engage in an “‘either/or”” approach to fact finding or a shifting of the burden of proof.¹¹¹² In her view,

¹¹⁰³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 137.

¹¹⁰⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 137.

¹¹⁰⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 138-139.

¹¹⁰⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 138-139; [T-271](#), p. 3, line 13 to p. 6, line 13.

¹¹⁰⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 139.

¹¹⁰⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 140.

¹¹⁰⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 141.

¹¹¹⁰ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 120.

¹¹¹¹ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 122.

¹¹¹² [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), paras 123, 125.

Mr Ntaganda fails to show an error in this regard and his submissions ‘merely parse out the established process of fact-finding that the Chamber followed’.¹¹¹³ Furthermore, the Prosecutor disputes the contention that the Trial Chamber “systematically dismissed” Ntaganda’s testimony when it “contradicted” the Prosecution evidence’.¹¹¹⁴ The Prosecutor submits that the Trial Chamber ‘properly reasoned its decision’ to rely on prosecution evidence despite Mr Ntaganda’s contradictory evidence in full view of ‘the totality of the evidence’.¹¹¹⁵ Finally, the Prosecutor submits that trial chambers have discretion to decide on the weight to be assigned to the timing of an accused’s testimony and that the fact that other chambers in other contexts have assigned weight to an accused’s decision to testify before other witnesses does not establish a fixed rule in this regard.¹¹¹⁶

(iii) The victims’ observations

573. Victims Group 1 submit that the Trial Chamber did not treat Mr Ntaganda’s testimony differently to the testimony of prosecution witnesses and ‘properly took into account his interest in the outcome of the case and the timing of his testifying’.¹¹¹⁷ Furthermore, they aver that Mr Ntaganda’s decision to testify was ‘part of a deliberate defence strategy’ to expedite the defence case by calling a few witnesses, including himself, and that ‘[t]he Defence should not be permitted to use the present appeal against [his] conviction as an attempt to remedy the shortcomings in its trial defence strategy [...]’.¹¹¹⁸

574. Victims Group 2 submit that an accused who chooses to testify is generally treated like any other witness and that the timing of this testimony does not ‘carry any sort of entitlement to credit’.¹¹¹⁹ Moreover, they submit that the Trial Chamber was entitled to rely on parts of Mr Ntaganda’s testimony and reject other parts on the basis that they ‘lacked credibility or were implausible’.¹¹²⁰

¹¹¹³ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 123.

¹¹¹⁴ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 126.

¹¹¹⁵ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 126.

¹¹¹⁶ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 127.

¹¹¹⁷ [Observations of Victims Group 1 on Appeal – Part II](#), para. 5.

¹¹¹⁸ [Observations of Victims Group 1 on Appeal – Part II](#), para. 6.

¹¹¹⁹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 68.

¹¹²⁰ [Observations of Victims Group 2 on Appeal – Part II](#), para. 69.

(iv) *Mr Ntaganda's reply to the Prosecutor and response to the victims*

575. Contrary to the Prosecutor's suggestion that Mr Ntaganda's arguments "merely parse out the established process of fact finding", he contends that they demonstrate that the Trial Chamber 'never engaged with the central task of assessing whether the Defence evidence cast doubt on that of the Prosecution's'.¹¹²¹ He highlights further examples of the Trial Chamber adopting what he describes as an 'either/or' approach to the evidence or reversing the burden of proof, relating to its findings on the attack in Nzebi and the firing of a grenade in Sayo.¹¹²² Mr Ntaganda argues that the Trial Chamber's 'analysis was limited to "retaining" one version, and "rejecting" the other', and that this 'approach is incompatible with the burden of proof, because it presumes that a Trial Chamber is required to accept the accused's version of events before it entertains reasonable doubt as to his guilt'.¹¹²³ He argues that the Trial Chamber described exactly what it was doing and it consistently said that it was doing something different to its statements on the standard and burden of proof at the beginning of the Conviction Decision.¹¹²⁴

576. Mr Ntaganda contends that Victims Group 2's argument that the Trial Chamber was entitled to rely on parts of his testimony and reject other parts, does not engage with the error raised.¹¹²⁵ He underscores that the error raised is that the Trial Chamber 'pre-ordained' certain witnesses as "credible", without having considered contradictory defence evidence, and then used that credibility ranking to reject the very defence evidence that it failed to take into account.¹¹²⁶ To illustrate his argument, Mr Ntaganda refers to the Trial Chamber's finding that he had ordered the killing of the three nuns who were being held at the *Appartements*, which was based on the testimony of P-0768.¹¹²⁷ He argues that the Trial Chamber 'pre-emptively decided that P-0768 was "credible", and that he gave "credible" testimony about the killing of the *Abbé*, the Trial Chamber felt entitled to reject Mr. Ntaganda's testimony on this

¹¹²¹ [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), para. 18, quoting [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 123.

¹¹²² [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), paras 17-18, 21.

¹¹²³ [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), paras 18-19.

¹¹²⁴ [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), paras 20-21.

¹¹²⁵ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 45.

¹¹²⁶ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 45.

¹¹²⁷ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 46.

basis alone'.¹¹²⁸ In his view, this approach is inconsistent with the established process of fact finding.¹¹²⁹

577. Regarding the timing of his testimony, Mr Ntaganda acknowledges that opting to testify ahead of other defence witnesses is a 'strategic choice', but maintains his argument that this entitles him to credit in the assessment of his credibility.¹¹³⁰

(b) Relevant part of the Conviction Decision

578. The Trial Chamber noted that Mr Ntaganda appeared 'as the second witness in the Defence's presentation of evidence [...] over the course of 30 court days'.¹¹³¹ In its general assessment of his testimony, the Trial Chamber found him to be 'composed throughout his testimony and prudent in providing his evidence'.¹¹³² It observed that 'he generally answered all questions put to him', but 'was on limited occasions more hesitant, and avoided answering directly a few questions put to him by the Prosecution on certain contested matters'.¹¹³³ It found that Mr Ntaganda's testimony was 'detailed and comprehensive, and touched on all matters relevant for this case'.¹¹³⁴ Apart from 'a limited number of discrepancies on discrete issues', the Trial Chamber found his testimony to be 'internally consistent' and stated that it took Mr Ntaganda's testimony into account where relevant and, where appropriate, relied on it for its findings of fact.¹¹³⁵

579. The Trial Chamber found that Mr Ntaganda was not credible when he affirmed 'that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri and that this revolutionary ideology was governing the functioning of the UPC/FPLC'.¹¹³⁶ Furthermore, the Trial Chamber indicated that it 'considered, on a case-by-case basis and where appropriate,

¹¹²⁸ [Mr Ntaganda's Response to Observations of Victims on Appeal– Part II](#), para. 47.

¹¹²⁹ [Mr Ntaganda's Response to Observations of Victims on Appeal– Part II](#), para. 47.

¹¹³⁰ [Mr Ntaganda's Response to Observations of Victims on Appeal– Part II](#), para. 50.

¹¹³¹ [Conviction Decision](#), para. 257.

¹¹³² [Conviction Decision](#), para. 257.

¹¹³³ [Conviction Decision](#), para. 257.

¹¹³⁴ [Conviction Decision](#), para. 258.

¹¹³⁵ [Conviction Decision](#), paras 258, 262.

¹¹³⁶ [Conviction Decision](#), para. 261.

the possibility that Mr Ntaganda had an incentive to provide exculpatory evidence’ when his evidence contradicted other evidence.¹¹³⁷

(c) Determination by the Appeals Chamber

(i) Introduction

580. The Appeals Chamber notes that the accused has the right to ‘make an unsworn oral or written statement in his or her defence’ under article 67(1)(h) of the Statute, a right which Mr Ntaganda exercised at the commencement of the trial.¹¹³⁸ The Statute provides, under article 67(1)(g), that the accused has the right ‘[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence’. The Trial Chamber was of the view that, ‘while the statutory scheme does not address the possibility of an accused giving a sworn statement and testifying under solemn undertaking, he has a right to do [so] deriving from Article 67 of the Statute’.¹¹³⁹

581. The Trial Chamber took the view that Mr Ntaganda, having agreed to testify, should, ‘in principle, be subject to the same rules that are applicable to other witnesses’.¹¹⁴⁰ It found that ‘once an accused voluntarily testifies under oath, he waives his right to remain silent and must answer all questions put to him or her’, and considered that the assurances against self-incrimination that may be provided to witnesses under rule 74 of the Rule, if sought, would not apply to Mr Ntaganda, insofar as charges in the present case are concerned.¹¹⁴¹ It confirmed ‘that the answers provided by Mr Ntaganda may be used against him in the present case, and if he declines to respond to a permissible question, the Chamber may draw adverse inferences, as appropriate’.¹¹⁴²

582. Mr Ntaganda appeared as the second witness for the Defence and testified over the course of 30 court days.¹¹⁴³ He testified under oath and was warned that he had waived his right to silence, that he must answer all permissible questions, that his

¹¹³⁷ [Conviction Decision](#), para. 262.

¹¹³⁸ [Conviction Decision](#), para. 256, fn. 647, referring to [T-24](#), pp. 74-76.

¹¹³⁹ [Decision 1914](#), para. 15.

¹¹⁴⁰ [Decision 1914](#), para. 18.

¹¹⁴¹ [Decision 1945](#), para. 24.

¹¹⁴² [Decision 1945](#), para. 24.

¹¹⁴³ [Conviction Decision](#), para. 257.

answers may be used in the case against him, that negative inferences could be drawn from a refusal to answer, and that it is an offence within the jurisdiction of the Court to provide false testimony.¹¹⁴⁴

583. The Appeals Chamber notes that common law and civil law systems have different approaches to the issue of whether an accused person may testify under oath in their own defence and the scope of the related right to remain silent and privilege against self-crimination. In the present case, Mr Ntaganda voluntarily agreed to testify under oath and the Trial Chamber's approach to this testimony as described above was agreed to by the parties and has not been challenged on appeal.¹¹⁴⁵ While Judge Ibáñez Carranza¹¹⁴⁶ and Judge Eboe-Osuji¹¹⁴⁷ consider it necessary to set out their views on this matter, the majority of the Appeals Chamber does not take a position on

¹¹⁴⁴ [T-209](#), p. 30, line 7 to p. 31, line 5.

¹¹⁴⁵ [Decision 1945](#), paras 23-24.

¹¹⁴⁶ Judge Ibáñez Carranza is of the view that the Trial Chamber's interpretation is at odds with fundamental fair trial rights and guarantees, due process of law, concrete human rights, as well as the principle of legality and the procedural safeguards that are enshrined in the Rome Statute, namely article 67(1)(g) of the Statute and the ICCPR. The fair trial rights and guarantees that an accused enjoys are fundamental and inalienable when facing a trial and the punitive and coercive power of the international community. It was thus legally impermissible for the Trial Chamber to 'exclude' the application of the fundamental guarantees of the accused person to remain silent, be presumed innocent and not be obliged to incriminate him or herself and to subject an accused person 'to the same rules that are applicable to other witnesses'. The approach followed by the Trial Chamber is that applied in common law systems but the Rome Statute establishes a system that resembles neither the common nor the civil law systems. When an accused provides his account of the facts, he does it in exercise of his full defence rights, and it cannot and does not imply that he is waiving any of the guarantees or his rights as an accused person. In inferring that giving a sworn statement and testifying under solemn undertaking is possible, the Trial Chamber erroneously interpreted the applicable law. In light of the principle of legality applicable in the realm of criminal law, criminal (substantive and procedural) provisions must be written and strict – there is no room to interpret that what is not explicitly prohibited is permitted and it is impermissible to interpret criminal provisions by analogy. Furthermore, in criminal procedural law and in the light of international human rights law, in case of doubt the interpretation of criminal provisions, including those concerning an accused's fair trial rights and guarantees, must be in favour of the accused. To treat an accused person as a witness thereby implying that he has waived fundamental rights and guarantees is a juridical fiction and entails an interpretation of the relevant provisions that prejudices the accused person in contravention of procedural criminal law and international human rights law. By virtue of the rights and guarantees attached to the accused, different procedural conditions apply to witnesses and accused persons. Although the Trial Chamber erred in law in its interpretation of the applicable law, this error had no material impact on the Trial Chamber's determination. Its assessment of Mr Ntaganda's account was reasonable and should be confirmed on appeal for reasons properly set out and explained below.

¹¹⁴⁷ Judge Eboe-Osuji is of the view that the Appeals Chamber should make a definitive pronouncement on this matter, so that future defendants and Trial Chambers know how to conduct themselves in future cases. In his view, the Trial Chamber's approach was correct. Accused persons are free to exercise any of the following three options: (i) remain silent completely; (ii) make unsworn declarations, and not be cross-examined; or (iii) step into the witness box and give sworn testimony. Once they exercise the third option, they must be treated like any other witness. They are not unique.

the correctness of the Trial Chamber's approach or its compatibility with article 67(1)(g) and (h) of the Statute.

(ii) *Presumption of innocence, and burden and standard of proof*

584. Mr Ntaganda argues that the Trial Chamber erred in law and in fact in the assessment of his testimony, alleging that it violated the presumption of innocence and shifted the burden of proof by assuming that he was lying and systematically rejecting his evidence when it contradicted prosecution evidence.¹¹⁴⁸

585. Article 66 of the Statute sets out the presumption of innocence, and the burden and standard of proof in the following terms:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Under article 67(1)(i) of the Statute, the accused also has the right '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'.

586. Therefore, the Statute makes it clear that the burden of proof is on the Prosecutor and any suggestion that the accused would have to present more convincing evidence than the Prosecutor, or indeed any evidence at all, to prove their innocence would represent an impermissible reversal of that burden. Nonetheless, it is clear that, if the Prosecutor presents evidence meeting the 'beyond reasonable doubt' standard of proof, the accused may be convicted if he or she does not present evidence capable of raising reasonable doubt regarding the Prosecutor's case.

587. If the accused person chooses to present evidence, the credibility, reliability and weight of that evidence falls to be assessed in the same manner as evidence presented by the Prosecutor. The Appeals Chamber considers that Mr Ntaganda's argument that his evidence *must* be accepted as raising a reasonable doubt unless it is *patently* implausible or untrustworthy is misplaced and confuses the burden and standard of

¹¹⁴⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 137-139.

proof with the general principles applicable to the assessment of evidence.¹¹⁴⁹ The question in all cases is whether the guilt of the accused has been proven beyond reasonable doubt. In reaching its determination, the trier of fact is bound to assess all relevant evidence, and it is proper that, in this context, it should evaluate the credibility and reliability of the testimony of all witnesses in light of the evidence as a whole.

588. Mr Ntaganda argues that the Trial Chamber added ‘an additional criterion to the assessment of his credibility’ (his incentive to exculpate himself), which implies that it started from the position that he might lie in order to be acquitted, thereby impermissibly shifting the burden of proof.¹¹⁵⁰

589. The Appeals Chamber notes that the Trial Chamber did not differentiate between its treatment of the testimony of Mr Ntaganda and that of other witnesses in discussing its general approach to the assessment of *viva voce* testimony.¹¹⁵¹ Indeed, the Trial Chamber stipulated that, in assessing the credibility of the witnesses, it took into account ‘the individual circumstances of each witness, including his or her relationship to the accused, age, any involvement in the events under consideration, any possible bias towards or against the accused, and/or any motives for telling the truth or providing false testimony’.¹¹⁵² Thus, the Appeals Chamber finds that the Trial Chamber did not add *per se* an additional criterion to the assessment of Mr Ntaganda’s credibility by taking into account the possibility, ‘on a case-by-case basis and where appropriate’, that he ‘had an incentive to provide exculpatory evidence’.¹¹⁵³

590. In the view of the Appeals Chamber, the fact that the Trial Chamber took into account Mr Ntaganda’s incentive to exculpate himself does not imply that it started from the position that he was guilty and would have to lie in order to be acquitted. Rather, it legitimately took into consideration his natural interest in being acquitted as one of many factors relevant to assessing the credibility and reliability of his

¹¹⁴⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 137.

¹¹⁵⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 137.

¹¹⁵¹ [Conviction Decision](#), para. 53.

¹¹⁵² [Conviction Decision](#), para. 77.

¹¹⁵³ [Conviction Decision](#), para. 262.

testimony in light of the evidence as a whole. Therefore, the Appeals Chamber finds no merit in Mr Ntaganda's argument that the Trial Chamber shifted the burden of proof and violated the presumption of innocence when it took into consideration a possible incentive to provide exculpatory evidence. Accordingly, Mr Ntaganda's argument is rejected.

591. Mr Ntaganda argues that the Trial Chamber improperly and systematically dismissed his testimony when it contradicted prosecution evidence, which the chamber had 'pre-ordained' to be credible.¹¹⁵⁴ He refers to domestic case law and international criminal cases, which highlight that such an "either/or" approach to fact-finding' is wrong because it conveys the assumption that the accused may only be acquitted if his or her version of events is believed over that of prosecution witnesses and excludes the possibility that, without fully believing the account of events provided by an accused person, a trier of fact may still have a reasonable doubt as to his/her guilt on the whole of the evidence.¹¹⁵⁵

592. Notwithstanding the correctness of the approach outlined by Mr Ntaganda, the Appeals Chamber notes that the domestic cases he cites were cases in which the factual issues in dispute were limited and the impugned conviction hinged on an assessment of the credibility of two witnesses who contradicted each other's accounts of events. It further notes that, even in such cases, it has been accepted that it is open to the trier of fact to accept a witness's evidence and reject a contradictory denial from the accused without impacting on the burden of proof.¹¹⁵⁶

¹¹⁵⁴ [Mr Ntaganda's Appeal Brief – Part II](#), paras 138-139.

¹¹⁵⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 139, fns 372-373, referring, *inter alia*, to [R. v. Dowling](#), para. 19: 'It is not the case that a tribunal of fact must accept a version put forward or advanced by an accused person before they entertain a reasonable doubt about the guilt of the accused. That version put forward by an accused may nevertheless give rise to a reasonable doubt about the guilt of the accused without being positively or affirmatively accepted. Nor is it a case of determining which version is preferred. The onus and burden is on the Crown from beginning to end to prove the guilt of the accused beyond reasonable doubt'; [R. v. S. \(W.D.\)](#), p. 533; J.Gans, 'The W. (D) Direction -Part One', in *Criminal Law Quarterly*, Vol. 43 (2000), pp. 220-246.

¹¹⁵⁶ [R. v. R. E. M.](#), para. 66: 'Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It followed of necessity that he rejected the accused's evidence where it

593. In the present case, the Trial Chamber established the guilt of Mr Ntaganda based on its assessment of the testimony of many different witnesses for the prosecution and defence, as well as other types of evidence. Therefore, any question of whether it reversed the burden of proof must be considered in light of the Conviction Decision as a whole.

594. As a starting point, the Appeals Chamber notes that the Trial Chamber correctly articulated the burden and standard of proof as described above; therefore, it must be assumed that it proceeded on the basis of a correct understanding of these concepts.¹¹⁵⁷ Having set out these principles, the Trial Chamber described its general approach to the evaluation of different types of evidence and its assessment of individual witnesses' credibility based on its evaluation of the evidence as a whole.¹¹⁵⁸ It went on to provide a detailed analysis of the incriminating and exculpatory evidence relevant to its factual findings.¹¹⁵⁹ Finally, it set out its legal findings in relation to the crimes charged.¹¹⁶⁰ In so doing, the Trial Chamber did not, as Mr Ntaganda argues, pre-ordain or rank certain prosecution witnesses as credible and then dismiss Mr Ntaganda's contradictory evidence on that basis alone.¹¹⁶¹ Rather, having considered all the evidence, it explained its conclusions regarding the credibility of witnesses, both in general and in relation to specific factual issues where the credibility of particular witnesses had been impugned, in a manner that minimised repetition of this assessment throughout the evidentiary evaluation supporting its factual findings.

595. In its overall assessment of Mr Ntaganda's testimony, the Trial Chamber stated that it

conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt'.

¹¹⁵⁷ [Conviction Decision](#), para. 44: 'Pursuant to Article 66 of the Statute, the accused shall be presumed innocent until proven guilty and the onus is on the Prosecution to demonstrate the guilt of the accused. For a conviction, each element of the particular offence charged must be established beyond "reasonable doubt"'.
¹¹⁵⁸ [Conviction Decision](#), section III, C, D.
¹¹⁵⁹ [Conviction Decision](#), section IV.
¹¹⁶⁰ [Conviction Decision](#), section V.
¹¹⁶¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 138.

does not find Mr Ntaganda credible when he affirms that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri and that this revolutionary ideology was governing the functioning of the UPC/FPLC. The Chamber observes that this statement is clearly contradicted by the other available evidence on the record which shows that at least a part of the civilian population in Ituri, in particular the Lendu, was actually the target of violent acts by the UPC/FPLC in 2002 and 2003.¹¹⁶²

596. The Appeals Chamber considers that it was appropriate and necessary for the Trial Chamber to assess the credibility of Mr Ntaganda's testimony in light of the evidentiary record as a whole in this manner. The Appeals Chamber understands that, in so doing, the Trial Chamber did not pre-judge the evidence in order to justify a systematic dismissal of Mr Ntaganda's testimony denying that certain crimes were committed, but rather, having heard all the evidence, it set out its overall conclusion on his testimony based on its evaluation of the contradictions between his testimony and that of different prosecution witnesses.

597. Mr Ntaganda points to several findings of the Trial Chamber that purport to demonstrate that it adopted an 'either/or' approach to its assessment of his testimony and that of prosecution witnesses.¹¹⁶³ In essence, he argues that the Trial Chamber failed to 'direct its mind to whether the accused's evidence, in the context of the evidence as a whole, raised a reasonable doubt as to his guilt' as the Chamber's analysis 'was limited to "retaining" one version, and "rejecting" the other'.¹¹⁶⁴

598. Mr Ntaganda highlights the following five instances of the Trial Chamber adopting what he claims is an 'either/or' approach to its evaluation of the evidence: (i) '[i]n respect to whether the UPC/FPLC planted landmines in Mongbwalu, [...] the Chamber found "no reason to doubt the truthfulness of P-0768's account" about mines and "**therefore exclude[d]** Mr Ntaganda's denial on this specific issue as not credible";¹¹⁶⁵ (ii) in finding that the UPC/FPLC killed persons during an attack on Nzebi, the Trial Chamber "carefully assessed P-0768's testimony [...] against Mr Ntaganda's account, and [decided] to rely on P-0768's testimony in this

¹¹⁶² [Conviction Decision](#), para. 261.

¹¹⁶³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 138, 153-155, 169-170, 179; [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 46; [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), paras 17-18.

¹¹⁶⁴ [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), para. 18.

¹¹⁶⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 138 (emphasis in original), quoting [Conviction Decision](#), para. 171, fn. 413 (emphasis in original).

respect”’;¹¹⁶⁶ (iii) in finding that Mr Ntaganda ‘interrogated the *Abbé* while hitting him with a piece of wood’ and ‘ordered that the three nuns locked in a room at the *Appartements* be killed’, the Trial Chamber recalled ‘its finding on P-0768’s credibility’ and indicated that it considered ‘Mr Ntaganda’s version of events not credible’;¹¹⁶⁷ (iv) in finding that ‘Mr Ntaganda’s bodyguards, upon Mr Ntaganda’s order, shot and killed two Lendu persons who had been captured [...] in Nzebi’,¹¹⁶⁸ the Trial Chamber ‘carefully assessed the testimony of P-0768 against that of Mr Ntaganda and, noting that P-0768 provided a sufficiently clear and detailed account of what he saw, and [...] retained the internally consistent testimony of P-0768 in this respect, as opposed to Mr Ntaganda’s account’;¹¹⁶⁹ and (v) regarding P-0017’s testimony about the firing of a grenade at civilians in Sayo, the Trial Chamber ‘carefully assessed the testimony of P-0017 against that of Mr Ntaganda and, noting that P-0017 provided a sufficiently clear and detailed account of what he saw, [...] retained the internally consistent testimony of P-0017 in this respect, as opposed to Mr Ntaganda’s account’.¹¹⁷⁰

599. The Appeals Chamber underlines that these statements were made in the context of the Trial Chamber evaluating contradictions between evidence given by prosecution witnesses and that of Mr Ntaganda for the purposes of determining whether it had been established that particular crimes had been committed. The Appeals Chamber recalls that the Trial Chamber is tasked with resolving inconsistencies in the evidence. In the instances highlighted by Mr Ntaganda, in carrying out this process of weighing and evaluating the evidence, the Trial Chamber found the prosecution witnesses to be credible and Mr Ntaganda’s directly contradictory testimony not to be credible.

¹¹⁶⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 153, quoting [Conviction Decision](#), fns 1505, 1507; [T-271](#), p. 9, lines 7-10. See also [Mr Ntaganda’s Appeal Brief – Part II](#), paras 154-155.

¹¹⁶⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 169-170, referring to [Conviction Decision](#), fn. 1589; [Mr Ntaganda’s Response to Observations of Victims on Appeal– Part II](#), para. 46, referring to [Conviction Decision](#), fn. 1598.

¹¹⁶⁸ [Conviction Decision](#), para. 510.

¹¹⁶⁹ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 17, quoting [Conviction Decision](#), fn. 1507.

¹¹⁷⁰ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 18, quoting [Conviction Decision](#), fn. 1494.

600. In the view of the Appeals Chamber, this does not demonstrate that the Trial Chamber failed to understand or properly apply the standard or burden of proof. While it accepts Mr Ntaganda's argument that the question remains whether the prosecution's evidence, considered in the context of the evidence as a whole, should be accepted as establishing beyond reasonable doubt the facts alleged, the Appeals Chamber notes that, in each instance highlighted by Mr Ntaganda, the Trial Chamber either went on to enter the requisite legal finding based on its assessment of the evidence as a whole or did not rely on the factual finding for the purposes of conviction.¹¹⁷¹ There is no basis to conclude from the examples highlighted that the Trial Chamber disregarded evidence capable of casting reasonable doubt on the prosecution case.

601. Mr Ntaganda also argues that the Trial Chamber decided on the credibility of P-0017's testimony that Mr Ntaganda ordered a grenade to be fired at a group of civilians in Sayo without considering Mr Ntaganda's evidence on this particular matter.¹¹⁷²

602. The Appeals Chamber is not persuaded by this interpretation of the Conviction Decision. The Appeals Chamber notes that, in its initial overall assessment of P-0017's testimony, the Trial Chamber also examined his evidence on this event in light of Mr Ntaganda's argument that the witness had not participated in the operation. Thereafter, the Trial Chamber expressly addressed Mr Ntaganda's challenges under the 'Factual Findings' section of the Conviction Decision recalling its finding on P-0017's credibility on this particular aspect of his testimony.¹¹⁷³ The Appeals Chamber considers that nothing in the Trial Chamber's approach suggests that it decided on P-0017's credibility without considering Mr Ntaganda's evidence on this particular event.

¹¹⁷¹ [Conviction Decision](#), paras 44, 737, 739, 873, 922, 1182. In relation to the finding that Mr Ntaganda 'ordered that the three nuns locked in a room at the *Appartements* be killed', the Trial Chamber found that the order was not executed and the nuns were subsequently released ([Conviction Decision](#), para. 534) and this finding was not referred to by the Trial Chamber in its legal findings section. Regarding the finding that the UPC/FPLC planted landmines in Mongbwalu, the Trial Chamber did not find that any deaths resulted from this action and did not refer to the planting of landmines in its legal findings ([Conviction Decision](#), para. 864).

¹¹⁷² [Mr Ntaganda's Appeal Brief – Part II](#), paras 196-198.

¹¹⁷³ [Conviction Decision](#), para. 508, fns 1488, 1493-1494.

603. Having considered Mr Ntaganda's arguments regarding the Trial Chamber's approach to assessing the credibility of prosecution witnesses and Mr Ntaganda's conflicting testimony as a whole, the Appeals Chamber considers that he has not demonstrated that the Trial Chamber shifted the burden of proof in law or in fact. Under his eighth ground of appeal, Mr Ntaganda has challenged the reasonableness of the Trial Chamber's conclusions regarding the placing of mines in Mongbwalu, the attack on Nzebi, the killing of the *Abbé* and the firing of a grenade at civilians in Sayo. The Trial Chamber's evaluation of the evidence in relation to these events and the question of whether its findings were reasonable will be considered in more detail in addressing these arguments.¹¹⁷⁴

(iii) Trial Chamber's alleged failure to properly weigh the timing of Mr Ntaganda's testimony

604. With respect to Mr Ntaganda's argument that the Trial Chamber erred in failing to favourably consider the timing of his testimony when assessing his credibility,¹¹⁷⁵ the Appeals Chamber notes that the Trial Chamber stated that Mr Ntaganda was the 'second witness' to appear for the Defence.¹¹⁷⁶ The Appeals Chamber finds that an accused person's election to testify ahead of other Defence witnesses is a factor that may be considered favourably when a trial chamber assesses his or her credibility. However, the question of how the timing of the accused's testimony should be considered forms part of a trial chamber's discretion in evaluating the evidence. Mr Ntaganda has not identified any particular features of the present proceedings that would justify his argument that the Trial Chamber was required to consider his testimony more favourably because he testified before other defence witnesses. Accordingly, Mr Ntaganda's argument is rejected.

(iv) Conclusion

605. Mr Ntaganda has not demonstrated that the Trial Chamber violated the presumption of innocence or reversed the burden of proof in assessing his testimony. His arguments regarding the manner in which the Trial Chamber evaluated his testimony are therefore rejected.

¹¹⁷⁴ See paragraphs 641-693, 730-745 below.

¹¹⁷⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 140.

¹¹⁷⁶ [Conviction Decision](#), para. 257.

2. *The dismissal of D-0017's evidence*

(a) **Summary of submissions**

(i) *Mr Ntaganda's submissions*

606. Mr Ntaganda disputes the Trial Chamber's assessment of D-0017's credibility and argues that the Chamber's disregard of the nuances of his testimony and other corroborative evidence represents a flawed approach to fact finding.¹¹⁷⁷ In his view, the Trial Chamber erroneously rejected D-0017's evidence on the sole basis that it differed from the prosecution allegations.¹¹⁷⁸ Mr Ntaganda contends that parts of D-0017's evidence, which were unrelated to the crimes or his conduct, were corroborative of other aspects of the defence case and as such these parts of the witness's evidence should have been assessed.¹¹⁷⁹ Mr Ntaganda argues that the Trial Chamber could not have reasonably reached its findings in relation to the attack on Songolo in August 2002, the attack on Komanda in November 2002 and his trip to Rwanda in February 2003 if it had duly considered D-0017's evidence.¹¹⁸⁰

(ii) *The Prosecutor's submissions*

607. The Prosecutor submits that the Trial Chamber reasonably rejected D-0017's evidence given its nature and the witness's close relationship with Mr Ntaganda whom he considered to be his "elder brother".¹¹⁸¹ In addition, the Prosecutor avers that D-0017 was 'evasive' and occasionally 'uncooperative in cross-examination'.¹¹⁸² The Prosecutor argues that Mr Ntaganda fails to acknowledge the Trial Chamber's detailed analysis and findings and instead 'cherry-picks from among them, often without context'.¹¹⁸³

(iii) *The victims' observations*

608. Victims Group 2 submit that Mr Ntaganda merely disagrees with the Trial Chamber's assessment of D-0017's evidence.¹¹⁸⁴ In their view, the instances

¹¹⁷⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 143-146.

¹¹⁷⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 145.

¹¹⁷⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 146.

¹¹⁸⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 147.

¹¹⁸¹ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 128, referring to [Conviction Decision](#), paras 250-255, quoting [T-255](#), p. 39, lines 1-22.

¹¹⁸² [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 129.

¹¹⁸³ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 130.

¹¹⁸⁴ [Observations of Victims Group 2 on Appeal – Part II](#), para. 73.

referenced by Mr Ntaganda of the Trial Chamber expressly choosing other evidence over that of D-0017 are examples of the Trial Chamber's proper weighing of the evidence.¹¹⁸⁵

(b) Relevant part of the Conviction Decision

609. In rejecting D-0017's evidence, the Trial Chamber observed that the witness generally tended 'to negate knowledge of any potentially incriminating facts' and that his testimony reflected 'a concern not to provide any incriminating evidence with regard to the accused'.¹¹⁸⁶ In addition, the Trial Chamber found that 'D-0017 generally denied the commission of crimes by the UPC/FPLC or having personal knowledge thereof'.¹¹⁸⁷ Specifically, the Trial Chamber found the witness's remarks concerning his training at Mandro to contrast with the consistent evidence provided by a number of credible witnesses.¹¹⁸⁸ Having considered all of the issues affecting D-0017's testimony, the Trial Chamber found that it lacked credibility and decided not to rely on it.¹¹⁸⁹

(c) Determination by the Appeals Chamber

610. In addressing its approach to the assessment of a witness's credibility, the Trial Chamber stated, in relevant part, as follows:

77. Where required, the Chamber has relied on the evidence of witnesses in relation to whose credibility the Chamber had some reservations to the extent that it was corroborated by other reliable evidence. However, the credibility of certain witnesses was so impugned that they could not be relied upon, even if parts of their testimony were corroborated by other evidence.

78. [...] Finally, whenever relevant, the Chamber considered the witnesses' conduct during their testimony, including their readiness and willingness to respond to questions put to them by the parties, the participants, and the Chamber, as well as the manner of answering.¹¹⁹⁰

611. With respect to the testimony of D-0017, the Trial Chamber arrived at the conclusion that it lacked credibility and could not be relied upon based on the following considerations: (i) on certain issues, the witness's 'demeanour was evasive,

¹¹⁸⁵ [Observations of Victims Group 2 on Appeal – Part II](#), paras 72-73.

¹¹⁸⁶ [Conviction Decision](#), para. 252.

¹¹⁸⁷ [Conviction Decision](#), para. 254.

¹¹⁸⁸ [Conviction Decision](#), para. 254.

¹¹⁸⁹ [Conviction Decision](#), para. 255.

¹¹⁹⁰ [Conviction Decision](#), paras 77-78 (footnotes omitted).

and, in cross-examination, at times uncooperative’ and ‘[i]n relation to certain questions concerning crucial matters, the witness did not answer in a straightforward manner, or appeared inconsistent’; (ii) the witness acknowledged that he considered Mr Ntaganda to be his ‘elder brother’ and that he had ‘received financial assistance from him’, and, although he denied that this had impacted on his decision to testify, ‘his testimony reflect[ed] a concern not to provide any incriminating evidence with regard to the accused’; (iii) his ‘testimony included a number of assertions that the Chamber f[ound] implausible, both in themselves and with regard to the overall evidence presented in this case’, namely that ‘the minimum age for recruits was 18 years’, that ‘he never saw any recruits aged under 18 years in Mandro’ and that the living conditions in the camp were favourable; (iv) he ‘generally denied the commission of crimes by the UPC/FPLC or having personal knowledge thereof’, specifically in stating that recruits were told to protect the population regardless of ethnicity and fire only in the direction from which fire was coming, which contradicts the consistent evidence of ‘a number of credible witnesses’.¹¹⁹¹

612. The Appeals Chamber has previously found that ‘there may be witnesses whose credibility is impugned to such an extent that he or she cannot be relied upon even if other evidence appears to corroborate parts of his or her testimony’.¹¹⁹² The Appeals Chamber notes that Mr Ntaganda’s arguments largely ignore the Trial Chamber’s analysis and findings concerning D-0017’s conduct during his testimony as well as his actual evidence when viewed in light of the evidentiary record as a whole. Contrary to Mr Ntaganda’s argument, the Appeals Chamber finds that, by rejecting his testimony, the Trial Chamber did not disregard his evidence in full because it differed from the Prosecutor’s allegations. Rather, it weighed his evidence against the other evidence on the record and rejected it on a reasoned basis.

613. Mr Ntaganda argues that, in finding that D-0017’s testimony that recruits were trained to protect the civilian population was not credible, the Trial Chamber ignored corroborating evidence from ‘P-0017 who [REDACTED]’,¹¹⁹³ similar evidence from

¹¹⁹¹ [Conviction Decision](#), paras 251-255.

¹¹⁹² [Ngudjolo Appeal Judgment](#), para. 168.

¹¹⁹³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 145, referring to P-0017: [T-63](#), p. 47, lines 16-19.

Mr Ntaganda and P-0769 regarding the UPC/FPLC's ideology,¹¹⁹⁴ as well as video evidence of Chief Kahwa's speech to troops in Mandro.¹¹⁹⁵

614. Having examined the evidence to which Mr Ntaganda refers and the Trial Chamber's evaluation of this evidence, the Appeals Chamber is not persuaded by his arguments. First, the Appeals Chamber notes that Mr Ntaganda selectively quotes P-0017's testimony in his Appeal Brief. In fact, the full extract of this part of the witness's evidence contradicts the testimony of D-0017. The witness went on to clarify immediately after the lines quoted by Mr Ntaganda:

[REDACTED].¹¹⁹⁶

Thus, P-0017's testimony supports rather than contradicts the Trial Chamber's finding that D-0017's evidence contrasted with the consistent evidence provided by a number of credible witnesses regarding the commission of crimes against civilians by the UPC/FPLC.¹¹⁹⁷

615. Second, the Appeals Chamber notes that the Trial Chamber did in fact consider the remaining evidence to which Mr Ntaganda refers. Regarding P-0769's testimony about the ideology of the UPC/FPLC, the Trial Chamber noted that, just after this statement, 'P-0769 testified that songs calling for violence against the Lendu were sung'; therefore, it found that this testimony did not contradict the evidence provided by other witnesses that 'recruits were taught that the Lendu and the Ngiti were the enemy'.¹¹⁹⁸ Regarding Mr Ntaganda's testimony about Chief Kahwa's speech, while the Trial Chamber did not refer to the extract mentioned by Mr Ntaganda, it considered very similar testimony that he gave the following day when he revisited the same issue.¹¹⁹⁹ Regarding both Chief Kahwa's speech and Mr Ntaganda's testimony about this speech, the Trial Chamber stated that it did 'not consider the statements in this speech to reflect the reality of the disciplinary system within the

¹¹⁹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 145, referring to D-0300: [T-215](#), p. 86, line 12 to p. 87, line 3; P-0769: [T-120](#), p. 30, line 25 to p. 31, line 12.

¹¹⁹⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 145, referring to video evidence of Chief Kahwa's speech: DRC-OTP-0082-0016, (transcript DRC-OTP-0164-0567, p. 7, line 200 to p. 8 line 258; translation DRC-OTP-0164-0710, at 0719, p. 6, line 1202 to p. 8, line 275).

¹¹⁹⁶ P-0017: [T-63](#), p. 47, line 19 to p. 48, line 4.

¹¹⁹⁷ [Conviction Decision](#), para. 254.

¹¹⁹⁸ [Conviction Decision](#), para. 373, fn. 1053, referring to P-0769: [T-120](#), pp. 31-32.

¹¹⁹⁹ [Conviction Decision](#), para. 305, fn. 790, referring to D-0300: [T-216](#), pp. 12-13.

UPC/FPLC as regards looting and rape of civilians associated with the enemy, during UPC/FPLC operations'.¹²⁰⁰ The Trial Chamber's evaluation of this evidence was based on its findings on how the operations unfolded, 'including the looting and rapes which occurred without punishment'.¹²⁰¹

616. As Mr Ntaganda has failed to show any error in the Trial Chamber's evaluation of this evidence, his argument that it should have been considered as corroborating D-0017's evidence regarding the training of the recruits is rejected.

617. Mr Ntaganda also argues that 'significant swathes of [D-0017's] testimony were unrelated to crimes, or Mr. Ntaganda's conduct, and yet were corroborative of the Defence evidence' and should have been considered.¹²⁰² In this regard, he highlights the witness's testimony regarding 'the security situation in Mongbwalu prior to the UPC/FPLC operation; the movement of UPC/FPLC troops from Bunia to Mongbwalu, the composition of the group, [and] the situation on arrival in Mongbwalu'.¹²⁰³ However, he does not explain how this evidence would have impacted on the Trial Chamber's factual findings, even if found to be credible and considered as such. As Mr Ntaganda has failed to show any error in the Trial Chamber's findings, his argument that at least parts of D-0017's evidence should have been considered is rejected.

618. In view of the foregoing, Mr Ntaganda's argument that the Trial Chamber erred in dismissing D-0017's evidence in its entirety is rejected.

3. *The prior recorded statements of P-0022 and P-0027*

(a) **Summary of submissions**

(i) *Mr Ntaganda's submissions*

619. Mr Ntaganda submits that the Trial Chamber erred in 'relying solely on the untested and uncorroborated' prior recorded statements of P-0022 and P-0027 to

¹²⁰⁰ [Conviction Decision](#), para. 305, fn. 790.

¹²⁰¹ [Conviction Decision](#), para. 305, fn. 790.

¹²⁰² [Mr Ntaganda's Appeal Brief – Part II](#), para. 146; [T-271](#), p. 7, line 16 to p. 8, line 12.

¹²⁰³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 146, referring to D-0017: [T-252](#), p. 45, line 2 to p. 47, line 6; [T-253](#), p. 32 line 11 to p. 40, line 10.

‘enter convictions against [him]’.¹²⁰⁴ Mr Ntaganda avers that, in so doing, the Trial Chamber violated his right to examine or have examined the witnesses against him and that, as a result, the ‘convictions should be reversed to the extent that they rely on these findings’.¹²⁰⁵

(ii) *The Prosecutor’s submissions*

620. The Prosecutor submits that the Trial ‘Chamber properly relied on the rule 68(2)(c) statements of P-0022 and P-0027 to enter discrete factual findings’.¹²⁰⁶ The Prosecutor indicates that these statements, together with ‘*other overwhelmingly consistent evidence*, supported the Chamber’s factual findings that UPC soldiers committed various underlying acts of murder, attempted murder, rape and persecution’.¹²⁰⁷ Moreover, the Prosecutor avers that Mr Ntaganda’s claim that the Trial Chamber relied on ‘uncorroborated’ evidence mischaracterises the notion of corroboration.¹²⁰⁸ The Prosecutor argues that corroboration is not required for each underlying discrete factual finding and that, even if it were, it is sufficient for the accounts of two or more witnesses to be compatible, even if not identical, for them to corroborate each other.¹²⁰⁹ In addition, the Prosecutor contends that Mr ‘Ntaganda overlooks that the prior recorded testimony at issue does not even relate to his own acts and conduct’, and ‘did not describe actions so “proximate” to [him]’, given that Mr Ntaganda was not even present for the events that P-0022 and P-0027 describe.¹²¹⁰ Thus, in her view, the Trial Chamber was not precluded from considering these statements.¹²¹¹

(iii) *Mr Ntaganda’s reply to the Prosecutor*

621. Contrary to the Prosecutor’s contention, Mr Ntaganda argues that where the evidence presented to prove a crime is ‘untested’ the Trial Chamber may only convict if there is other evidence which specifically corroborates the untested evidence.¹²¹² To rely on the evidence of one murder as corroboration for another murder which is

¹²⁰⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 148.

¹²⁰⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 150.

¹²⁰⁶ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 132.

¹²⁰⁷ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 132 (emphasis in original).

¹²⁰⁸ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 133.

¹²⁰⁹ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 133.

¹²¹⁰ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 134.

¹²¹¹ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 134.

¹²¹² [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 44.

unrelated and for which the evidence is untested would, in his view, ‘artificially bestow reliability on otherwise low-probative value evidence, and weaken the evidential fabric of the factual findings’.¹²¹³

622. In relation to the Prosecutor’s argument that the Trial Chamber was entitled to rely on P-0022 and P-0027’s statements because they do not relate to his own acts and conduct, Mr Ntaganda argues that it is ‘erroneously narrow’ because “‘acts and conduct’” can relate to “[...] any facts which [are] indispensable for a conviction’”.¹²¹⁴ Mr Ntaganda argues that the evidence relied upon by the Trial Chamber from the witnesses’ statements was ‘pivotal evidence directly related to material elements of the crimes’ which required corroboration.¹²¹⁵ By raising this argument, Mr Ntaganda contends that the Prosecutor ‘seems to conflate the distinction between the admissibility of a statement and the weight to be afforded to it pursuant to rule 68(2)(c) [of the Rules]’.¹²¹⁶

623. Lastly, Mr Ntaganda disputes the Prosecutor’s argument that P-0022 and P-0027’s evidence was consistent with other witnesses’ accounts of the UPC’s actions during the First and Second Operations which collectively established a pattern of the UPC’s criminal conduct.¹²¹⁷ Mr Ntaganda argues that ‘no other witnesses testified about the specific crimes described by P-0022 and P-0027’ and that, in the absence of any indication that the Trial Chamber relied on the UPC’s pattern of criminal conduct to corroborate the evidence of P-0022 and P-0027, the Prosecutor ‘cannot speculate to that effect’.¹²¹⁸

(b) Relevant part of the Conviction Decision

624. The Trial Chamber found, *inter alia*, that in the aftermath of the attack on Kilo the UPC/FPLC ‘began going after the Lendu in the village, killing some of them’.¹²¹⁹ It found that, in one instance, two Lendu women, including P-0022, were captured by

¹²¹³ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 44.

¹²¹⁴ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 45, quoting *Prlić et al.* Appeal Decision, para. 59.

¹²¹⁵ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 45.

¹²¹⁶ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 45.

¹²¹⁷ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 46.

¹²¹⁸ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 46.

¹²¹⁹ [Conviction Decision](#), para. 543.

a UPC/FPLC soldier.¹²²⁰ Relying on the prior recorded statement of P-0022, the Trial Chamber found: (i) that the UPC/FPLC soldiers attempted to murder P-0022 by cutting her neck and throwing her into a pit and forced another detainee to rape her;¹²²¹ (ii) that an Ngiti man and pregnant Lendu woman were killed in Kilo;¹²²² and (iii) that her account exemplified the manner in which the UPC/FPLC persecuted the Lendu civilians.¹²²³

625. The Trial Chamber found that, during the Second Operation, on or about 25 February 2003, the UPC/FPLC attacked Buli, shot and fired heavy weapons at those present in the village, ‘chased individuals into the surrounding bush’, and fired at those fleeing.¹²²⁴ Based on the prior recorded statement of P-0027, the Trial Chamber found that ‘[a]t least one person was killed by a member of the UPC/FPLC in the surrounding bush’.¹²²⁵

(c) Determination by the Appeals Chamber

626. The reasoning and analysis of the Appeals Chamber that follows represents the view of the majority of the Judges. Judge Eboe-Osuji is unable to concur with this part of the judgment and his views are set out in his partly concurring opinion.¹²²⁶ Pursuant to article 67(1)(e) of the Statute, the accused has the right ‘[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her’. Article 69(2) of the Statute provides:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

¹²²⁰ [Conviction Decision](#), para. 545.

¹²²¹ [Conviction Decision](#), paras 545-546, 874, 940. *See also* [P-0022 rule 68 Decision](#).

¹²²² [Conviction Decision](#), paras 546, 873.

¹²²³ [Conviction Decision](#), para. 1017.

¹²²⁴ [Conviction Decision](#), para. 604.

¹²²⁵ [Conviction Decision](#), para. 605. *See also* [P-0027 rule 68 Decision](#).

¹²²⁶ [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji.

627. Nevertheless, rule 68 of the Rules allows for the introduction of prior recorded testimony of a person who is not present before a trial chamber in certain circumstances. In the present case, the prior recorded testimony of P-0022 and P-0027 was admitted pursuant to rule 68(2)(c) of the Rules,¹²²⁷ which provides for a situation in which:

The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:

(i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.

(ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

The Appeals Chamber notes that rule 68(2)(c) of the Rules is an amendment of the original rule 68 adopted by the Assembly of States Parties in 2012 in order to introduce three additional instances in which prior recorded testimony could be introduced.¹²²⁸ The aim of this amendment was to ‘allow the judges of the Court to reduce the length of Court proceedings and streamline evidence presentation [...] while paying due regard to the principles of fairness and the rights of the accused’.¹²²⁹

628. The Appeals Chamber is mindful of the need to give effect to these aims in considering how evidence introduced pursuant to rule 68(2) of the Rules may subsequently be used and relied upon by a trial chamber. Indeed, it would defeat the purpose of the amendment if written statements admitted *in lieu* of oral testimony were automatically accorded lower evidentiary weight such that they could not be

¹²²⁷ [P-0022 rule 68 Decision](#); [P-0027 rule 68 Decision](#).

¹²²⁸ Assembly of States Parties, Resolution ICC-ASP/12/Res.7, adopted at the 12th plenary meeting, on 27 November 2013. *See also* Study Group on Governance Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, [ICC-ASP/12/37/Add.1](#), p. 18: The three instances when such evidence may be introduced were as follows: (i) when the prior recorded testimony goes to the proof of a matter other than the acts and conduct of the accused; (ii) when the prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; and (iii) when the prior recorded testimony comes from a person who has been subjected to interference.

¹²²⁹ Assembly of States Parties, Twelfth Session, Report of the Working Group on Amendments, 24 October 2013, ICC-ASP/12/44, para. 8.

relied upon alone to establish particular facts as Mr Ntaganda suggests. In this regard, the Appeals Chamber notes that the criteria established in rule 68(2) of the Rules appear to make the admission of prior recorded testimony *in lieu* of oral testimony particularly apt for the purpose of establishing individual criminal acts in cases of mass criminality when the accused is not alleged to have carried out the acts directly and the commission of the crimes is not materially disputed.¹²³⁰

629. Therefore, the Appeals Chamber considers that there is no legal impediment to prior recorded testimony admitted pursuant to rule 68(2) of the Rules being relied upon to establish individual criminal acts in circumstances in which they are not the direct acts of the accused. However, the Appeals Chamber underlines that reliance on such evidence should not be prejudicial to or inconsistent with the rights of the accused. In this regard, it notes that the Appeals Chamber of the ICTY has emphasised that ‘a conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial’.¹²³¹ This jurisprudence follows the principle established by the ECtHR that a conviction based solely, or in a decisive manner, on witness evidence that the accused has had no opportunity to examine is incompatible with the fair trial rights enshrined in the Convention.¹²³² The Appeals Chamber considers that this principle is equally applicable to proceedings before the Court as the corollary of the right of the accused person to examine or have examined the witnesses against him or her enshrined in article 67(1)(e) of the Statute.

630. Therefore, it finds that prior recorded testimony must not form the sole or decisive basis for the conviction for a particular crime as such. Other instances of similar criminal acts must be established on the basis of oral testimony such that the right of the accused to challenge the evidence grounding his conviction for that crime

¹²³⁰ Rule 68(2)(b) of the Rules allows for the introduction of prior recorded testimony going ‘to proof of a matter other than the acts and conduct of the accused’, while rule 68(2)(b)(i) allows for the introduction of such testimony when, *inter alia*, it relates to issues that are not materially in dispute and ‘is of a cumulative or corroborative nature, in the sense that other witnesses will give or have given oral testimony of *similar facts*’. Rule 68(2)(c) and (d) allow for the introduction of prior recorded testimony without these strict limitations in certain circumstances, although these sub-rules specify that ‘[t]he fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it’.

¹²³¹ [Karadžić Appeal Judgment](#), para. 449; [Popović et al. Appeal Judgment](#), para. 96; [Dorđević Appeal Judgment](#), para. 807; [Haraqija and Morina Contempt Appeal Judgment](#), para. 61.

¹²³² [Bocos-Cuesta Judgment](#), paras 67-70; [Solakov Judgment](#), para. 57.

is not prejudiced. The extent to which a prior recorded statement is corroborated by other evidence is also important in determining the weight to be accorded to it and this must be carefully assessed in light of the full evidentiary record and in relation to the issue(s) to be determined.

631. In the present case, the Appeals Chamber notes that the prior recorded statements of P-0022 and P-0027 were not relied upon by the Trial Chamber to establish Mr Ntaganda's own acts and conduct. Rather they were relied upon to establish the acts and conduct of unidentified UPC/FPLC soldiers who directly perpetrated crimes for which Mr Ntaganda was found guilty as an indirect co-perpetrator.

632. The Trial Chamber relied upon P-0022's statement to establish that the following war crimes and crimes against humanity were committed by UPC/FPLC soldiers after the takeover of Kilo: the murder of a Ngiti man and a pregnant Lendu woman;¹²³³ the attempted murder of P-0022;¹²³⁴ and the forced rape of P-0022 by another detainee.¹²³⁵ However, Mr Ntaganda's conviction for murder, attempted murder and rape was not solely or decisively based on P-0022's prior recorded testimony. For its findings on murder, attempted murder and rape as a crime against humanity and as a war crime, the Trial Chamber principally relied on the oral testimony of numerous witnesses regarding similar acts to establish the material element of the 'killing of persons', attempted murder and rape committed by the UPC/FPLC soldiers.¹²³⁶

¹²³³ [Conviction Decision](#), paras 546, 873, 1199.

¹²³⁴ [Conviction Decision](#), paras 546, 874, 1199.

¹²³⁵ [Conviction Decision](#), paras 545, 940, 1199.

¹²³⁶ [Conviction Decision](#), paras 873-874, *referring to* the killing of people in Mongbwalu, Sayo, and Nzebi by the UPC/FPLC during the assaults on these localities and the killing of a woman in front of the health centre in Sayo; the killing of people in Mongbwalu and Sayo during *ratissage* operations by members of the UPC/FPLC and – in the case of Mongbwalu – also by Hema 'civilians', including a Lendu woman accused of being a 'chieftain' of the Lendu 'combatants' and persons killed at the *Appartements* camp following interrogation; the killing of two Lendu persons in Nzebi by Mr Ntaganda's bodyguards, pursuant to Mr Ntaganda's order, sometime between the assault on Nzebi and Mr Ntaganda's departure from Mongbwalu to Bunia; the killing of Lendu persons, a Ngiti man and a pregnant Lendu woman who had been detained in a pit, and of a Nyali man by UPC/FPLC soldiers in Kilo after the takeover of the village; the killing of at least two young children in Kobu by UPC/FPLC soldiers during the assault and the killing of at least two detained persons during the *ratissage* operation that followed; the killing of nine hospital patients in Bambu by UPC/FPLC soldiers; the killing of a woman who was raped and who tried to defend herself and of P-0018's sister-in-law by

633. The Appeals Chamber also notes that P-0022's general account of events in Kilo was consistent with the oral testimony of other witnesses. In particular, the Trial Chamber relied upon P-0022's statement, together with the evidence of other witnesses, to find that 'the attack was carried out with regular assault weapons and heavy weapons', and that 'members of the population fled Kilo, to the bush and to other places', but were prompted to return by UPC/FPLC members who told them they would not be harmed.¹²³⁷ Based on P-0022's statement and the testimony of other witnesses, it found that the 'UPC/FPLC made the men and boys from Kilo, including Lendu, dig trenches outside the UPC/FPLC camp', and 'began going after the Lendu in the village, killing some of them', whose bodies were then thrown into mass graves.¹²³⁸

634. In addition to the finding of murder/attempted murder in Kilo based on P-0022's prior recorded testimony, the Trial Chamber also found that Lendu persons and a Nyali man were killed by UPC/FPLC soldiers after the takeover of the village and that UPC/FPLC soldiers used their influence on girls to have sexual intercourse with them. For these findings, the Trial Chamber relied on the prior recorded testimony of P-0850, the oral testimony and prior recorded testimony of P-0877 (for murder), as well as the oral testimony of P-0017 (for rape).¹²³⁹

635. Therefore, the Appeals Chamber rejects Mr Ntaganda's argument that the Trial Chamber relied solely on the untested and uncorroborated prior recorded statement of

UPC/FPLC soldiers in Sangi; and some men who were anally penetrated by UPC/FPLC soldiers with their penises or by using 'bits of wood' died following their aforementioned treatment in Kobu; and the killing of at least 49 persons in a banana field near the Paradiso building in Kobu by UPC/FPLC soldiers. Regarding attempted murder, the Trial Chamber relied on its findings that UPC/FPLC soldiers shot at a patient at the hospital in Bambu during the assault on the village; the patient survived but later died of tetanus; a UPC/FPLC soldier, after having raped P-0018, shot her through her cheek and mouth, following which the witness lost consciousness; a UPC/FPLC soldier struck P-0108, one of persons detained at the Paradiso building in Kobu, on the head with a machete as P-0108 tried to flee; and UPC/FPLC soldiers shot P-0019 in her ankle as she was trying to flee a house where she had previously been raped. [Conviction Decision](#), para. 940, *referring to* the following findings: during and in the immediate aftermath of the UPC/FPLC assault on Mongbwalu, UPC/FPLC soldiers forced women and girls to have sexual intercourse with them, including at the *Appartements* camp; in Kilo, some UPC/FPLC soldiers used their influence on girls in Kilo to have sexual intercourse with them; in Kobu, UPC/FPLC soldiers raped detained women and girls; and also anally penetrated men with their penises or by using 'bits of wood'; in Sangi, UPC/FPLC soldiers raped women, and in Buli a UPC/FPLC soldier raped P-0113.

¹²³⁷ [Conviction Decision](#), paras 539-541.

¹²³⁸ [Conviction Decision](#), para. 543.

¹²³⁹ [Conviction Decision](#), paras 543, 547-548.

P-0022 to enter a conviction against him for the war crimes and crimes against humanity of murder, attempted murder and rape in Kilo.

636. The Trial Chamber also relied on P-0022's statement as an example of the manner in which the UPC/FPLC persecuted the Lendu in its findings on the crime against humanity of persecution.¹²⁴⁰ However, Mr Ntaganda's conviction for the crime against humanity of persecution was not based on P-0022's prior recorded testimony alone. Rather, it was based on all the 'crimes committed during and in the aftermath of the UPC/FPLC takeover of Mongbwalu, Sayo, Nzebi, Kilo, Nyangaray, Kobu, Sangi, Bambu, Lipri, Tsili, Jitchu, Buli, and Gola, as well as following the capture of persons at the "pacification meeting" in Sangi and during related events during the "Kobu massacre"', which were found to have 'effectively targeted the Lendu ethnic group as such'.¹²⁴¹ Therefore, the Appeals Chamber rejects Mr Ntaganda's argument that the Trial Chamber relied solely on the untested and uncorroborated prior recorded statement of P-0022 to enter a conviction against him for the crime against humanity of persecution in Kilo.

637. The Trial Chamber relied on P-0027's statement to support its finding that at least one person was killed by the UPC/FPLC in the bush surrounding Buli.¹²⁴² In turn, this finding was relied upon to support Mr Ntaganda's conviction for the war crime of attacking civilians during the assault on Buli.¹²⁴³ However, the Appeals Chamber notes that the Trial Chamber did not base Mr Ntaganda's conviction for this war crime on P-0027's statement alone.¹²⁴⁴ It based its findings that the 'UPC/FPLC advanced into Buli, shooting and firing heavy weapons, including at those present in the village, and chasing individuals into the surrounding bush, firing their rifles at those fleeing' and 'searched the bush, including into the next day', on the witness statements and oral testimony of P-0039, P-0105, P-0127, P-0300, P-0963, P-0792, P-

¹²⁴⁰ [Conviction Decision](#), paras 545-546, 1017, 1199.

¹²⁴¹ [Conviction Decision](#), para. 1022.

¹²⁴² [Conviction Decision](#), para. 605.

¹²⁴³ [Conviction Decision](#), para. 915.

¹²⁴⁴ [Conviction Decision](#), para. 915: 'On or about 25 February 2003, the UPC/FPLC advanced into Buli, shooting and firing heavy weapons, including at those present in the village, and chasing individuals into the surrounding bush, firing their rifles at those fleeing. The UPC/FPLC searched the bush, including into the next day. At least one person was killed by a member of the UPC/FPLC in the surrounding bush'.

0113, and P-0907.¹²⁴⁵ Therefore, the Appeals Chamber rejects Mr Ntaganda's argument that the Trial Chamber relied solely on the untested and uncorroborated prior recorded statement of P-0027 to enter a conviction against him for the war crime of attacking civilians during the assault on Buli.

638. Based on the foregoing, the Appeals Chamber finds that, contrary to Mr Ntaganda's argument, the statements of P-0022 and P-0027 were not the 'sole or decisive' basis for the Trial Chamber to enter convictions against Mr Ntaganda. Mr Ntaganda's right to examine, or have examined witnesses against him under article 67(1)(e) of the Statute was therefore not violated. Mr Ntaganda's arguments are rejected.

4. *Overall conclusion*

639. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's assessment of his evidence, rejection of D-0017's evidence and reliance on the prior recorded statements of P-0022 and P-0027, the Appeals Chamber rejects this ground of appeal.

H. Eighth ground of appeal: Errors in finding that the UPC/FPLC and Hema civilians committed crimes during the First Operation

640. Under the eighth ground of appeal, Mr Ntaganda challenges the Trial Chamber's findings in relation to six discrete events which concern crimes committed by the UPC/FPLC during the First Operation.¹²⁴⁶ Mr Ntaganda argues that the Trial Chamber's assessment of the evidence with regard to these six events is tainted by its reliance on the 'uncorroborated testimony' of individual witnesses, namely, P-0768, P-0963 and P-0017.¹²⁴⁷ Mr Ntaganda characterises these witnesses as 'accomplice witnesses' whose testimony lacked corroboration and submits that the Trial Chamber erred in failing to apply the requisite caution to such evidence.¹²⁴⁸ The Appeals Chamber will consider Mr Ntaganda's arguments concerning each witness in turn.

¹²⁴⁵ [Conviction Decision](#), para. 915.

¹²⁴⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 151-230.

¹²⁴⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 151.

¹²⁴⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 151, 226-228.

I. P-0768

641. P-0768 was a ‘UPC/FPLC military insider who testified, *inter alia*, about the organisational structure of the UPC/FPLC, the recruitment, training, and alleged use of child soldiers, and his participation in military interventions in the context of the First Operation’.¹²⁴⁹ Mr Ntaganda seeks to impugn the Trial Chamber’s reliance on the evidence of P-0768 alone for its findings on the attack on Nzebi; the killing of *Abbé* Bwanalunga and the planting of anti-personnel mines at the entry and exit points of Mongbwalu.¹²⁵⁰

(a) **Relevant part of the Conviction Decision**

642. During the unfolding of the First Operation and after taking over Sayo, the Trial Chamber found, *inter alia*, that the UPC/FPLC attacked the village of Nzebi, killing some individuals by gunshot and shelling.¹²⁵¹ In addition, the Trial Chamber found that ‘[s]ometime between the assault on Nzebi and Mr Ntaganda’s departure from Mongbwalu to Bunia, Mr Ntaganda’s bodyguards, upon [his] order, shot and killed two Lendu persons who had been captured [...] in Nzebi’.¹²⁵² For these findings, the Trial Chamber relied on the testimony of P-0768, having assessed his testimony against Mr Ntaganda’s testimony on these events and finding it to be credible and reliable.¹²⁵³

643. Furthermore, the Trial Chamber found that the UPC/FPLC captured *Abbé* Boniface Bwanalunga, a Lendu Catholic priest of advanced age, together with three Lendu nuns, in the aftermath of the takeover of Mongbwalu.¹²⁵⁴ According to the Trial Chamber, *Abbé* Bwanalunga was detained at the *Appartements* where he was interrogated by Mr Ntaganda who hit him with a piece of wood in the presence of Mr Ntaganda’s bodyguards.¹²⁵⁵ It further found that, ‘after the interrogation, Mr Ntaganda ordered his bodyguards to take the *Abbé* behind the *Appartements*, where

¹²⁴⁹ [Conviction Decision](#), para. 161.

¹²⁵⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 152-184.

¹²⁵¹ [Conviction Decision](#), para. 509.

¹²⁵² [Conviction Decision](#), para. 510.

¹²⁵³ [Conviction Decision](#), paras 509-510, fns 1499, 1500, 1502, 1503, 1505, 1506, 1507.

¹²⁵⁴ [Conviction Decision](#), paras 529-530.

¹²⁵⁵ [Conviction Decision](#), para. 532.

[he] shot the *Abbé*'.¹²⁵⁶ For its findings on the killing of *Abbé* Bwanalunga, the Trial Chamber relied on the testimony of P-0768.¹²⁵⁷

644. In addition, the Trial Chamber found that '[a]fter Mongbwalu was taken over, Mr Ntaganda ordered anti-personnel mines to be placed at the entry and exit points of the town that were not guarded by the UPC/FPLC soldiers'.¹²⁵⁸ For this finding, the Trial Chamber relied on the testimony of P-0768 and other related evidence.¹²⁵⁹

(b) Summary of submissions

(i) *Mr Ntaganda's submissions*

645. Mr Ntaganda disputes various aspects of P-0768's testimony on the Nzebi attack, including the witness's motivation for testifying against him.¹²⁶⁰ He argues that 'by pitting Mr. Ntaganda's testimony against that of P-0768, and then choosing a side', the Trial Chamber adopted an "either/or" approach to fact finding'.¹²⁶¹ Moreover, Mr Ntaganda avers that the lack of corroboration of P-0768's testimony coupled with the Trial Chamber's failure to consider relevant evidence which undermined this witness's testimony and corroborated Mr Ntaganda's account, and its failure to provide sufficient reasons for its findings are errors that materially affected the Trial Chamber's findings.¹²⁶²

646. In relation to the killing of *Abbé* Bwanalunga, Mr Ntaganda argues that the same errors noted above invalidate this finding.¹²⁶³ In his view, the finding is unsafe given the Trial Chamber's reliance on the uncorroborated testimony of P-0768 and its conclusions on the witness's credibility.¹²⁶⁴

647. As to the Trial Chamber's finding that Mr Ntaganda ordered the placing of anti-personnel mines at entry and exit points of Mongbwalu, he reiterates his arguments in

¹²⁵⁶ [Conviction Decision](#), para. 533.

¹²⁵⁷ [Conviction Decision](#), para. 533, fn. 1590.

¹²⁵⁸ [Conviction Decision](#), para. 524.

¹²⁵⁹ [Conviction Decision](#), para. 524, fn. 1558. *See also* paras 171, 334, fns 408-413.

¹²⁶⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 152-166.

¹²⁶¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 154.

¹²⁶² [Mr Ntaganda's Appeal Brief – Part II](#), paras 156-158, 166.

¹²⁶³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 167.

¹²⁶⁴ [Mr Ntaganda's Appeal Brief – Part II](#), paras 167-177.

relation to P-0768's credibility and the witness's status as an accomplice.¹²⁶⁵ Moreover, he once again challenges the Trial Chamber's approach to fact-finding, arguing that before the Trial Chamber considered the defence evidence it had already decided that P-0768's evidence was truthful.¹²⁶⁶

(ii) *The Prosecutor's submissions*

648. The Prosecutor submits that the Trial Chamber correctly relied on P-0768's account of the First Operation and the attack on Nzebi, and sufficiently explained why it found the witness to be credible.¹²⁶⁷ Furthermore, the Prosecutor argues that the Trial Chamber 'properly considered' Mr Ntaganda's 'challenges to P-0768's credibility - whether based on his alleged motivations to testify or on his alleged false testimony on his presence in Mongbwalu - and reasonably rejected them'.¹²⁶⁸ In the Prosecutor's view, Mr Ntaganda 'merely repeats his arguments, without showing error'.¹²⁶⁹

649. With respect to Mr Ntaganda's arguments regarding the circumstances of *Abbé Bwanalunga's* death, the Prosecutor submits that the Trial Chamber 'comprehensively explained why it found P-0768's account credible and reliable and Ntaganda's denial of this murder "implausible", "obviously evasive" and, ultimately, not credible'.¹²⁷⁰

650. Regarding Mr Ntaganda's arguments on the use of anti-personnel mines in Mongbwalu, the Prosecutor argues that Mr Ntaganda 'misconstrues the record when he claims that the Chamber reversed the burden of proof and that P-0768's account was not credible and uncorroborated'.¹²⁷¹ In her view, '[r]ather than shifting the burden of proof', the Trial Chamber 'engaged in proper fact-finding'.¹²⁷² Furthermore, she avers that Mr Ntaganda 'disregards the totality of the evidence' and effectively argues that the Trial Chamber should have accepted his 'explanation over all else'.¹²⁷³ As to Mr Ntaganda's arguments in relation to P-0768's status as an

¹²⁶⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 181-184.

¹²⁶⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 179-180.

¹²⁶⁷ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), paras 145, 150.

¹²⁶⁸ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 145.

¹²⁶⁹ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 145.

¹²⁷⁰ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 152 (footnotes omitted).

¹²⁷¹ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 156 (footnotes omitted).

¹²⁷² [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 157.

¹²⁷³ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 157.

‘accomplice witness’ and the lack of corroboration for his account, the Prosecutor submits that he ‘misunderstands the concepts of accomplice evidence and corroboration’.¹²⁷⁴

(iii) The victims’ observations and Mr Ntaganda’s response to the victims

651. Victims Group 2 submit that the Trial Chamber ‘conducted a lengthy and detailed credibility assessment’ of P-0768, considered Mr Ntaganda’s challenges to the credibility of the witness and explained why it rejected them.¹²⁷⁵ They argue that the Trial Chamber took into account his role in the events, but that it was not required to consider his accomplice status explicitly because he was not ‘at the same leadership level as Mr Ntaganda’ and his interest in testifying against him would ‘not have been that of a co-accused shifting blame’ or ‘having made a plea bargain with the Prosecution’.¹²⁷⁶

652. In response, Mr Ntaganda maintains that P-0768 was an accomplice and that the Trial Chamber failed to properly consider whether he had a motive to blame Mr Ntaganda for the crimes in which he himself participated.¹²⁷⁷

(c) Determination by the Appeals Chamber

653. The Appeals Chamber identifies two strands of argument that Mr Ntaganda raises in relation to the Trial Chamber’s credibility assessment of P-0768. First, he argues that the Trial Chamber erred in adopting a so-called ‘either/or’ approach to the assessment of the evidence that resulted in a ‘contest of credibility’ between the prosecution evidence and his testimony.¹²⁷⁸ The Appeals Chamber has considered and rejected these arguments together with similar arguments made by Mr Ntaganda under the seventh ground of appeal.¹²⁷⁹

654. Second, Mr Ntaganda challenges the Trial Chamber’s assessment of P-0768’s credibility by arguing that the Trial Chamber erred in failing to: (i) apply appropriate caution to the credibility assessment of P-0768 given his status as an accomplice; and

¹²⁷⁴ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 158 (footnote omitted).

¹²⁷⁵ [Observations of Victims Group 2 on Appeal – Part II](#), paras 78-79.

¹²⁷⁶ [Observations of Victims Group 2 on Appeal – Part II](#), para. 81.

¹²⁷⁷ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), paras 52-53.

¹²⁷⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 154-155, 157-158, 167-171, 178-179.

¹²⁷⁹ See paragraphs 591-600 above.

(ii) take into account corroborating evidence which undermines the Trial Chamber's findings on P-0768's credibility.¹²⁸⁰ Mr Ntaganda raises several other arguments which purport to undermine the Trial Chamber's factual findings in relation to the attack on Nzebi, the killing of *Abbé* Bwanalunga, and the placing of anti-personnel mines in Mongbwalu.¹²⁸¹ These arguments will be addressed below.

(i) *Credibility assessment of P-0768*

655. Mr Ntaganda argues that the Trial Chamber failed to exercise proper caution regarding P-0768's testimony or to explain why it accepted this evidence given his status as an accomplice.¹²⁸² The Appeals Chamber notes that an 'accomplice witness' may be understood as being a witness who was 'involved in the criminal events' for which the accused person was charged regardless of whether or not he or she was prosecuted for their participation.¹²⁸³ In this regard, the Appeals Chamber recalls that P-0768 was considered to be a 'military insider' who testified, *inter alia*, about his 'participation in military interventions in the context of the First Operation'.¹²⁸⁴ The Appeals Chamber observes that the Trial Chamber did not characterise P-0768 as an 'accomplice witness', nor was it required so to do. However, given the witness's involvement in the criminal events, it was essential for the Trial Chamber to provide sufficient reasoning for its reliance on P-0768's evidence, and to consider any motives or incentives that he may have had to implicate Mr Ntaganda in light of the vigorous challenges made at trial by Mr Ntaganda to the witness's credibility.¹²⁸⁵ In this regard, the Appeals Chamber has previously stated that:

The condition of a witness as an 'accomplice' is a circumstance that needs to be carefully considered when assessing the reliability of his or her evidence, but, [...] does not make this evidence unreliable *per se* or in need of corroboration as a matter of law.¹²⁸⁶

¹²⁸⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 159-165, 172, 181.

¹²⁸¹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 156-158, 172-177, 181-184.

¹²⁸² [Mr Ntaganda's Appeal Brief – Part II](#), para. 159; [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), paras 52-53; [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), paras 10-15.

¹²⁸³ See [Popović et al. Trial Judgment](#), para. 26.

¹²⁸⁴ [Conviction Decision](#), para. 161.

¹²⁸⁵ [Mr Ntaganda's Closing Brief](#), paras 249-298.

¹²⁸⁶ [Bemba et al. Appeal Judgment](#), para. 1531. See also [Ntagerura et al. Appeal Judgment](#), para. 203; [Karemera and Ngirumpaste Appeal Judgment](#), para. 42.

656. The Appeals Chamber notes that, at the outset, the Trial Chamber explained its approach to the assessment of a witness's credibility, in relevant part, as follows:

77. [T]he Chamber considered the individual circumstances of each witness, including his or her relationship to the accused, age, *any involvement in the events under consideration, any possible bias towards or against the accused, and/or any motives for telling the truth or providing false testimony*. Where required, the Chamber has relied on the evidence of witnesses in relation to whose credibility the Chamber had some reservations to the extent that it was corroborated by other reliable evidence [...].

78. In determining the reliability of the witnesses' testimony and the weight to be accorded thereto, the Chamber considered the entirety of the witnesses' testimony, having regard, in particular, to the capacity and quality of their recollection. In this respect, the Chamber took into account, *inter alia*, the consistency and precision of the accounts, whether the information provided was plausible, and, if applicable, whether the evidence conflicted with prior statements of the witness. Finally, whenever relevant, the Chamber considered the witnesses' conduct during their testimony, including their readiness and willingness to respond to questions put to them by the parties, the participants, and the Chamber, as well as the manner of answering.¹²⁸⁷

657. The Appeals Chamber observes that the Trial Chamber was aware of the general standards applicable to the assessment of witnesses' credibility including those concerning 'accomplice witnesses' as highlighted in the above cited paragraphs of the Conviction Decision. Mr Ntaganda shows no error in this respect. The Appeals Chamber considers that the manner in which the Trial Chamber carried out its assessment of P-0768's credibility, as discussed below, demonstrates that the Trial Chamber did not overlook P-0768's accomplice status and provided sufficient reasons for its reliance on the witness.

658. In assessing P-0768's credibility, the Trial Chamber conducted a lengthy and detailed assessment and addressed Mr Ntaganda's numerous challenges to the witness's credibility.¹²⁸⁸ It found that he 'generally provided detailed evidence, explained the basis of his knowledge, [...] acknowledged when he did not directly witness certain events, or when his testimony was based on information received from others', and 'indicated when he had no knowledge in relation to a specific issue, or

¹²⁸⁷ [Conviction Decision](#), paras 77-78 (emphasis added, footnotes omitted).

¹²⁸⁸ [Conviction Decision](#), paras 161-173.

did not remember certain events'.¹²⁸⁹ It also noted that 'many aspects of P-0768's testimony [were] corroborated by, and consistent with, other evidence on the record'.¹²⁹⁰

659. With regard to Mr Ntaganda's allegation that the witness held a 'malignant grudge' against him, the Trial Chamber found that,

these factual allegations are based on the testimony of Mr Ntaganda alone and otherwise not supported by other evidence. These claims have also been convincingly denied by the witness in court.¹²⁹¹

660. Mr Ntaganda takes issue with this finding, arguing that other evidence that corroborated his testimony that P-0768 held a grudge against him should have been considered by the Trial Chamber.¹²⁹² In his view, the Trial Chamber should have considered: (i) a prosecution screening note that indicated that P-0768 initiated contact with the prosecution and [REDACTED], which he suggests corroborates his testimony that P-0768 hated him;¹²⁹³ and (ii) P-0768's testimony that he was imprisoned, which Mr Ntaganda argues aligns with his claim that P-0768's grudge against him was fuelled by the fact that P-0768 spent a year in prison because Mr Ntaganda had informed the Rwandan authorities of his presence as a deserter.¹²⁹⁴

661. The Appeals Chamber notes that the Trial Chamber considered the significance of the fact that P-0768 [REDACTED] as set out in the prosecution screening note.¹²⁹⁵ Regarding his testimony to the contrary that he was contacted and asked to testify by the prosecution, the Trial Chamber considered that it was unclear 'whether the witness sufficiently understood the scope of the Defence's questioning on this issue, notably the specific suggestion regarding contacts which would have taken place prior to the first phone call he received from the investigators'.¹²⁹⁶ It found that, 'although the fact that a witness volunteered to provide testimony may be a relevant factor when

¹²⁸⁹ [Conviction Decision](#), para. 162.

¹²⁹⁰ [Conviction Decision](#), para. 162.

¹²⁹¹ [Conviction Decision](#), para. 163 (footnotes omitted).

¹²⁹² [Mr Ntaganda's Appeal Brief – Part II](#), paras 160-161.

¹²⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 160, referring to [Conviction Decision](#), para. 164 and DRC-OTP-2055-0254 (the screening note), pp. 0255-0256.

¹²⁹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 160, referring to D-0300: [T-223](#), p. 30, line 13 to p. 31, line 4.

¹²⁹⁵ [Conviction Decision](#), paras 164-167.

¹²⁹⁶ [Conviction Decision](#), para. 165.

examining a witness's motivation to testify, it does not, in itself, reveal bias or an intention to fabricate evidence'.¹²⁹⁷ In the circumstances pertaining to P-0768, the Trial Chamber found that 'no particular conclusion can be drawn from the circumstances of [the witness's] first contact with the Prosecution'.¹²⁹⁸ Having considered the Trial Chamber's assessment of this issue in light of Mr Ntaganda's arguments on appeal regarding the credibility of P-0768, the Appeals Chamber can find no error in the Trial Chamber's treatment of Mr Ntaganda's argument that P-0768 [REDACTED].

662. Regarding Mr Ntaganda's alleged responsibility for the imprisonment of P-0768, the Trial Chamber noted that this allegation was based on Mr Ntaganda's testimony alone and that this claim had been 'convincingly denied' by P-0768 in court.¹²⁹⁹ The Appeals Chamber recalls that the Trial Chamber is vested with the primary responsibility to fairly resolve any inconsistencies in the evidence received at trial.¹³⁰⁰ The Appeals Chamber can discern no error in the manner in which the Trial Chamber resolved the inconsistency between the testimony of Mr Ntaganda and P-0768 in this instance.

663. Mr Ntaganda argues that P-0768 arrived in Mongbwalu after the attack and that his testimony regarding related events was fabricated.¹³⁰¹ According to Mr Ntaganda, the Trial Chamber ignored logbook entries that show that P-0768 was not in Mongbwalu at the time of the attack and that mention [REDACTED] only in December 2002, which, in Mr Ntaganda's submission, reinforce his testimony that P-0768 was 'chastened and sidelined' by him since 21 November 2002 for arriving *after* the battle of Mongbwalu.¹³⁰² Furthermore, Mr Ntaganda disputes the Trial Chamber's approach to the sequencing of the pages in the logbook, arguing that the Trial Chamber failed to adjudicate a 'live issue' which impacted the credibility of P-0768's claim that he had participated in the attack on Mongbwalu.¹³⁰³ Mr Ntaganda claims

¹²⁹⁷ [Conviction Decision](#), para. 166.

¹²⁹⁸ [Conviction Decision](#), para. 167.

¹²⁹⁹ [Conviction Decision](#), para. 163, referring to P-0768: [T-35](#), pp. 16-18.

¹³⁰⁰ See paragraph 40 above.

¹³⁰¹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 161-164.

¹³⁰² [Mr Ntaganda's Appeal Brief – Part II](#), para. 161.

¹³⁰³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 165, fn. 467; [T-271](#), p. 9, line 18 to p. 10, line 23; p. 13, lines 3-9.

that this issue was ‘essential, in particular with respect to the pages where no dates are mentioned’.¹³⁰⁴ In addition, Mr Ntaganda alleges that the Trial Chamber ignored the following evidence which he submits corroborates his testimony that P-0768 was not in Mongbwalu as the operation unfolded: (i) a video of Abner who drove a truck that arrived in Mongbwalu after the liberation of Sayo and stated that he had received fuel from P-0768 prior to leaving Aru;¹³⁰⁵ and (ii) the evidence of P-0017 to the effect that [REDACTED] was taken.¹³⁰⁶

664. The Trial Chamber dismissed Mr Ntaganda’s claim that P-0768 arrived in Mongbwalu after the First Operation and found that the witness gave ‘a detailed account’ of ‘his participation in the Mongbwalu operation and his interactions with Mr Ntaganda in this context’.¹³⁰⁷ It found that he gave more details under cross-examination and ‘was able to provide a geographic description of Mongbwalu, including the locations relevant to his account concerning the unfolding of the attack’, ‘explained or acknowledged and corrected certain potential discrepancies or inaccuracies identified by the Defence’, ‘recognised himself in a video filmed when Mongbwalu was captured, and was able to identify a number of individuals and scenes depicted therein’.¹³⁰⁸ Moreover, the Trial Chamber found that other evidence on the record corroborated P-0768’s testimony that he participated in the Mongbwalu operation.¹³⁰⁹ The Prosecutor refers to additional excerpts of the testimony of P-0907, P-0055, P-0901 and P-0041 that support the Trial Chamber’s finding.¹³¹⁰

665. Although the Trial Chamber did not refer to the logbook messages in this context, it set out its view of their evidentiary value elsewhere in the Conviction Decision. The Trial Chamber’s finding in this regard reads as follows:

¹³⁰⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 165 (footnote omitted).

¹³⁰⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 161, *referring to* DRC-OTP-2058-0251 and DRC-OTP-2102-3708, p. 3747, lines 1384-1385 (Transl. DRC-OTP-2102-3766, p. 3809, lines 1494-1495).

¹³⁰⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 164, *referring to* P-0017: [T-59](#), p. 13, lines 13-20; [T-61](#), p. 97, lines 8-13.

¹³⁰⁷ [Conviction Decision](#), para. 168.

¹³⁰⁸ [Conviction Decision](#), para. 168 (footnotes omitted).

¹³⁰⁹ [Conviction Decision](#), paras 169 and 487, *referring to* P-0907: [T-90](#), p. 11; P-0041: DRC-OTP-0147-0002, from 0015 to 0016, para. 80.

¹³¹⁰ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 147, *referring to* P-0907: [T-90](#), p. 7 lines 3-20; p. 11, lines 13-16; p. 23, lines 2-12; [T-92](#), p. 48, line 20 to p. 49, line 23; P-0055: [T-70](#), p. 93, line 1 to p. 94, line 21; P-901: [T-28](#), p. 40, line 13 to p. 41, line 4; p. 42, lines 1-22; [T-32](#), p. 10, line 12 to p. 11, line 14; P-0041: DRC-OTP-0147-0002, 0015-0016, para. 80.

62. The Defence ‘concur[s] with the Prosecution’s submission that the two FPLC logbooks are key pieces of evidence, which contain contemporaneous information on the FPLC activities on a near daily basis’. As concerns item DRC-OTP-0017-0003, the Defence points out that the pages were ‘recorded in evidence in a non-chronological order’ and that Mr Ntaganda testified as to the correct sequence of pages. According to the Defence, document DRC-D18-0001-5748, admitted as evidence, represents the same information in the correct chronological order.

63. The Prosecution responds, in relation to item DRC-OTP-0017-0003, that Mr Ntaganda ‘adapted his account using the Logbook and rearranged the loose Logbook pages to fit the sequence of events he wished to portray’ and that ‘[t]he Defence presented no evidence that the loose Logbook pages constitute one *ensemble*’. The Defence, replies on this specific point that Mr Ntaganda rearranged the pages ‘on the basis of objective criteria’.

64. In light of all the relevant evidence on the record, the Chamber considers the logbooks to be authentic and reliable as concerns the recorded communications within the UPC/FPLC. [...].

65. With regard to the sequence of pages, the Chamber notes that this issue was not put to P-0290, who would have had a good basis of knowledge to comment on the order of the pages. While P-0290 does not appear to have noticed that the order of the document he was shown was incorrect, the Chamber observes that he was also not specifically questioned on this point. However, the Chamber considers that it is not necessary for the purpose of the Judgment to resolve the question of the correct sequence of messages registered as item DRC-OTP-0017-0003. Instead, the Chamber has considered the item carefully in relation to each question of fact for which it is relevant, and has borne in mind the submissions of the parties and Mr Ntaganda’s testimony, notably regarding the sequencing issue.¹³¹¹

666. The Appeals Chamber observes that the logbook pages to which Mr Ntaganda refers bear no date.¹³¹² As pointed out by the Trial Chamber, P-0290 (a military man who described how and where a specific logbook was produced and recognised document DRC-OTP-0017-0003 as the relevant logbook)¹³¹³ was never questioned about the correct order of the pages.¹³¹⁴ The record shows that Mr Ntaganda raised this issue only during his testimony which followed well after P-0290’s testimony.¹³¹⁵ The witness was not recalled to testify again, in part because Mr Ntaganda objected to a proposal to call him as a chamber witness pursuant to articles 64(6)(b) and (d) and

¹³¹¹ [Conviction Decision](#), paras 62-65 (footnotes omitted).

¹³¹² Translated logbooks DRC-D18-0001-5778, at 5778, 5784, 5786.

¹³¹³ [Conviction Decision](#), paras 60, 144.

¹³¹⁴ [Conviction Decision](#), para. 65.

¹³¹⁵ [Conviction Decision](#), para. 65, fn. 147. *See also* para. 145, fn. 340.

69(3) of the Statute.¹³¹⁶ In these circumstances, the Appeals Chamber finds no error in the Trial Chamber’s approach to the logbook. As indicated, the Trial Chamber was careful to consider it where relevant. The Appeals Chamber recalls that the Trial Chamber found P-0768’s testimony that he was present during the attack on Mongbwalu to be reliable and [REDACTED].¹³¹⁷ In the absence of evidence corroborating Mr Ntaganda’s testimony on the date and the sequencing of the pages of document DRC-D18-0001-5748, the Trial Chamber was not required to consider this item of evidence as relevant for its finding.

667. Regarding P-0017’s testimony, the Appeals Chamber notes that the witness was not [REDACTED].¹³¹⁸ The witness stated that [REDACTED].¹³¹⁹ As this testimony neither confirms nor contradicts Mr Ntaganda’s claim that P-0768 was not present at the Mongbwalu battle, the Appeals Chamber considers that the Trial Chamber was not required to consider this item of evidence as relevant for its finding.

668. Similarly, the Appeals Chamber considers that the video of the Abner, who arrived in Mongbwalu after the battle and explained that he had been given a barrel of fuel by P-0768, does not confirm or contradict Mr Ntaganda’s claim that P-0768 was not present at the Mongbwalu battle.¹³²⁰ In particular, it notes that the video provides no indication of when or where P-0768 gave the barrel of fuel to Abner. In these circumstances, the Appeals Chamber considers that the Trial Chamber was not required to consider this item of evidence as relevant for its finding.

669. Mr Ntaganda argues that [REDACTED] and that the Trial Chamber erred in finding that [REDACTED].¹³²¹ Mr Ntaganda alleges two errors in this respect.¹³²² First, he argues that the Trial Chamber ‘circumvented the evidence that [REDACTED] by reasoning that “even if” [REDACTED]’.¹³²³ In Mr Ntaganda’s

¹³¹⁶ [Conviction Decision](#), para. 145, fn. 340; [Article 64\(6\)\(b\) and 69\(3\) Decision](#), paras 8, 12-13.

¹³¹⁷ [Conviction Decision](#), para. [REDACTED], fn. [REDACTED].

¹³¹⁸ [REDACTED].

¹³¹⁹ [REDACTED].

¹³²⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 161, *referring to* DRC-OTP-2058-0251 and DRC-OTP-2102-3708, p. 3747, lines 1384-1385 (Transl. DRC-OTP-2102-3766, p. 3809, lines 1494-1495).

¹³²¹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 162-163, *referring to* [Conviction Decision](#), para. [REDACTED].

¹³²² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 163.

¹³²³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 163 (emphasis in original), *referring to* [Conviction Decision](#), para. [REDACTED], fn. [REDACTED].

view, this finding ignores P-0768's repeated insistence [REDACTED].¹³²⁴ He contends that the Trial Chamber 'cannot have it both ways'; '[e]ither [REDACTED], or he was lying about his involvement in the attack on Mongbwalu'.¹³²⁵

670. The Appeals Chamber notes that Mr Ntaganda's argument misstates the Trial Chamber's finding. In noting Mr Ntaganda's argument that it was [REDACTED], the Trial Chamber stated:

[REDACTED].¹³²⁶

671. The Appeals Chamber considers that, rather than trying to have it 'both ways', the Trial Chamber found on the evidence that P-0768's account [REDACTED].¹³²⁷ The Trial Chamber also noted the evidence of other witnesses that corroborated P-0768's presence [REDACTED].¹³²⁸

672. In this regard, the Appeals Chamber is of the view that trial chambers enjoy broad discretion in assessing inconsistencies within the evidence and in deciding whether corroboration is necessary. In this respect, as the ICTR Appeals Chamber has previously stated, different testimonies do not need to 'be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others'.¹³²⁹ Accordingly, while testimonies need not be identical in all aspects, they must confirm, even if in different ways, the same fact. Mr Ntaganda's argument shows no error in the Trial Chamber's approach and is rejected.

(ii) *The attack on Nzebi*

673. The Appeals Chamber notes that in relation to the manner in which the attack on Nzebi occurred, the Trial Chamber found:

After taking over Sayo, the UPC/FPLC attacked Nzebi. Nzebi was also shelled from the *Appartements* camp. The UPC/FPLC killed some individuals by

¹³²⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 163.

¹³²⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 163.

¹³²⁶ [Conviction Decision](#), para. [REDACTED], fn. [REDACTED].

¹³²⁷ [Conviction Decision](#), para. [REDACTED], fn. [REDACTED].

¹³²⁸ [Conviction Decision](#), para. [REDACTED], fn. [REDACTED].

¹³²⁹ See [Nahimana et al. Appeal Judgment](#), para. 428.

gunshot during the assault. Some were also killed by shelling. The Defence challenges that Nzebi was attacked in the manner described by P-0768. However, the Chamber considers P-0768's evidence in this respect to be credible and reliable.¹³³⁰

674. The Trial Chamber provided the following analysis of the relevant evidence:

The Chamber notes that the fact that Nzebi is not referred to in a segment of the video referred to by the Defence and/or in the logbooks *does not demonstrate that an assault on the village did not occur*. As to the Defence's argument that P-0768 could not have gone to Nzebi, the Chamber notes that is based on the testimony of Mr Ntaganda alone. As also noted below, the Chamber has carefully assessed P-0768's testimony in relation to the unfolding of an assault in Nzebi against Mr Ntaganda's account, and decides to rely on P-0768's testimony in this respect.¹³³¹

675. In this regard, Mr Ntaganda argues that

[t]here was no obligation on him to demonstrate that the assault on Nzebi did not occur. Rather, the Chamber should have considered whether the absence of any references to Nzebi in the contemporaneous material raised doubt as to P-0768's account, particularly given that it corroborated [his] testimony.¹³³²

676. The Appeals Chamber observes that the Trial Chamber's choice of language in footnote 1505 of the Conviction Decision, as emphasised in italics above, could be perceived as a shift in the burden of proof, when viewed in isolation. As Mr Ntaganda correctly points out, he was not required to 'demonstrate that an assault on the village did not occur'.¹³³³ Nevertheless, the Appeals Chamber finds that the Trial Chamber's approach to the evidence of P-0768, the contemporaneous material and Mr Ntaganda's testimony for its finding, does not reflect a shift in the burden of proof to Mr Ntaganda. Rather, it reflects the Trial Chamber's assessment of the limited probative value of the evidence that he highlights. The Appeals Chamber notes that the four minute video excerpt referred to by Mr Ntaganda shows a number of different scenes and it is not clear that any of them could be described as a briefing about the liberation of Sayo.¹³³⁴ Regarding the logbook of communications over the

¹³³⁰ [Conviction Decision](#), para. 509 (footnotes omitted).

¹³³¹ [Conviction Decision](#), para. 509, fn. 1505 (emphasis added).

¹³³² [Mr Ntaganda's Appeal Brief – Part II](#), para. 158; *See also* [T-271](#), p. 10, line 24 to p. 11, line 4.

¹³³³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 158.

¹³³⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 157, *referring to* DRC-OTP-2058-0251 at 45:56-49:54.

radiophonie radio network to which Mr Ntaganda refers,¹³³⁵ the Trial Chamber found that there were limitations to the conclusions that could be drawn from these logbooks given that the *radiophonie* could also be used for uncoded, informal and direct communication and that other unlogged means of communication were also used by the UPC/FPLC.¹³³⁶ In these circumstances, the Appeals Chamber considers that the Trial Chamber did not err in its assessment of these items of evidence, which lacked any reference to an assault in Nzebi, in light of the evidence as a whole.

677. In addition, Mr Ntaganda argues that the Trial Chamber's finding that civilians were killed by 'shelling' ignored the evidence of P-0963 (whom the Chamber had found to be credible) that [REDACTED].¹³³⁷ The Appeals Chamber finds that Mr Ntaganda's argument is inapposite given the Trial Chamber's finding that [REDACTED].¹³³⁸ Therefore, rather than 'casting doubt' on P-0768's testimony, the testimony of P-0963 is consistent with it in material respects.

(iii) *The killing of Abbé Bwanalonga*

678. Mr Ntaganda again challenges the Trial Chamber's reliance on the evidence of P-0768 whom he characterises as an 'accomplice witness' and claims that the Trial Chamber failed to apply any caution to the witness's evidence which was the only evidence implicating him in *Abbé Bwanalonga's* death.¹³³⁹ Moreover, he alleges that the Trial Chamber failed to provide reasons for its reliance on such evidence.¹³⁴⁰

679. Given the overlap in the substance of Mr Ntaganda's arguments regarding P-0768's status as an accomplice, the Appeals Chamber notes its abovementioned findings in this regard.¹³⁴¹ The Trial Chamber found P-0768's account of the killing of *Abbé Bwanalonga* to be credible and reliable, noting that the witness 'is the only alleged eyewitness to the event' and that it considered his account to be a 'strong',

¹³³⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 157, referring to translated logbooks DRC-D18-0001-5778, at 5782, 5778, 5780, 5784, 5796; DRC-D18-0001-5748 at 5748, 5750, 5752, 5754, 5766.

¹³³⁶ [Conviction Decision](#), para. 66. See also paras 59, 62, referring to DRC-OTP-0017-0003 (French translation DRC-OTP-2102-3828), dated 23 November 2003, and DRC-OTP-0017-0033 (DRC-OTP-2102-3854), dated 1 December 2002, and noting that, according to the defence, DRC-D18-0001-5748 represents the same information in the correct chronological order.

¹³³⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 156.

¹³³⁸ [Conviction Decision](#), para. [REDACTED].

¹³³⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 172.

¹³⁴⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 172.

¹³⁴¹ See paragraphs 655-672 above.

‘detailed, step-by-step account of the event [...] which was consistent between direct and cross-examination’.¹³⁴² The Trial Chamber also noted that the witness ‘stated when he did not remember details about the event’ and that, ‘despite the attempts by [the] Defence to destabilise him on issues of small detail (exact times of day, distances between locations etc.), the witness maintained his version of events and provided additional details’.¹³⁴³ The Appeals Chamber considers that the Trial Chamber provided sufficient reasons for its findings on the witness’s credibility in relation to the killing of *Abbé* Bwanalonga.

680. In challenging P-0768’s evidence on the killing of *Abbé* Bwanalonga, Mr Ntaganda argues that, according to the witness’s testimony, his bodyguards were present when he hit *Abbé* Bwanalonga with a piece of wood, and they took *Abbé* Bwanalonga behind the *Appartements* when he was shot and killed.¹³⁴⁴ However, Mr Ntaganda contends that neither P-0010 nor P-0888, both bodyguards of Mr Ntaganda who testified at trial, mentioned that they were aware of the allegation that Mr Ntaganda himself had killed *Abbé* Bwanalonga.¹³⁴⁵ In Mr Ntaganda’s view, a ‘reasonable Trial Chamber would have considered whether the bodyguards’ complete lack of knowledge of an event they apparently participated in, raised doubt as to P-0768’s account’.¹³⁴⁶

681. The Appeals Chamber notes that the Trial Chamber found that Mr Ntaganda had a company of bodyguards, which included P-0010 and P-0888.¹³⁴⁷ However, P-0768 did not specify which of Mr Ntaganda’s bodyguards were present at that event and he was not asked to identify these bodyguards during his examination at trial.¹³⁴⁸ In addition, neither P-0010 nor P-0888 testified to being present at the killing of *Abbé* Bwanalonga. In these circumstances, the Appeals Chamber finds that it was reasonable for the Trial Chamber to not consider these witnesses’ lack of knowledge as to who killed *Abbé* Bwanalonga. Mr Ntaganda’s argument does not show an error in the Trial Chamber’s finding and is rejected.

¹³⁴² [Conviction Decision](#), para. 533, fn. 1592.

¹³⁴³ [Conviction Decision](#), para. 533, fn. 1592.

¹³⁴⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 173.

¹³⁴⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 173.

¹³⁴⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 173.

¹³⁴⁷ [Conviction Decision](#), paras 381, 89, 189.

¹³⁴⁸ P-0768: [T-33](#), p.56, lines 2-3, 23-25; [T-35](#), p. 60, line 24 to p. 65, line 25.

682. Furthermore, in claiming that the Trial Chamber incorrectly relied on three other prosecution witnesses to ‘partly corroborate’ P-0768’s account, the Appeals Chamber finds that Mr Ntaganda misrepresents the evidence and the Trial Chamber’s finding in this regard.¹³⁴⁹ The Appeals Chamber notes that, in referring to this evidence, the Trial Chamber expressly stated that these witnesses’ evidence partly corroborated P-0768’s account ‘on aspects other than Mr Ntaganda’s direct involvement in the interrogation and killing’.¹³⁵⁰ Mr Ntaganda’s argument is therefore rejected.

683. Mr Ntaganda further argues that given the infamy surrounding the death of *Abbé Bwanalunga* in the region it was implausible that only P-0768 would link him directly to the murder.¹³⁵¹ The Appeals Chamber finds that ‘[d]epending on the circumstances, a single piece of evidence [...] may suffice to establish a specific fact’.¹³⁵² As already established, it was reasonable for the Trial Chamber to rely on P-0768’s testimony alone to find that Mr Ntaganda was responsible for the killing of *Abbé Bwanalunga*. Contrary to Mr Ntaganda’s argument, the Appeals Chamber finds that, for P-0768’s account to be considered reliable, it was not necessary for other witnesses to have been aware of Mr Ntaganda’s involvement in the murder. The Trial Chamber provided a comprehensive assessment of the evidence before it, which showed that people were aware that *Abbé Bwanalunga* had been detained and killed by members of the UPC/FPLC (who were not identified), and that his body had been thrown in the bushes below the *Appartements*, before being retrieved and buried.¹³⁵³ The Appeals Chamber notes that this evidence is not incompatible with facts linked to aspects of P-0768’s evidence. Indeed, as the Trial Chamber determined, this evidence partly corroborated rather than undermined P-0768’s account. In these circumstances and in the absence of information to substantiate or support this argument, it would be speculative to engage in a consideration of whether other witnesses should have been in a position to confirm P-0768’s testimony as to Mr Ntaganda’s involvement. Mr Ntaganda shows no error in the Trial Chamber’s reliance on P-0768’s evidence.

¹³⁴⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 174.

¹³⁵⁰ [Conviction Decision](#), para. 533, fn. 1593, referring to the evidence of P-0963, P-0901 and P-0859.

¹³⁵¹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 175-176.

¹³⁵² [Lubanga Appeal Judgment](#), para. 218.

¹³⁵³ [Conviction Decision](#), para. 533, fn. 1593.

Anti-personnel mines used in Mongbwalu

684. The Trial Chamber found that ‘[a]fter Mongbwalu was taken over, Mr Ntaganda ordered anti-personnel mines to be placed at the entry and exit points of the town that were not guarded by the UPC/FPLC soldiers’.¹³⁵⁴ The Trial Chamber explained its view of the evidence as follows:

The Chamber also notes that Mr Ntaganda himself confirmed that the UPC/FPLC had anti-personnel mines within their inventory [...], however, he denied the use of these mines in Mongbwalu. [...] With regard to the Defence argument that P-0768 provided a false narrative on the issue [...], the Chamber recalls its finding in the witness’s credibility assessment, as well as its finding that Mr Ntaganda is not credible on this point in para. 75 [*sic*] above.¹³⁵⁵

685. The Appeals Chamber observes that the Trial Chamber found P-0768 to be a credible witness concerning his testimony about Mr Ntaganda ordering the placement of anti-personnel mines in all entry and exit points not guarded by UPC/FPLC soldiers in Mongbwalu. The Trial Chamber found that the witness:

(i) reiterated his account in cross-examination, providing additional information when requested; and (ii) satisfactorily explained the absence of this allegation in his first statement. In addition, noting that anti-personnel mines were part of the UPC/FPLC inventory, and that UPC/FPLC communications establish that the use of land-mines was – at a minimum – being contemplated, the Chamber considers that there is no reason to doubt the truthfulness of P-0768’s account regarding the planting of landmines.¹³⁵⁶

686. In a footnote to the above cited paragraph, the Trial Chamber went on to find:

The Chamber therefore excludes Mr Ntaganda’s denial on this specific issue as not credible [...]. The Chamber further considers that the mere fact that this specific aspect of P-0768’s evidence is no [*sic*] corroborated by any other witness does not render his testimony unreliable.¹³⁵⁷

687. The Appeals Chamber observes that the Trial Chamber’s assessment of P-0768 and Mr Ntaganda’s evidence on this issue was based on the totality of the evidence on record. In this respect, the Trial Chamber specifically noted Mr Ntaganda’s testimony, ‘that the UPC/FPLC had anti-tank mines, and also received a box of anti-personnel

¹³⁵⁴ [Conviction Decision](#), para. 524 (footnote omitted).

¹³⁵⁵ [Conviction Decision](#), para. 524, fn. 1558.

¹³⁵⁶ [Conviction Decision](#), para. 171 (footnotes omitted).

¹³⁵⁷ [Conviction Decision](#), para. 171, fn. 413.

mines from Goma'.¹³⁵⁸ In addition, a logbook entry reflected a communication in which Salumu Mulenda requested mines and in response, Mr Ntaganda enquired as to the type of mines he wished to receive.¹³⁵⁹

688. The Appeals Chamber finds that the Trial Chamber's approach to the evidence of P-0768 in this instance together with Mr Ntaganda's admission as to the availability of landmines in the UPC/FPLC inventory and other contemporaneous evidence, does not imply that it dismissed Mr Ntaganda's testimony without considering the explanations he offered.¹³⁶⁰ Rather, it reflects the Trial Chamber's assessment of the credibility of the evidence presented by Mr Ntaganda in the context of the evidence as a whole presented by both parties. Accordingly, the Appeals Chamber rejects Mr Ntaganda's argument that the Trial Chamber failed to consider 'the totality of this evidence in assessing whether P-0768's allegation could be established beyond a reasonable doubt'.¹³⁶¹

689. Mr Ntaganda also takes issue with the Trial Chamber's finding that corroboration was not needed with regard to P-0768's allegation against him.¹³⁶² In his view, the 'lack of corroboration necessarily affects the credibility of the allegation' given that P-0768 had testified that [REDACTED] and that the UPC/FPLC soldiers knew that they had to avoid the area where the mines had been planted.¹³⁶³

690. As noted above, '[d]epending on the circumstances, a single piece of evidence [...] may suffice to establish a specific fact'.¹³⁶⁴ As previously found:

Pursuant to rule 63 (4) of the Rules there is no legal requirement of corroboration irrespective of the type of evidence or the fact to be established on its basis. This is not to say that corroboration will never have a role to play when assessing a witness's credibility and the reliability of his or her testimony.

¹³⁵⁸ [Conviction Decision](#), para. 334, fn. 906.

¹³⁵⁹ [Conviction Decision](#), para. 334, fn. 906, *referring to* DRC-OTP-2102-3854 at 3863, 4031.

¹³⁶⁰ *See* [Mr Ntaganda's Appeal Brief – Part II](#), para. 180.

¹³⁶¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 180.

¹³⁶² [Mr Ntaganda's Appeal Brief – Part II](#), paras 181-184.

¹³⁶³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 181.

¹³⁶⁴ [Lubanga Appeal Judgment](#), para. 218.

[...] [H]owever, this does not mean that corroboration is required as a matter of law when evaluating the testimony of any witness.¹³⁶⁵

691. Having found P-0768's account about the use of landmines to be truthful, the Trial Chamber was not required by law to corroborate P-0768's evidence on this point. Moreover, as set out above, P-0768's status as someone who was involved in the criminal events, does not *per se* render his evidence unreliable or in need of corroboration.¹³⁶⁶

692. In such circumstances, the Appeals Chamber finds that the absence of testimony from UPC/FPLC soldiers and civilians attesting to the use of landmines in the area does not show that the Trial Chamber erred in relying on the evidence of P-0768 alone for its finding that Mr Ntaganda ordered the use of landmines.

693. In addition, Mr Ntaganda argues that the witness's credibility is impugned because he did not mention the allegation about the use of landmines in his first statement to the prosecution.¹³⁶⁷ The Trial Chamber found that P-0768 had 'satisfactorily explained the absence of this allegation'.¹³⁶⁸ The Appeals Chamber considers that a witness is not required to set out every detail of his or her evidence in his or her first statement to the prosecution. As to the argument that P-0768 [REDACTED] and that the Trial Chamber should have considered this when accepting P-0768's explanation, the Appeals Chamber recalls its finding that the Trial Chamber did not err in its assessment of P-0768's [REDACTED].¹³⁶⁹ Therefore, it finds that Mr Ntaganda fails to show any error in the Trial Chamber's assessment in this respect and his arguments are rejected.

2. P-0963

694. P-0963 was a UPC/FPLC soldier who served in Salumu Mulenda's brigade.¹³⁷⁰ He testified, *inter alia*, about the organisational structure of the UPC/FPLC, the

¹³⁶⁵ [Bemba et al. Appeal Judgment](#), para. 1084.

¹³⁶⁶ See paragraph 655 above.

¹³⁶⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 183-184.

¹³⁶⁸ [Conviction Decision](#), para. 171, fn. 410, wherein the Trial Chamber noted that '[i]n cross-examination, the witness acknowledged not having mentioned this allegation when he first met with the OTP investigators, stating that he was not prepared to testify and that, therefore, certain events "may have escaped him"'. The Trial Chamber referred to P-0768: [T-36](#), pp. 4-5.

¹³⁶⁹ See paragraph 661 above.

¹³⁷⁰ [Conviction Decision](#), para. 236.

training of new recruits, and his participation in the First and Second Operation.¹³⁷¹ The Trial Chamber relied on his evidence to find, *inter alia*, that the UPC/FPLC soldiers fired at everyone in Mongbwalu, including civilians, during the assault on Mongbwalu.¹³⁷²

(a) Relevant part of the Conviction Decision

695. In reaching its finding that the UPC/FPLC soldiers fired at everyone in Mongbwalu, including civilians, the Trial Chamber found that ‘[w]hile some chose to stay, many persons who were present in the town as the assault unfolded fled Mongbwalu to the bush and to other places’.¹³⁷³ The Trial Chamber explained that for this finding it relied on the evidence of ‘eyewitnesses and witnesses who fled Mongbwalu themselves together with members of their families as a consequence of the attack’.¹³⁷⁴

696. In the Trial Chamber’s assessment, its finding that ‘many persons were present in the town as the assault unfolded’ was:

unaffected by Mr Ntaganda’s testimony that when the UPC/FPLC got to Mongbwalu, the members of the population had already left, which the Chamber considers to be not credible, and the Defence argument that the civilian population fled Mongbwalu upon hearing the first gunshots, leaving before the fighting reached Mongbwalu and that therefore, there were no ‘civilians’ in Mongbwalu when the fighting reached the town.¹³⁷⁵

(b) Summary of submissions

(i) Mr Ntaganda’s submissions

697. Mr Ntaganda argues that it was unreasonable for the Trial Chamber to reject the argument that the civilian population had left Mongbwalu before the fighting started on the basis that ‘the witnesses cited by the Defence did not consistently specify the “exact moment” they left, or the precise “moment in time” civilians fled’.¹³⁷⁶ In his view, the inability of these witnesses to specify exactly when they left Mongbwalu before the fighting began ‘does not support a finding that they remained for the

¹³⁷¹ [Conviction Decision](#), para. 236.

¹³⁷² [Conviction Decision](#), para. 494, fn. 1433.

¹³⁷³ [Conviction Decision](#), para. 497 (footnotes omitted).

¹³⁷⁴ [Conviction Decision](#), para. 498, fns 1447-1448.

¹³⁷⁵ [Conviction Decision](#), para. 498 (footnotes omitted).

¹³⁷⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 187.

unfolding of the assault'.¹³⁷⁷ In addition, with reference to the evidence of P-0039, P-0805, P-0868, P-0887, P-0893 and P-0792, Mr Ntaganda submits that the Trial Chamber 'ignored relevant evidence from others who fled (or from those who encountered them), which corroborated the evidence cited by the Defence'.¹³⁷⁸

698. Mr Ntaganda further argues that if the Trial Chamber wanted to know when the civilians fled in relation to the advancing UPC/FPLC soldiers, it had only to look at the evidence of the soldiers themselves, namely, himself (he testified that when the UPC/FPLC arrived the population had already left), P-0768 (testified that 'there were very few people in the city' when the UPC/FPLC arrived) and P-0010 (testified that in Mongbwalu 'there were no civilians [...]').¹³⁷⁹ Mr Ntaganda asserts that 'it was wrong for the Trial Chamber to discard [his] testimony as not credible, without acknowledging that the other UPC witnesses said the same thing'.¹³⁸⁰

699. Moreover, Mr Ntaganda argues that the fact that Mongbwalu was deserted by civilians prior to the attack was further corroborated by P-0017's testimony, in relation to which the Trial Chamber found 'that "it was possible" that civilians were there and P-0017 just didn't see them'.¹³⁸¹ Mr Ntaganda submits that the question was not whether it was 'possible' but whether P-0017's evidence 'raised doubt as to the soundness of the Chamber's finding that "many" remained'.¹³⁸²

700. In sum, Mr Ntaganda argues that relying on P-0963's uncorroborated evidence was an error because it went against the weight of the evidence and the legal errors committed in reaching this finding materially affect it and 'have occasioned a miscarriage of justice'.¹³⁸³

(ii) *The Prosecutor's submissions*

701. The Prosecutor argues that the Trial Chamber reasonably found that 'UPC soldiers fired at everyone in Mongbwalu, including civilians [and] that "many persons

¹³⁷⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 188.

¹³⁷⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 190.

¹³⁷⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 191.

¹³⁸⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 191 (footnote omitted).

¹³⁸¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 192 (footnotes omitted), referring to [Conviction Decision](#), para. 498, fn. 1448.

¹³⁸² [Mr Ntaganda's Appeal Brief – Part II](#), para. 192.

¹³⁸³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 193.

were present in the town as the assault unfolded”, before they fled Mongbwalu’ based on the testimony of P-0963 as ‘corroborated by witnesses who saw bodies of victims in Mongbwalu, by a witness who treated victims fleeing from the town, and by Ntaganda himself’, as well as ‘persons who had themselves fled Mongbwalu’.¹³⁸⁴

702. The Prosecutor submits that Mr Ntaganda’s argument ‘that Mongbwalu’s population *instantaneously vanished* upon hearing the first sounds of battle’ is ‘implausible and unsupported by the evidence’.¹³⁸⁵ Furthermore, she avers that the witnesses, civilian (P-0039, P-0805, P-0868, P-0887, P-0863 and P-0792) and military (P-0768 and P-0010), on whose evidence Mr Ntaganda relies as corroborative of his version of events, were not in Mongbwalu during the attack and do not support his claim.¹³⁸⁶ The Prosecutor submits that, ‘[i]n these circumstances (particularly when the evidence is irrelevant), the Chamber is presumed to evaluate all the evidence before it and need not expressly address all evidence or arguments as long as its decision is clear’.¹³⁸⁷

(iii) The victims’ observations and Mr Ntaganda’s response to the victims

703. Victims Group 2 submit that the Trial Chamber provided a detailed assessment of P-0963’s credibility, and considered Mr Ntaganda’s challenges to the credibility of the witness including allegations that he was coached, which the Trial Chamber considered in some detail.¹³⁸⁸ They argue that the Trial Chamber took into account his role in events, but that it was not required to consider his accomplice status explicitly because he was not at the same leadership level as Mr Ntaganda and his interest in testifying against him would not have been that of a co-accused shifting blame or having made a plea bargain with the prosecution.¹³⁸⁹

¹³⁸⁴ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 159.

¹³⁸⁵ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 160 (emphasis in original).

¹³⁸⁶ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 160.

¹³⁸⁷ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 160 (footnote omitted).

¹³⁸⁸ [Observations of Victims Group 2 on Appeal – Part II](#), para. 80.

¹³⁸⁹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 81.

704. In response, Mr Ntaganda maintains that P-0963 was an accomplice and that the Trial Chamber failed to properly consider whether he had a motive to blame Mr Ntaganda for the crimes in which he himself participated.¹³⁹⁰

(c) Determination by the Appeals Chamber

705. The Appeals Chamber notes that the Trial Chamber relied on the evidence of P-0963 for its overall finding that the UPC/FPLC soldiers fired on the civilian population as they attacked Mongbwalu.¹³⁹¹ Mr Ntaganda challenges the Trial Chamber's associated finding that 'many persons were present in the town as the assault unfolded',¹³⁹² in respect of which he alleges that the Trial Chamber ignored prosecution and defence evidence.¹³⁹³ He contends that P-0963 was the only witness who testified that the UPC/FPLC fired on the civilian population during the assault on Mongbwalu and that his uncorroborated allegation went against the weight of the evidence, which showed that the civilian population fled the town to avoid the attack.¹³⁹⁴

706. The Appeals Chamber notes that, in his closing brief, Mr Ntaganda relied on the evidence of P-0859, P-0887, P-0892, P-0800, P-850 and P-0894 to argue that the civilian population had fled by the time the fighting started.¹³⁹⁵ In assessing the evidence of these witnesses, the Trial Chamber noted that, with the exception of P-0892 who indicated that she remained in Mongbwalu during the attack, they either had not specified the exact time that they and others had left Mongbwalu or had indicated that they fled as soon as they heard the first shots being fired.¹³⁹⁶ The Trial Chamber concluded in the same footnote, apparently based on the 'evidence of eyewitnesses who fled Mongbwalu themselves', that, 'while some people fled upon hearing the first sounds of fighting, before the fighting reached Mongbwalu, others fled *once the UPC/FPLC entered the town*'.¹³⁹⁷

¹³⁹⁰ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), paras 52-53.

¹³⁹¹ [Conviction Decision](#), para. 494; fn. 1433, referring to P-0963: [T-78](#), p. 81, lines 5-22; p. 84, lines 7-11.

¹³⁹² [Conviction Decision](#), para. 498.

¹³⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 187-192.

¹³⁹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 193.

¹³⁹⁵ [Mr Ntaganda's Closing Brief](#), para. 598.

¹³⁹⁶ [Conviction Decision](#), para. 498, fn. 1448.

¹³⁹⁷ [Conviction Decision](#), para. 498, fn. 1448 (emphasis added).

707. Mr Ntaganda disputes the reasonableness of the finding that many persons were present in the town, arguing that the fact that witnesses could not specify the exact moment they fled does not mean that they remained for the unfolding of the assault.¹³⁹⁸ The Appeals Chamber accepts Mr Ntaganda's argument that the Trial Chamber's own assessment of the evidence in the relevant footnote does not appear to support the conclusion in the footnote that 'others fled once the UPC/FPLC entered the town' or in the main text that 'many persons were present in the town as the assault unfolded'.¹³⁹⁹ The Appeals Chamber also notes that there is a discrepancy between the finding in the main text associated with this footnote, that '*many* persons were present in the town as the assault unfolded' and the prior finding to which it refers, which was that '[w]hile *some* chose to stay, many persons who were present in the town as the assault unfolded fled Mongbwalu to the bush and to other places'.¹⁴⁰⁰

708. The core of Mr Ntaganda's argument is that the Trial Chamber erred in finding that the UPC/FPLC fired at everyone in Mongbwalu, including civilians.¹⁴⁰¹ Although the Appeals Chamber has identified certain discrepancies in the Trial Chamber's assessment of part of the evidence regarding when exactly civilians fled Mongbwalu and some inconsistency in its findings regarding the extent to which civilians remained, for the reasons set out below, it considers that it was reasonable for the Trial Chamber to rely on the testimony of P-0963 to find that the UPC/FPLC fired at civilians in Mongbwalu.

709. The Appeals Chamber notes that the relevant legal finding of the Trial Chamber is that the UPC/FPLC killed people in Mongbwalu during the assault on this location.¹⁴⁰² This legal finding was based on the Trial Chamber's factual findings that '[t]he UPC/FPLC killed some individuals during the assault, including children and the elderly [and] [s]ome people were killed by shelling'.¹⁴⁰³ The Trial Chamber also relied on the testimony of P-0963 in this context, in addition to the evidence of P-

¹³⁹⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 188.

¹³⁹⁹ [Conviction Decision](#), para. 498, fn. 1448.

¹⁴⁰⁰ [Conviction Decision](#), paras 497-498 (emphasis added).

¹⁴⁰¹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 185-186, 193.

¹⁴⁰² [Conviction Decision](#), para. 873; fn. 2545, *referring to* para. 495.

¹⁴⁰³ [Conviction Decision](#), para. 495 (footnotes omitted).

0017, P-0768, P-0894, P-0055 and P-0886.¹⁴⁰⁴ These findings have not been challenged by Mr Ntaganda. The Appeals Chamber notes that the evidence of these witnesses corroborates P-0963's testimony that the UPC/FPLC shot civilians, noting in particular the statements that lots of civilians were killed during the fighting, including new born babies, that civilians were killed in houses on the road from Mongbwalu to Sayo, and that the witnesses were informed that children had been killed in Mongbwalu or heard from others that people who had gathered in the parking in the centre of Mongbwalu were killed by shelling during the attack.¹⁴⁰⁵

710. As to Mr Ntaganda's argument that the Trial Chamber ignored evidence that corroborated his evidence from additional civilian witnesses, namely, P-0039, P-0805, P-0868, P-0887, P-0863,¹⁴⁰⁶ and P-0792 and military witnesses P-0768, P-0010 and P-0017, the Appeals Chamber finds that Mr Ntaganda fails to show an error in the Trial Chamber's assessment of all the relevant evidence.¹⁴⁰⁷ First, the Appeals Chamber observes that the Trial Chamber did consider the evidence of P-0887 and noted that she 'testified that as soon as they heard gunfire coming from the direction of the Mongbwalu airstrip, she and members of her family fled'.¹⁴⁰⁸ Second, the Appeals Chamber notes that Mr Ntaganda himself submits that, the additional civilian witnesses whom he relies on were either persons who fled Mongbwalu at the sound of gunfire, or persons who had encountered civilians after they had fled Mongbwalu.¹⁴⁰⁹ Therefore, none of these witnesses corroborate Mr Ntaganda's submission that there were *no* civilians in Mongbwalu when the UPC/FPLC arrived, nor do they contradict the Trial Chamber's finding that '[w]hile some chose to stay, many persons who were

¹⁴⁰⁴ [Conviction Decision](#), para. 495, referring to P-0017: [T-58](#), pp. 67-68; [T-59](#), p. 3; P-0768: [T-33](#), pp. 58-59, referring to DRC-REG-0001-0004; P-0894: DRC-OTP-2076-0194-R02, from 0201 to 0202, para. 38; P-0963: [T-78](#), pp. 84-85; P-0055: [T-71](#), pp. 19-20; P-0886: [T-40](#), pp. 60-62; [T-37](#), p. 7.

¹⁴⁰⁵ P-0768: [T-33](#), pp. 58-59, referring to DRC-REG-0001-0004; P-0894: DRC-OTP-2076-0194-R02, from 0201 to 0202, para. 38; P-0055: [T-71](#), pp. 19-20; P-0886: [T-40](#), pp. 60 to 62; [T-37](#), p. 7.

¹⁴⁰⁶ The Appeals Chamber notes a typographical error in the pseudonym used with respect to this witness. Given the footnote reference and subsequent quote of the witness's evidence in para. 190 of Mr Ntaganda's Appeal Brief – Part II, the Appeals Chamber understands Mr Ntaganda to be referring to P-0863 and not P-0893.

¹⁴⁰⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 190-192.

¹⁴⁰⁸ [Conviction Decision](#), para. 498, fn. 1448.

¹⁴⁰⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 190.

present in the town as the assault unfolded fled Mongbwalu to the bush and to other places'.¹⁴¹⁰

711. Likewise, P-0768 testified that 'many people fled; the chef de cité, the policemen, and their entourage and even the inhabitants had fled' and that when they 'got to Mongbwalu there were very few people in the city',¹⁴¹¹ whilst P-0010 stated 'I don't know whether there were any civilians as such in Mongbwalu. It was all mixed up and everybody seemed to be a Lendu. There were no civilians. You see, when there is an attack, the civilians flee. So all who were in the city were the Lendu'.¹⁴¹² Given that P-0768 testified that a few people remained in the city, the Appeals Chamber considers that this testimony is consistent with the Trial Chamber's finding that some people remained. Given the lack of clarity in P-0010's statement as to whether Lendu civilians were present in Mongbwalu at the time of the assault, the Appeals Chamber finds that, contrary to Mr Ntaganda's argument, this evidence was not corroborative of his testimony that the civilian population had fled. The Trial Chamber was not required to expressly address evidence of such limited relevance to its finding. Mr Ntaganda's arguments are rejected.

712. With respect to the evidence of P-0017, the Appeals Chamber notes that the witness testified that '[w]hen we engaged in fighting I did not in fact see any civilians at that time'.¹⁴¹³ The Trial Chamber considered that, 'as P-0017 formed part of one of the brigades involved in the takeover of Mongbwalu, it was possible for "civilians" to have still been present in the town without P-0017 having seen them'.¹⁴¹⁴ Mr Ntaganda disputes the correctness of the Trial Chamber's finding, arguing that the issue was not whether it was possible for P-0017 to see the civilians at the time but whether P-0017's evidence raised any doubt as to the Trial Chamber's finding that "'many" remained'.¹⁴¹⁵

713. The Appeals Chamber notes that the Trial Chamber's finding that it was possible for P-0017 not to have seen any civilians in the town at the time of the attack

¹⁴¹⁰ [Conviction Decision](#), para. 497 (footnotes omitted).

¹⁴¹¹ P-0768: [T-34](#), p. 15, lines 9-11.

¹⁴¹² P-0010: [T-50](#), p. 62, lines 17-20.

¹⁴¹³ P-0017: [T-61](#), p. 51, line 13.

¹⁴¹⁴ [Conviction Decision](#), para. 498, fn. 1448.

¹⁴¹⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 192.

is supported by the witness's testimony regarding his movements during the operation. P-0017 testified that, [REDACTED],¹⁴¹⁶ [REDACTED],¹⁴¹⁷ on the night of the second day, they entered Mongbwalu centre,¹⁴¹⁸ [REDACTED].¹⁴¹⁹ The Appeals Chamber finds that, given P-0017's [REDACTED] at the start of the operation and the limited time he would have spent in Mongbwalu, it was reasonable for the Trial Chamber to have found that it was 'possible for "civilians" to have still been present in the town without P-0017 having seen them'.¹⁴²⁰ In these circumstances, the Appeals Chamber also considers that it was reasonable for the Trial Chamber to conclude that its finding regarding the presence of civilians in Mongbwalu was unaffected by the testimony of P-0017.

714. Finally, regarding Mr Ntaganda's argument that the Trial Chamber failed to properly consider whether P-0963 had a motive as an accomplice to blame Mr Ntaganda for the crimes in which he himself participated,¹⁴²¹ the Appeals Chamber notes that the Trial Chamber did not characterise P-0963 as an 'accomplice witness', nor was it required so to do. However, as previously stated, it was essential for the Trial Chamber to provide sufficient reasoning for its reliance on P-0963's evidence given the witness's involvement in the criminal events, and to consider any motives or incentives that he may have had to implicate Mr Ntaganda in light of the challenges to the witness's credibility raised at trial.¹⁴²²

715. The Trial Chamber noted that P-0963 was 'a UPC/FPLC soldier who served in Salumu Mulenda's brigade' and that generally his evidence 'was rich in detail, particularly in relation to subjects where the witness possessed personal knowledge', that he 'openly admitted when he did not know certain things, and clarified when he was relying on information provided by others, or could not remember certain facts, emphasising the time passed since the events'.¹⁴²³ It considered and rejected

¹⁴¹⁶ P-0017: [T-58](#), p. 59, lines 15-18; p. 63, lines 1-6, 10-14.

¹⁴¹⁷ P-0017: [T-58](#), p. 63, lines 15-25, p. 65, lines 2-7.

¹⁴¹⁸ P-0017: [T-58](#), p. 66, lines 2-6.

¹⁴¹⁹ P-0017: [T-58](#), p. 66, lines 21-25; p. 67, line 20 to p. 68, line 5.

¹⁴²⁰ [Conviction Decision](#), para. 498, fn. 1448.

¹⁴²¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 151; [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), paras 52-53; [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), paras 10-15.

¹⁴²² [Mr Ntaganda's Closing Brief](#), paras 330-355.

¹⁴²³ [Conviction Decision](#), paras 236-237.

Mr Ntaganda's arguments that the witness had fabricated evidence,¹⁴²⁴ and observed that he provided detailed testimony regarding his participation in the First Operation and Second Operation, and that 'certain details concerning the Mongbwalu and Sayo assaults provided by P-0963 are consistent with the details provided by other witnesses who testified to having participated in these operations or to having been present in Mongbwalu following the attack'.¹⁴²⁵ Based on this assessment, the Appeals Chamber considers that the Trial Chamber did not overlook P-0963's involvement in the crimes and provided sufficient reasons for its reliance on the witness.

716. Accordingly, the Appeals Chamber finds that Mr Ntaganda does not show any error in the Trial Chamber's finding that the UPC/FPLC soldiers fired at everyone in Mongbwalu, including civilians and rejects his argument.

3. P-0017

717. P-0017 was a UPC/FPLC soldier who served in Salumu Mulenda's brigade.¹⁴²⁶ He testified about his service and participation in both the First and Second Operations.¹⁴²⁷ Mr Ntaganda seeks to impugn the Trial Chamber's reliance on the evidence of P-0017 for its findings on the firing of a grenade at people in civilian clothing in Sayo and the killing of prisoners at the *Appartements*.¹⁴²⁸

(a) Relevant part of the Conviction Decision

718. The Trial Chamber found that, on or about 24 November 2002, the UPC/FPLC attacked Sayo and that Mr Ntaganda oversaw the assault from the *Appartements* Camp.¹⁴²⁹ It found that, as the operation was nearing its end, 'Mr Ntaganda, followed by a group of Hema Gegere persons, joined the UPC/FPLC troops already present in Sayo'.¹⁴³⁰

719. With respect to the order to fire a grenade launcher, the Trial Chamber, relying on the evidence of P-0017 alone, found as follows:

¹⁴²⁴ [Conviction Decision](#), paras 238-248.

¹⁴²⁵ [Conviction Decision](#), paras 246-248 (footnote omitted).

¹⁴²⁶ [Conviction Decision](#), para. 106.

¹⁴²⁷ [Conviction Decision](#), para. 106.

¹⁴²⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 194-208, 209-225.

¹⁴²⁹ [Conviction Decision](#), para. 500.

¹⁴³⁰ [Conviction Decision](#), para. 507 (footnotes omitted).

Mr Ntaganda issued an order to Salumu Mulenda's brigade to fire with a grenade launcher at the slope of the mountain where a number of men and women wearing civilian clothing were walking in a single file. Mr Ntaganda's order was executed. It was a hot and clear day and the visibility was good. After the firing, the people spread in all directions, but none of them appeared to have been injured.¹⁴³¹

720. Despite challenges to P-0017's credibility and the reliability of his evidence, the Trial Chamber found 'P-0017's evidence in relation to Mr Ntaganda's order to fire on people walking on the slope of the mountain to be credible and reliable'.¹⁴³²

721. In relation to the detention of persons at the *Appartements* and the killing of two persons detained there, the Trial Chamber stated as follows:

UPC/FPLC troops detained several persons, including Lendu, at the *Appartements* during the First Operation. This finding is unaffected by Mr Ntaganda's contradictory testimony on this subject, which the Chamber finds not credible. Lendu who could provide valuable information, such as community and military leaders were captured and brought to the *Appartements* for interrogation. Those questioned were not only Lendu, but most Lendu were killed afterwards, while members of other ethnic groups were released. Mr Ntaganda himself would sometimes come to the *Appartements* and take persons held there away. On one occasion, Mr Ntaganda ordered UPC/FPLC soldiers to tie up and kill two persons detained there, who were accused of being members of the APC. Those two persons were beaten and killed subsequent to the order.¹⁴³³

(b) Summary of submissions

(i) *Mr Ntaganda's submissions*

722. Mr Ntaganda takes issue with the Trial Chamber's reliance on the evidence of P-0017 to find that he had ordered the firing of a grenade launcher at the slope of a mountain where a number of men and women wearing civilian clothing were walking in a single file.¹⁴³⁴ Mr Ntaganda submits that, in accepting P-0017's testimony over his, the Trial Chamber adopted an 'either/or' approach to fact-finding by first finding the witness to be credible without considering his contradictory evidence and then using its finding as a justification for disregarding his testimony.¹⁴³⁵ Furthermore, Mr Ntaganda argues that the Trial Chamber's theory as to how a grenade could be

¹⁴³¹ [Conviction Decision](#), para. 508 (footnotes omitted).

¹⁴³² [Conviction Decision](#), para. 508.

¹⁴³³ [Conviction Decision](#), para. 528 (footnotes omitted, emphasis in the original).

¹⁴³⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 194.

¹⁴³⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 196-198.

launched, given the 200 meter distance between [REDACTED] and the column of people, with no resultant injuries has no basis in the evidence and is speculative.¹⁴³⁶ Mr Ntaganda further argues that the Trial Chamber erred in failing to exercise caution in assessing P-0017's testimony and failing to provide reasons for accepting the witness's evidence given his status as an 'accomplice' witness and inconsistencies in the statements that he made.¹⁴³⁷ Finally, Mr Ntaganda argues that P-0017's account is incompatible with the evidence regarding [REDACTED] and that the Trial Chamber offered no explanation for its finding that Mr Ntaganda circumvented the military hierarchy and gave an order directly to [REDACTED] to fire the grenade launcher.¹⁴³⁸

723. Mr Ntaganda challenges the following findings of the Trial Chamber with respect to events that took place at the *Appartements* in the aftermath of the attack on Mongbwalu: (i) the finding that Mr Ntaganda ordered the killing of two persons (accused of being members of the APC) who were then subsequently beaten and killed by UPC/FPLC soldiers; and (ii) the finding that people were imprisoned at the *Appartements* by the UPC/FPLC.¹⁴³⁹

724. Mr Ntaganda alleges several errors in the Trial Chamber's reliance on the evidence of P-0017 who was the only witness that implicated Mr Ntaganda in the killing of the two prisoners.¹⁴⁴⁰ In his view, while a Trial Chamber can rely on the uncorroborated evidence of an accomplice even when the evidence directly implicates the accused, it may only do so with the exercise of due caution and a discussion of the witness's status of 'accomplice' or reasoning as to why the testimony was reliable.¹⁴⁴¹ Mr Ntaganda contends that the Trial Chamber's lack of reasoning especially in circumstances where the witness's credibility was 'vigorously impugned' most notably on the basis that there was reasonable doubt as to him even being present at the material time amounts to a legal error that warrants a reversal of this finding.¹⁴⁴²

¹⁴³⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 199-201; [T-271](#), p. 13, line 20 to p. 14, line 1.

¹⁴³⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 202-205.

¹⁴³⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 206-207.

¹⁴³⁹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 218, 223, referring to [Conviction Decision](#), para. 528, fn. 1577.

¹⁴⁴⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 209-217.

¹⁴⁴¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 210.

¹⁴⁴² [Mr Ntaganda's Appeal Brief – Part II](#), para. 210.

725. With respect to the finding that people were imprisoned at the *Appartements*, Mr Ntaganda contends that the Trial Chamber ‘misrepresented’ and ‘invented contradictions’ with respect to his testimony and/or the record and that it erroneously accepted competing evidence from Prosecution witnesses as consistent.¹⁴⁴³ Mr Ntaganda submits that these errors materially affected the Trial Chamber’s findings which should be reversed.

(ii) *The Prosecutor’s submissions*

726. The Prosecutor argues that Mr Ntaganda ‘merely speculates that the Chamber shifted the burden of proof or engaged in an “either/or” approach to credibility.’¹⁴⁴⁴ Regarding Mr Ntaganda’s argument that the Trial Chamber speculated as to how a grenade could be launched at persons close by without causing carnage, the Prosecutor submits that this argument is irrelevant and does not directly relate to the finding of the Trial Chamber that he is supposedly challenging, namely, that he ordered that attack.¹⁴⁴⁵ Furthermore, the Prosecutor argues that, regardless of whether P-0017 may be characterised as an ‘accomplice’, the Trial Chamber correctly exercised all caution when assessing his credibility.¹⁴⁴⁶ As to Mr Ntaganda’s argument that he would not likely have circumvented the chain of command to give [REDACTED] a direct order, the Prosecutor observes that this contradicts the record of the case given the evidence that he was ‘present on the ground and personally commanded the Sayo attack’.¹⁴⁴⁷

727. The Prosecutor argues that Mr Ntaganda fails to show any error in the Trial Chamber’s findings. Instead she contends that Mr Ntaganda’s arguments ‘disregard the record and cherry-pick findings out of context’.¹⁴⁴⁸ With regard to Mr Ntaganda’s arguments on the lack of corroboration of P-0017’s evidence, the Prosecutor argues that the evidence shows that other witnesses testified about the murder of prisoners at

¹⁴⁴³ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 218-223.

¹⁴⁴⁴ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 164 (footnote omitted).

¹⁴⁴⁵ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 165.

¹⁴⁴⁶ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 162.

¹⁴⁴⁷ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 166, referring to D-300: [T-235](#), p. 58, lines 3-7.

¹⁴⁴⁸ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 167.

the *Appartements* and that Mr Ntaganda ‘fails to explain how their evidence is inconsistent, let alone that the Chamber erred’.¹⁴⁴⁹

(iii) The victims’ observations and Mr Ntaganda’s response to the victims

728. Victims Group 2 submit that the Trial Chamber provided a detailed assessment of P-0017’s evidence and explained why it found him to be credible.¹⁴⁵⁰ They argue that the Trial Chamber took into account his role in events, but that it was not required to consider his accomplice status explicitly because he was not at the same leadership level as Mr Ntaganda and his interest in testifying against him would not have been that of a co-accused shifting blame or having made a plea bargain with the prosecution.¹⁴⁵¹

729. In response, Mr Ntaganda maintains that P-0017 was an accomplice and that the Trial Chamber failed to properly consider whether he had a motive to blame Mr Ntaganda for the crimes in which he himself participated.¹⁴⁵²

(c) Determination by the Appeals Chamber

730. The Appeals Chamber notes that Mr Ntaganda confronts the Trial Chamber’s credibility assessment of P-0017 on the basis of similar arguments raised in relation to P-0768. First, he argues that the Trial Chamber erred in adopting a so-called ‘either/or’ approach to the assessment of the evidence whereby the Chamber pitted his testimony against that of P-0017 resulting in a shift in the burden of proof.¹⁴⁵³ The Appeals Chamber has considered and rejected these arguments together with similar arguments made by Mr Ntaganda under the seventh ground of appeal.¹⁴⁵⁴

731. Second, Mr Ntaganda raises several other challenges that purport to undermine the Trial Chamber’s credibility assessment of P-0017 and the reasonableness of its

¹⁴⁴⁹ [Prosecutor’s Response to Mr Ntaganda’s Appeal Brief – Part II](#), para. 168, referring to the testimony of P-0907, P-0963, P-0887, and P-0898.

¹⁴⁵⁰ [Observations of Victims Group 2 on Appeal – Part II](#), para. 77.

¹⁴⁵¹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 81.

¹⁴⁵² [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), paras 52-53.

¹⁴⁵³ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 196-198.

¹⁴⁵⁴ See paragraphs 591-602 above.

findings on the firing of a grenade launcher at people in civilian clothing in Sayo and the killing of prisoners at the *Appartements*.¹⁴⁵⁵ These arguments are addressed below.

(i) *P-0017's 'accomplice status'*

732. Mr Ntaganda argues that, for the Trial Chamber's findings on the firing of a grenade launcher and the killing of prisoners at the *Appartements*, P-0017's testimony was not approached with the caution that was appropriate given his status as an 'accomplice', nor did the Trial Chamber provide reasons for accepting P-0017's evidence despite his status.¹⁴⁵⁶ He suggests that P-0017 was a soldier 'on the ground purporting to mitigate or excuse their own criminal conduct on the basis of the accused's conduct'.¹⁴⁵⁷

733. Mr Ntaganda argues that the need for caution was 'heightened' by an apparent inconsistency in P-0017's oral testimony and a statement that he had given to the Prosecutor in 2006.¹⁴⁵⁸ In his 2006 statement, the witness alleged that, when they reached the church in Sayo, [REDACTED].¹⁴⁵⁹ The Trial Chamber held that, when this information was put to him in cross-examination, P-0017:

appeared to no longer stand by the information provided in 2016, and could not provide a satisfactory explanation for this change. In light of this significant discrepancy, the Chamber finds that it cannot rely on this specific aspect of P-0017's evidence.¹⁴⁶⁰

Mr Ntaganda contends that 'not relying on this "specific aspect" of his testimony was not enough'.¹⁴⁶¹ In his view, the Trial Chamber was required to explain why the witness's 'retraction of such a grave allegation had no impact on his' overall credibility.¹⁴⁶² Furthermore, Mr Ntaganda argues, in relation to P-0017's account of prisoners being killed at the *Appartements*, that 'his inability to recognise the *Appartements* or central characters in his story raise reasonable doubt as to him even

¹⁴⁵⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 199-225.

¹⁴⁵⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 202, 209-210.

¹⁴⁵⁷ [T-271](#), p. 6, lines 14-18.

¹⁴⁵⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 203, referring to P-0017: [T-61](#), p. 108, line 24 to p. 109, line 11.

¹⁴⁵⁹ P-0017: [T-61](#), p. 108, line 24 to p.109, line 11.

¹⁴⁶⁰ [Conviction Decision](#), para. 115 (footnote omitted).

¹⁴⁶¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 204.

¹⁴⁶² [Mr Ntaganda's Appeal Brief – Part II](#), para. 204.

being present'.¹⁴⁶³ In these circumstances, Mr Ntaganda submits that the Trial Chamber was required to explain why it relied on the 'uncorroborated evidence of an accomplice, in the absence of any caution'.¹⁴⁶⁴

734. As discussed elsewhere under this ground of appeal, the Appeals Chamber considers that 'the condition of a witness as an "accomplice" is a circumstance that needs to be carefully considered when assessing the reliability of his or her evidence, but, [...] does not make this evidence unreliable *per se* or in need of corroboration as a matter of law'.¹⁴⁶⁵

735. The Appeals Chamber notes that in setting out its approach to the assessment of a witness's credibility the Trial Chamber stated that it considered, *inter alia*, whether the witness in question had 'any involvement in the events under consideration'.¹⁴⁶⁶ The Appeals Chamber considers that the Trial Chamber was therefore aware that some of the witnesses were so-called 'insiders' or 'accomplices'. In relation to the evidence of P-0017, the Appeals Chamber finds that the Trial Chamber carried out a comprehensive assessment of the witness's credibility and carefully considered Mr Ntaganda's challenges in this regard.¹⁴⁶⁷ The Trial Chamber observed, *inter alia*, that P-0017's evidence was 'rich in detail', that the witness explained the basis of his knowledge, 'readily conceded when he was not able to answer a question, and the inferences he made appeared reasonable'.¹⁴⁶⁸ However, the Trial Chamber also rejected an aspect of P-0017's evidence in light of a 'significant discrepancy' between his oral testimony and a statement that he had provided in 2016.¹⁴⁶⁹

736. As to Mr Ntaganda's further argument that the Trial Chamber failed to explain why its rejection of this aspect of P-0017's evidence had no impact on the witness's overall credibility, the Appeals Chamber notes that a Trial Chamber may rely on certain aspects of a witness's evidence and consider other aspects unreliable provided

¹⁴⁶³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 210.

¹⁴⁶⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 210.

¹⁴⁶⁵ See paragraph 655 above; [Bemba et al. Appeal Judgment](#), para. 1531. See also [Ntagerura et al. Appeal Judgment](#), para. 203, [Karemera and Ngirumpaste Appeal Judgment](#), para. 42.

¹⁴⁶⁶ [Conviction Decision](#), para. 77.

¹⁴⁶⁷ [Conviction Decision](#), paras 106-117.

¹⁴⁶⁸ [Conviction Decision](#), para. 107.

¹⁴⁶⁹ [Conviction Decision](#), para. 115.

that it explains why it considers the remainder of the testimony to be reliable.¹⁴⁷⁰ As set out above, the Trial Chamber adequately explained the basis for its finding that the testimony of P-0017 was generally credible.¹⁴⁷¹ Having adjudicated all of Mr Ntaganda's challenges against P-0017's credibility, the Trial Chamber concluded that the witness was credible as 'none of the aforementioned Defence challenges affect the general credibility of the witness'.¹⁴⁷² Mr Ntaganda shows no error in the Trial Chamber's approach and his argument is rejected.

737. Likewise, in addressing Mr Ntaganda's challenge that P-0017 was not present at the *Appartements* on the basis that he was unable to recognise the *Appartements* or central characters in his story from a video recording, the Trial Chamber explained that the witness:

(i) maintained that he was present at the *Appartements*; (ii) explained that he did not go to the specific houses that appear on the recording because they were occupied by the officers; (iii) testified that he knew that Mr Ntaganda lived in those houses, but did not know the specific house inhabited by Mr Ntaganda; (iv) recognised the *Appartements* camp area on two satellite images in cross-examination; and (v) explained his failure to recognise Thomas Kasangaki and Salumu Mulenda by the quality of the images and the time passed.¹⁴⁷³

738. Consequently, the Trial Chamber found that Mr Ntaganda's challenge 'does not, without more, cast doubt on the witness's alleged presence in the area at the relevant time'.¹⁴⁷⁴ Contrary to Mr Ntaganda's argument, the Trial Chamber applied the appropriate caution to P-0017's evidence on this point and sufficiently explained why it rejected Mr Ntaganda's challenge. The Appeals Chamber finds that Mr Ntaganda repeats his arguments at trial on this issue which amount to mere disagreement with the Trial Chamber's finding.¹⁴⁷⁵

(ii) *Other arguments that purport to undermine P-0017's credibility regarding the firing of the grenade launcher*

739. Regarding the Trial Chamber's finding that Mr Ntaganda ordered that a grenade launcher be fired at a slope where people were walking, the Appeals Chamber notes

¹⁴⁷⁰ [Ngudjolo Appeal Judgment](#), para. 168.

¹⁴⁷¹ [Conviction Decision](#), paras 107-117.

¹⁴⁷² [Conviction Decision](#), para. 117.

¹⁴⁷³ [Conviction Decision](#), para. 109 (footnotes omitted).

¹⁴⁷⁴ [Conviction Decision](#), para. 109.

¹⁴⁷⁵ [Mr Ntaganda's Closing Brief](#), para. 302.

that, in response to Mr Ntaganda's argument that a grenade fired at people less than 200 meters away would have caused 'carnage', the Trial Chamber found:

In this respect, the Chamber considers that it is plausible for the shooter to have missed the target, even under the aforementioned circumstances, or not to have shot at the people themselves, but only in their direction, thereby still leaving them unharmed.¹⁴⁷⁶

740. Mr Ntaganda argues that this finding is in error as '[t]he question is not whether P-0017's story was **plausible**, but whether it could be relied upon to support a finding beyond a reasonable doubt that this incident happened, particularly in light of the evidence from the Accused that it did not'.¹⁴⁷⁷

741. As already noted, the Trial Chamber's approach to the evidence on this point shows that it found beyond reasonable doubt that Mr Ntaganda had ordered the firing of a grenade launcher at civilians, on the basis of P-0017's evidence and having considered Mr Ntaganda's testimony to the contrary.¹⁴⁷⁸ It then rejected the defence argument that many people would have been killed had the grenade launcher been fired as described by P-0017, finding that it was plausible that the shooter had missed the target, or did not shoot at the people themselves but only in their direction.¹⁴⁷⁹ The Appeals Chamber finds that the Trial Chamber reasonably assessed the evidence before it in finding that Mr Ntaganda's denial that the event took place did not raise any doubt with respect P-0017's account which the Trial Chamber found to be credible.

742. Furthermore, Mr Ntaganda's argument that the Trial Chamber's finding 'is based on speculation, very similar to that which led to the quashing of convictions in *Gotovina*', is misplaced.¹⁴⁸⁰ In that case, the ICTY Appeals Chamber found that the Trial Chamber having heard evidence on a highly technical subject, namely, the margin of error of artillery weapons in particular conditions, relied on a single margin of error, the so-called '200 Meter Standard', that was not linked to any evidence it had

¹⁴⁷⁶ [Conviction Decision](#), para. 508, fn. 1498.

¹⁴⁷⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 200 (emphasis in original).

¹⁴⁷⁸ See paragraphs 600-602 above.

¹⁴⁷⁹ [Conviction Decision](#), para. 508, fn. 1498.

¹⁴⁸⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 201.

received and failed to explain the basis for the adoption of this standard.¹⁴⁸¹ In the present case, the Trial Chamber relied on the evidence of a witness it found to be credible and reliable as to the firing of a grenade at a group of people. Mr Ntaganda does not refer to any evidence to support his assertion that firing a grenade at this distance would have resulted in carnage.¹⁴⁸² The comparison with the *Gotovina* case is thus inapplicable.

743. Mr Ntaganda further argues that the Trial Chamber's finding that he gave the order to 'point and shoot' the grenade launcher is 'incompatible with all other evidence heard about the use of heavy weapons in the case'.¹⁴⁸³ He suggests that if he wanted a heavy weapon to be fired he would have followed the 'chain of command' and given the order to Kasangaki and not directly to the heavy weapons [REDACTED].¹⁴⁸⁴

744. The Appeals Chamber is not convinced by Mr Ntaganda's argument concerning [REDACTED]. Mr Ntaganda argues that [REDACTED].¹⁴⁸⁵ On this basis, he argues that the idea that [REDACTED] fired a grenade launcher at the column of people is incompatible with the evidence. However, as highlighted by the Prosecutor, the record shows that Mr Ntaganda's argument was contradicted by: (i) P-0963, who testified that [REDACTED]; and (ii) P-0017, who stated that [REDACTED].¹⁴⁸⁶ Mr Ntaganda shows no error in the Trial Chamber's finding and his argument is rejected.

745. Furthermore, the Appeals Chamber finds no merit in the argument that Mr Ntaganda would not circumvent the military hierarchy to give an order directly to a heavy weapons [REDACTED]. The Trial Chamber found, on the basis of Mr Ntaganda's own admission, that he commanded the attack on Sayo.¹⁴⁸⁷ In addition, the Trial Chamber found, on the basis of P-0963's testimony and other evidence, that

¹⁴⁸¹ [Gotovina and Markač Appeal Judgment](#), paras 51-61.

¹⁴⁸² [Mr Ntaganda's Appeal Brief – Part II](#), para. 199.

¹⁴⁸³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 207.

¹⁴⁸⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 207.

¹⁴⁸⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 206.

¹⁴⁸⁶ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 166, referring to P-0963: [T-81](#), p. 71, line 20 to p. 72, line 3; P-0017: [T-61](#), p. 52, lines 12-23; p. 67, line 1 to p. 68, line 13; p. 69, line 12 to p. 70, line 11.

¹⁴⁸⁷ [Conviction Decision](#), para. 500; fn. 1453, referring, *inter alia*, to D-0300: [T-235](#), p.58.

Mr Ntaganda's orders were obeyed.¹⁴⁸⁸ Consequently, the Appeals Chamber finds that it was reasonable for the Trial Chamber to find that Mr Ntaganda gave a direct order to [REDACTED].

(iii) *Other arguments that purport to undermine P-0017's credibility regarding treatment of prisoners at the Appartements*

746. Mr Ntaganda raises further challenges to the Trial Chamber's finding that the UPC/FPLC detained several persons at the *Appartements* camp in Mongbwalu during the First Operation and that he ordered the UPC/FPLC soldiers to beat and kill two of those detained persons.¹⁴⁸⁹

747. First, Mr Ntaganda argues that this finding is undermined by errors in the Trial Chamber's underlying findings concerning the date of P-0017's arrival at the *Appartements*, the date on which Mr Ntaganda left Mongbwalu, and their simultaneous presence at the *Appartements*.¹⁴⁹⁰ The Appeals Chamber notes, by way of context, that the Trial Chamber found that the UPC/FPLC attacked Mongbwalu 'on or about 20 November 2002' and that it lasted 'approximately three to four days' before the UPC/FPLC took control of the town.¹⁴⁹¹ On this basis, Mr Ntaganda contends that 'Mongbwalu fell to the UPC/FPLC on or about 23 or 24 November 2002'.¹⁴⁹² Mr Ntaganda testified that he left Mongbwalu on 28 November 2002.¹⁴⁹³ However, the Trial Chamber found that his testimony was not credible and that it was satisfied that he 'remained in the area until at least one week after the UPC/FPLC had taken over Mongbwalu', although the exact date of Mr Ntaganda's departure could not be established.¹⁴⁹⁴ The Trial Chamber reasoned its finding as follows:

The Chamber notes that it also received evidence on Mr Ntaganda's stay in Mongbwalu and his departure from a number of witnesses, including Mr Ntaganda himself. [...] In this regard, the Chamber has not retained as credible Mr Ntaganda's statement that he left by plane on 28 November 2002, noting that it is contradicted by the evidence of P-0002, who states that he returned to Bunia by plane with, *inter alia*, Mike Arereng, but also specifying

¹⁴⁸⁸ [Conviction Decision](#), para. 322, fn. 852.

¹⁴⁸⁹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 209-225, referring to [Conviction Decision](#), para. 528.

¹⁴⁹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 211-217.

¹⁴⁹¹ [Conviction Decision](#), paras 486, 492.

¹⁴⁹² [Mr Ntaganda's Appeal Brief – Part II](#), para. 211.

¹⁴⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 212, D-0300: [T-218](#), p. 4, line 19 to p. 5, line 10.

¹⁴⁹⁴ [Conviction Decision](#), para. 489.

that Floribert Kisembo, and not Mr Ntaganda, travelled with them to Bunia. While the exact day of Mr Ntaganda's departure cannot be established, the Chamber, in light of the informed evidence of the abovementioned witnesses who were in Mongbwalu at the time, and having had further regard to the other findings related to Mr Ntaganda's whereabouts and conduct during the First Operation (see paras 510 (killings in Nzebi) and 535 (women being brought to *Appartements*)), is satisfied that he remained in the town for at a minimum one week after the UPC/FPLC took over Mongbwalu.¹⁴⁹⁵

748. In this regard, Mr Ntaganda contends that the evidence relied upon by the Trial Chamber to reject his testimony that he departed on 28 November 2002 was not incompatible with it.¹⁴⁹⁶ In fact, he asserts that the testimony of P-0002, P-0768, P-0901 and P-0963 'reinforce' his more precise account.¹⁴⁹⁷ The Appeals Chamber notes that the Trial Chamber rejected Mr Ntaganda's date of departure on the basis of P-0002's specific contradiction.¹⁴⁹⁸ On the question of how long he stayed in Mongbwalu, the Appeals Chamber notes that P-0768 and P-0901 testified that Mr Ntaganda had stayed for almost a week if not longer while P-0963's account appears inconclusive on this point.¹⁴⁹⁹ Based on this evidence, it was reasonable for the Trial Chamber to find that Mr Ntaganda's testimony that he left Mongbwalu on 28 November 2002 was not credible, and there is no error in the finding that Mr Ntaganda 'remained in the area until at least one week after the UPC/FPLC had taken over Mongbwalu'.¹⁵⁰⁰

749. As to the date of P-0017's arrival in Mongbwalu and Mr Ntaganda's simultaneous presence at the *Appartements*, the Appeals Chamber notes that the witness testified that he arrived [REDACTED].¹⁵⁰¹ Mr Ntaganda argues in this regard that, on the basis of P-0017's estimation, he [REDACTED] and therefore could not [REDACTED].¹⁵⁰² The Appeals Chamber considers that, as there was no error in the Trial Chamber's finding that Mr Ntaganda 'remained in the area until at least one week after the UPC/FPLC had taken over Mongbwalu', it was reasonable for the Trial

¹⁴⁹⁵ [Conviction Decision](#), para. 489, fn. 1412.

¹⁴⁹⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 212.

¹⁴⁹⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 212.

¹⁴⁹⁸ [Conviction Decision](#), para. 489, fn. 1412.

¹⁴⁹⁹ P-0768: [T-34](#), p. 7, lines 9-12; P-0901: [T-28](#), p. 57, lines 19-22; P-0963: [T-82](#), p. 40, lines 9-16.

¹⁵⁰⁰ [Conviction Decision](#), para. 489.

¹⁵⁰¹ P-0017: [T-62](#), p. 56, lines 10-15.

¹⁵⁰² [Mr Ntaganda's Appeal Brief – Part II](#), para. 215.

Chamber to conclude that both Mr Ntaganda and the witness were [REDACTED] long enough for the witness to [REDACTED].

750. Second, Mr Ntaganda takes issue with the Trial Chamber's finding that prisoners were detained at the *Appartements* during the First Operation.¹⁵⁰³ The Trial Chamber rejected Mr Ntaganda's account as contradictory on this subject and reasoned as follows:

Mr Ntaganda, contrary to the evidence of P-0907, P-0963, P-0017, P-0898 and P-0887, testified that only one person was taken 'prisoner' during the First Operation, in Sayo, and that this person was released. [...] The Chamber considers that Mr Ntaganda's evidence on this issue is not credible, noting first, that it is contradicted by his admission that *Abbé Boniface Bwanalonga* was captured and interrogated at the *Appartements* [...], and by what [*sic*] Mr Ntaganda's statement shortly after the takeover of Mongbwalu that many people were captured and that a significant number of them were killed. [...] Mr Ntaganda's explanation for the latter contradiction – which was that his statement was intended as a military tactic to intimidate the 'enemy' [...] – is unconvincing, in the Chamber's view, when viewed in light of the other unexplained contradiction, and the competing, consistent evidence from P-0907, P-0963, P-0017, P-0898 and P-0887.¹⁵⁰⁴

751. Mr Ntaganda argues that the Trial Chamber misrepresents his testimony when it claims that there was a contradiction between his testimony that only one person was taken prisoner during the First Operation in Sayo and the detention of *Abbé Bwanalonga* at the *Appartements*.¹⁵⁰⁵ In this regard, Mr Ntaganda refers to the following extract of his testimony:

Q: Now in relation to prisoners, you've indicated that there was one prisoner in Sayo and you let him go. Correct?

A: Yes, I let him go.

Q: But in fact your troops in Mongbwalu took many prisoners during the operation, didn't they?¹⁵⁰⁶

752. In Mr Ntaganda's view, the above extract of his testimony was limited to the taking of prisoners in Sayo and not Mongbwalu. However, the Appeals Chamber notes that his testimony immediately continued with an emphatic denial that any

¹⁵⁰³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 218, referring to [Conviction Decision](#), para. 528.

¹⁵⁰⁴ [Conviction Decision](#), para. 528, fn. 1574.

¹⁵⁰⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 218-219.

¹⁵⁰⁶ D-0300: [T-235](#), p. 84, lines 17-21.

prisoners had been taken in direct response to the second question posed which referenced Mongbwalu:

A: No. My soldiers did not take a lot of prisoners. But once on the radio when I was giving an interview, I took the opportunity to spread the news to intimidate APC soldiers, saying that we arrested a lot of their troops. Other than that, to say that we had a lot of prisoners, that was not the reality of the situation. There weren't, there weren't any.¹⁵⁰⁷

The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that this testimony was contradicted by his account of the detention of *Abbé Bwanalonga* at the *Appartements*.

753. Furthermore, Mr Ntaganda contends that the Trial Chamber again misrepresents the record by finding that his account is further contradicted by his statement given during an interview shortly after the takeover of Mongbwalu where he said that 'many people were captured and that a significant number **of them** were killed'.¹⁵⁰⁸ After being shown the relevant excerpt of the video interview, Mr Ntaganda responded as follows:

Q: Now, sir, my question again was: What you have said to Mike Arereng in the Mongbwalu video is very different than what you are saying today, because you told him that you captured a lot of people in their ranks and a lot of them were killed.

A: That's not exactly right. I said when I was interviewed in the evening, the news was going to be given in Swahili, it was going to be broadcast in Swahili at that time. When you capture somebody who you free, that person will tell the others, he's going to give a message to the others, and when I announced that we captured a lot of people and that a lot of others had died, this was another tactic, another military tactic. But in reality it was to intimidate the enemy.¹⁵⁰⁹

754. Mr Ntaganda argues that the Trial Chamber misrepresents his testimony when it found that the two groups of people he referred to – those who were captured and those who were killed – were the same people.¹⁵¹⁰ The Appeals Chamber finds this argument to be irrelevant. Regardless of whether the two groups of people were the

¹⁵⁰⁷ D-0300: [T-235](#), p. 84, line 22 to p. 85, line 1.

¹⁵⁰⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 220 (emphasis in original), referring to [Conviction Decision](#), para. 528, fn. 1574, referring to DRC-OTP-2058-0251, at 00:12:04-00:12:40 (Translation DRC-OTP-2102-3766, at 3774, lines 201-202).

¹⁵⁰⁹ D-0300: [T-235](#), p. 86, lines 2-11.

¹⁵¹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 220.

same, the Trial Chamber found Mr Ntaganda's statement in the interview that 'many people were captured and that a significant number of them were killed' contradicted his testimony that one person was taken 'prisoner' during the First Operation, in Sayo, and that this person was released.¹⁵¹¹

755. In addition, Mr Ntaganda disputes the Trial Chamber's finding that his explanation for his statement to the journalist - that it was a 'military tactic to intimidate the "enemy"' - was unconvincing when viewed against 'the competing, consistent evidence from P-0907, P-0963, P-0017, P-0898 and P-0887'.¹⁵¹² Mr Ntaganda contends that the witnesses were not consistent in their evidence and differed on 'key details', including the location of the prison,¹⁵¹³ the identity of the prisoners,¹⁵¹⁴ whether prisoners would be questioned and by whom, and whether they would be tried.¹⁵¹⁵

756. The Appeals Chamber considers that, as highlighted by the Prosecutor,¹⁵¹⁶ there was broad consistency in the testimony of these witnesses on certain details regarding the *Appartements* prison. Although they may have differed on the level of detail provided regarding the specific location of the prison,¹⁵¹⁷ the identity of the prisoners,¹⁵¹⁸ whether they were interrogated or not,¹⁵¹⁹ as well as the use of other

¹⁵¹¹ [Conviction Decision](#), para. 528, fn. 1574.

¹⁵¹² [Mr Ntaganda's Appeal Brief – Part II](#), paras 221-222, referring to [Conviction Decision](#), para. 528, fn. 1574.

¹⁵¹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 222, arguing that the witnesses testified that the prison was '[REDACTED]; was "underground"; was "in a small room" called Mabushu; or the prisoners were spread between the *Appartements*, Salumu's camp, camp Galanga, or camp Goli'.

¹⁵¹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 222, arguing that the witnesses testified that the detainees were 'those [REDACTED]; or were "prisoners of war" who might have been combatants; or were "Lendus"; or Lendu, Nyali and also "Lulu"'.
¹⁵¹⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 222, arguing that 'P-0017 and P-0898 made no mention of prisoners being questioned, whereas P-0887 said they were brought to the camp to be questioned (although it is unclear by whom); P-0963 said the questioning was done by Pigwa (with no knowledge of Mr. Ntaganda interrogating anyone); whereas P-0907 was alone in testifying that some of them would be tried'.

¹⁵¹⁶ [Prosecutor's Response to Mr Ntaganda's Appeal Brief – Part II](#), para. 168.

¹⁵¹⁷ P-0887: [T-93](#), p. 33, lines 11-16; P-0963: [T-79](#), p. 24, lines 15-19; P-0898: [T-154](#), p. 20, lines 4-7; P-0017: [T-59](#), p. 21, lines 18-21. While P-0887 and P-0963 testified that it was underground, P-0898 referred to a small room called Mabushu and P-0017 indicated that it was [REDACTED].

¹⁵¹⁸ P-0017: [T-59](#), p. 24, lines 9-11; P-0887, [T-93](#), p. 33, lines 1-3; p. 34, lines 5-11; P-0963: [T-79](#), p. 21, line 19 to p. 22, line 15; P-0898: [T-154](#), p. 19, lines 1-4. While P-0017 [REDACTED], P-0887 referred to prisoners of war, P-0963 and P-0898 referred to Lendu prisoners.

¹⁵¹⁹ P-0898: [T-154](#), p. 18, lines 18-21; P-0887: [T-93](#), p. 33, lines 8-10; P-0963: [T-79](#), p. 15, line 22 to p. 16, line 2; p. 22, line 20 to p. 23, line 13, p. 23, line 23 to p. 24, line 4; p. 25, lines 14-15; P-0907: [T-90](#), p. 34, lines 20-25. While P-0898, P-0887 and P-0963 indicated that prisoners would be interrogated, P-0907 did not refer to interrogations.

prisons in Mongbwalu,¹⁵²⁰ the Appeals Chamber considers that there was no material contradiction in their testimony on these points. As explained above, the Appeals Chamber recalls that ‘while testimonies need not be identical in all aspects, they must confirm, even if in different ways, the same fact’.¹⁵²¹

757. Therefore, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that prisoners were detained at the *Appartements* during the First Operation, based on the evidence of P-0017, P-0907, P-0963, P-0898 and P-0887, despite Mr Ntaganda’s testimony that ‘only one person was taken “prisoner” during the First Operation, in Sayo, and that this person was released’.¹⁵²²

758. Lastly, Mr Ntaganda argues that the Trial Chamber erred in finding that P-0017’s testimony ‘that Mr. Ntaganda would “sometimes come to the *Appartements* and take persons held there away”, or that he ordered soldiers to “tie up and kill two persons detained there”’ was consistent with the evidence of P-0963, P-0887 and P-0898.¹⁵²³ He contends that none of these witnesses testified as to his role in the taking of prisoners away or ordering that they be killed.¹⁵²⁴ The Appeals Chamber notes that the Trial Chamber’s finding that Mr Ntaganda detained prisoners and was responsible for ordering the killing of two prisoners at the *Appartements* was based solely on the testimony of P-0017. While Mr Ntaganda correctly points out that P-0963, P-0887 and P-0898 did not implicate him in these crimes, they did testify about other prisoners who were interrogated or killed at the *Appartements*.¹⁵²⁵ It was reasonable for the Trial Chamber to have found P-0017’s ‘account of having been a guard at the “prison” at *Appartements* to be credible and reliable, noting that it is detailed and consistent with evidence of P-0963, P-0887, and P-0898’.¹⁵²⁶ Mr Ntaganda shows no error in the Trial Chamber’s assessment of this evidence and his argument is rejected.

¹⁵²⁰ P-0907: [T-90](#), p. 34, lines 12-19; P-0017: [T-59](#), p. 35, line 15 to p. 36, line 22; P-0898: [T-154](#), p. 18, lines 13-17. While P-0907 and P-0017 referred to other prisons, P-0898 did not.

¹⁵²¹ See paragraph 672 above.

¹⁵²² [Conviction Decision](#), para. 528, fn. 1574.

¹⁵²³ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 223-224, referring to [Conviction Decision](#), para. 528, fn. 1577.

¹⁵²⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 224.

¹⁵²⁵ P-0963: [T-79](#), p. 21, line 19 to p. 22, line 19; P-0898: [T-154](#), p. 18, line 18 to p. 19, line 19; p. 20, lines 14-19; P-0887: [T-93](#), p. 33, lines 1-16.

¹⁵²⁶ [Conviction Decision](#), para. 528, fn. 1577.

4. *Overall conclusion*

759. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's finding that the UPC/FPLC and Hema committed crimes during the First Operation, the Appeals Chamber rejects this ground of appeal.

I. Ninth ground of appeal: Use of individuals under 15 years of age as escorts for Mr Ntaganda

760. Under the ninth ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in finding, on the basis of video images, that three of his escorts were aged under 15 years.¹⁵²⁷

1. *Relevant part of the Conviction Decision*

761. The Trial Chamber found that 'Mr Ntaganda's personal escort included children under 15 years of age', namely, an individual called Lamama, an unidentified individual and another one called Tipe.¹⁵²⁸ In reaching this conclusion, the Trial Chamber relied on 'video images of three such children who it found to be "manifestly" under 15 years of age'.¹⁵²⁹ These video images were discussed in the context of the testimony of P-0010 and P-0898.¹⁵³⁰

2. *Summary of submissions*

(a) Mr Ntaganda's submissions

762. Mr Ntaganda argues that the Trial Chamber failed to exercise the caution required for age determination based on extracts of visual images and to explain its approach for such determination.¹⁵³¹ He challenges the Trial Chamber's reliance on: (i) the evidence of P-0010 for the age of Lamama and the unidentified individual, noting that the Trial Chamber found that P-0010 lied about her own age;¹⁵³² and (ii) the evidence of P-0898 with regard to the individual identified as 'Tipe'.¹⁵³³

¹⁵²⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 231-232, 249.

¹⁵²⁸ [Conviction Decision](#), paras 387-388, 1190.

¹⁵²⁹ [Conviction Decision](#), para. 1190 (footnotes omitted).

¹⁵³⁰ [Conviction Decision](#), paras 387-388.

¹⁵³¹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 237-238.

¹⁵³² [Mr Ntaganda's Appeal Brief – Part II](#), paras 242-243.

¹⁵³³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 246-247.

(b) The Prosecutor's submissions

763. The Prosecutor submits that Mr Ntaganda 'mischaracterises the evidence and misapprehends' the Conviction Decision.¹⁵³⁴ She argues that Mr Ntaganda repeats his unsuccessful trial arguments and merely disagrees with the Trial Chamber's reasonable assessment of evidence, without showing an error.¹⁵³⁵ The Prosecutor further avers that Mr Ntaganda does not demonstrate any error in the Trial Chamber's assessment of the witnesses' credibility and reliability.¹⁵³⁶

764. The Prosecutor argues that the Trial Chamber 'was competent to assess the age of individuals appearing in the video images' and that this is part of its 'routine function of assessing and evaluating the credibility and reliability of evidence'.¹⁵³⁷ The Prosecutor submits that by applying a 'large and wide margin of error' and making findings only in relation to individuals that 'were "manifestly" under the age of 15 years', the Trial Chamber 'exercised due caution' and was cognisant of 'the limitations in determining age based on physical appearance'.¹⁵³⁸

(c) The victims' observations

765. Victims Group 1 argue that it was reasonable and correct for the Trial Chamber to find that 'children under the age of 15' were included in Mr Ntaganda's escort.¹⁵³⁹ Victims Group 1 recall that the 'jurisprudence of both international and domestic tribunals confirms that a trier of fact is competent to assess the age of individuals based on their appearance, without requiring expert evidence'.¹⁵⁴⁰ They aver that the Trial Chamber properly relied on video-imagery evidence and on P-0010's and P-0898's evidence to assess the age of Lamama, the unnamed individual and Tipe.¹⁵⁴¹

(d) Mr Ntaganda's response to the victims

766. Mr Ntaganda responds that Victims Group 1 'misconstrue[] the domestic jurisprudence' he relied on.¹⁵⁴² He reiterates that in accordance with the *Lubanga*

¹⁵³⁴ [Prosecutor's Response to Appeal – Part II](#), para. 175. *See also* para. 188.

¹⁵³⁵ [Prosecutor's Response to Appeal – Part II](#), paras 182-183, 189.

¹⁵³⁶ [Prosecutor's Response to Appeal – Part II](#), paras 183-188.

¹⁵³⁷ [Prosecutor's Response to Appeal – Part II](#), para. 179.

¹⁵³⁸ [Prosecutor's Response to Appeal – Part II](#), para. 180.

¹⁵³⁹ [Observations of Victims Group 1 on Appeal – Part II](#), para. 8.

¹⁵⁴⁰ [Observations of Victims Group 1 on Appeal – Part II](#), para. 13.

¹⁵⁴¹ [Observations of Victims Group 1 on Appeal – Part II](#), paras 11-29.

¹⁵⁴² [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 54.

Appeal Judgment, the age assessment by a chamber must be performed ‘with the outmost caution and it must be “clear” that a child is under the age of 15’.¹⁵⁴³ He adds that Victims Group I misconstrue his argument regarding corroboration, as in the present case corroboration was needed to assess the credibility and reliability of P-0898’s account on Tipe.¹⁵⁴⁴

3. *Determination by the Appeals Chamber*

767. The Appeals Chamber notes Mr Ntaganda’s contention that the Trial Chamber failed to set out reasons explaining its approach and that no reasonable judge, ‘applying the proper degree of caution’, could have concluded beyond reasonable doubt that Lamama and the unidentified individual were under the age of 15.¹⁵⁴⁵ He avers that the Trial Chamber ‘merely incanted the formula of words from *Lubanga* – “large margin of error” and “manifestly”’, with no mention to the inter-cultural context.¹⁵⁴⁶ He adds that the Trial Chamber erred in according ‘weight to estimates of age by witnesses in the absence of any basis on which the Chamber could assess the accuracy of those estimates’.¹⁵⁴⁷

768. The Appeals Chamber recalls its holding in the *Lubanga* Appeal Judgment that ‘the question of whether video evidence can be relied upon to establish the element of age is a question of fact’.¹⁵⁴⁸ The Appeals Chamber notes that a determination of the age of individuals appearing in video extracts is part of the Trial Chamber’s assessment and appreciation of the credibility and reliability of evidence before it. However, ‘one factor relevant to reviewing whether a Trial Chamber’s factual finding was reasonable is whether it appropriately exercised caution when assessing the age of an individual on the basis of video images’.¹⁵⁴⁹

769. In the present case, the Trial Chamber made a detailed assessment of the video images, referring to the size, physical and facial features of individuals identified on

¹⁵⁴³ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 54.

¹⁵⁴⁴ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), paras 60-63.

¹⁵⁴⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 237-238 (emphasis in original). *See also* para. 240.

¹⁵⁴⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 237, referring to [Conviction Decision](#), para. 387.

¹⁵⁴⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 248.

¹⁵⁴⁸ [Lubanga Appeal Judgment](#), para. 221.

¹⁵⁴⁹ [Lubanga Appeal Judgment](#), para. 221.

those images.¹⁵⁵⁰ The Appeals Chamber notes that the Trial Chamber indicated that it allowed for a ‘large’ or ‘wide margin of error’ in its assessment and only found that individuals were under 15 when they were ‘manifestly’ under that age, such as in the cases of Lamama, an unnamed individual and Tipe.¹⁵⁵¹ This demonstrates that the Trial Chamber was mindful of the need to exercise caution.

770. The Appeals Chamber notes that Mr Ntaganda appended pictures of asylum-seekers in his Appeal Brief to support his contention that the Trial Chamber did not apply proper caution when determining Lamama’s age.¹⁵⁵² However, apart from arguing that none of these individuals ‘have been found to be over 18 years of age’, he does not explain how these photographs show that the Trial Chamber erred in finding that Lamama was under the age of 15.¹⁵⁵³ Furthermore, to the extent these photographs purport to demonstrate that it is only possible ‘to distinguish beyond reasonable doubt between a “pre-pubescent” and an adult’,¹⁵⁵⁴ the above-mentioned findings of the Trial Chamber show that it was aware of this difficulty and only found the age of a person to be under 15 years when that was ‘manifest’. Mr Ntaganda does not challenge this approach of the Trial Chamber or its application.

771. In addition, when finding that Mr Ntaganda’s escort included individuals under the age of 15 years, the Trial Chamber relied on video extracts presented to P-0010 and P-0898 during their testimony and formed its own views on the basis of that evidence.¹⁵⁵⁵ It also relied on corroborating evidence of these witnesses.¹⁵⁵⁶ With respect to Mr Ntaganda’s challenge to the accuracy of age estimates provided by the witnesses, as it will be discussed below, a review of the Trial Chamber’s detailed assessment of the testimony of these witnesses and the video extracts indicates that it was aware of this difficulty and took it into consideration. The Appeals Chamber notes that the witnesses were examined on these specific issues and the Trial Chamber

¹⁵⁵⁰ [Conviction Decision](#), paras 387-388, fns 1099-1100.

¹⁵⁵¹ [Conviction Decision](#), paras 387-388, 1190, 1192, fns 1099-1100, 3221.

¹⁵⁵² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 238.

¹⁵⁵³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 238.

¹⁵⁵⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 238.

¹⁵⁵⁵ [Conviction Decision](#), paras 387-388.

¹⁵⁵⁶ See [Conviction Decision](#), paras 389-390.

considered contextual information provided by P-0010 and P-0898 to conclude on the credibility of their respective age assessments.¹⁵⁵⁷

772. In that regard, Mr Ntaganda argues that no reasonable trier of fact could afford ‘any corroborative weight’ to P-0010’s testimony because she lied about her own age and may also have lied about other persons’ age.¹⁵⁵⁸ He adds that the Trial Chamber failed to explain why it found P-0010’s statements on Lamama’s age “‘credible and reliable’”.¹⁵⁵⁹

773. The Trial Chamber found P-0010’s account of her experience as an escort of Mr Ntaganda credible and held that it would ‘determine on a case-by-case basis which other aspects of her testimony can be relied upon with or without corroboration’.¹⁵⁶⁰ Contrary to Mr Ntaganda’s claim that the Trial Chamber failed to explain why it found this witness’s testimony about Lamama’s age credible, the Trial Chamber provided a detailed assessment of that testimony.¹⁵⁶¹ In particular, it noted the witness’s ‘demeanour and level of detail provided during her testimony’, which ‘appeared to vary to some extent depending on the nature of the issues discussed’.¹⁵⁶²

774. Moreover, the Trial Chamber did not find that P-0010 lied about her age. Rather it found ‘discrepancies and uncertainties’ in the witness’s testimony about her age and abduction by and training with the UPC/FPLC and addressed them when assessing the witness’s reliability.¹⁵⁶³ In that regard, the Trial Chamber followed its general approach to the assessment of witnesses’ credibility, according to which ‘[i]t is possible for a witness to be accurate and truthful, or provide reliable evidence, on some issues, and inaccurate and/or untruthful, or provide unreliable evidence, on others’.¹⁵⁶⁴ The Trial Chamber was of the view that such ‘[i]nconsistencies, contradictions, and inaccuracies do not automatically render a witness’s account unreliable in its entirety, as witnesses, depending on their personal circumstances,

¹⁵⁵⁷ See [Conviction Decision](#), paras 91, 98-101, 104, 201, 203-204, 207, 387-388.

¹⁵⁵⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 243.

¹⁵⁵⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 243, referring to [Conviction Decision](#), fn. 1099.

¹⁵⁶⁰ [Conviction Decision](#), para. 105. See also paras 101, 387.

¹⁵⁶¹ [Conviction Decision](#), paras 89-105.

¹⁵⁶² [Conviction Decision](#), para. 91.

¹⁵⁶³ [Conviction Decision](#), paras 94, 98.

¹⁵⁶⁴ [Conviction Decision](#), para. 80.

may experience, and therefore remember, past events in different ways'.¹⁵⁶⁵ The Trial Chamber stated that, in certain instances, it had decided to rely 'only on part of a witness's account' and when it rejected part of a witness's testimony, 'it invariably considered the impact of that rejection on the reliability of the remainder of the testimony'.¹⁵⁶⁶ The Appeals Chamber finds no error in this approach.

775. Bearing in mind this approach, the Trial Chamber found that it could not 'establish beyond reasonable doubt' that P-0010's age was under 15 years at the time when she served as an escort for Mr Ntaganda.¹⁵⁶⁷ In particular, it held that the witness's testimony about certain escorts being 'younger than her cannot, alone, support a finding that Mr Ntaganda's escort included individuals under 15'.¹⁵⁶⁸ However, the Trial Chamber found aspects of P-0010's testimony to be credible. It held that the witness 'provided detailed and coherent information about her experiences in Mr Ntaganda's escort' such as 'names of other bodyguards and their respective age range', the chief escort's name, and the 'location of Mr Ntaganda's residence'.¹⁵⁶⁹ The Trial Chamber was satisfied that her account was 'generally in line with, or corroborated by, other evidence in the case record'.¹⁵⁷⁰

776. The Trial Chamber also found the witness's account of a visit to the Rwampara training camp to be credible.¹⁵⁷¹ The Trial Chamber observed that when she was presented video scenes depicting that training camp, 'she was able to identify a number of individuals, certain locations' and their functions, 'recognised songs being sung and certain events depicted in the video'.¹⁵⁷² The Trial Chamber further noted that she could identify herself in a video scene and could 'remember and spontaneously provide details concerning certain accessories she could be seen wearing in the scene'.¹⁵⁷³ It is in light of this detailed assessment that the Trial Chamber considered the witness's evidence on Lamama's and the unnamed

¹⁵⁶⁵ [Conviction Decision](#), para. 80.

¹⁵⁶⁶ [Conviction Decision](#), para. 80.

¹⁵⁶⁷ [Conviction Decision](#), paras 94, 386.

¹⁵⁶⁸ [Conviction Decision](#), para. 386 (footnote omitted).

¹⁵⁶⁹ [Conviction Decision](#), para. 99 (footnote omitted). *See also* P-0010: [T-47](#), p. 5, line 22 to p. 6 line 13, p. 33, lines 1-13.

¹⁵⁷⁰ [Conviction Decision](#), para. 99.

¹⁵⁷¹ [Conviction Decision](#), paras 104-105.

¹⁵⁷² [Conviction Decision](#), para. 104 (footnotes omitted).

¹⁵⁷³ [Conviction Decision](#), para. 104.

individual's identification and age estimate.¹⁵⁷⁴ The Appeals Chamber finds no error in the Trial Chamber's reliance on P-0010's evidence with respect to the age of these two individuals, despite its reservations in relation to other aspects of her evidence.

777. Mr Ntaganda further argues that P-0010 'merely' stated that the unnamed individual was a *kadogo* and that this term, according to the Trial Chamber, refers to 'individuals up to 18 years of age' and the age estimates of witnesses on *kadogos* 'often straddl[ed] the 15-year threshold'.¹⁵⁷⁵ The Appeals Chamber observes that, contrary to Mr Ntaganda's contention, the Trial Chamber did not only rely on P-0010's reference to the individual as *kadogo*, but also on her evidence that this individual was younger than her.¹⁵⁷⁶

778. As to the meaning of the term *kadogo*,¹⁵⁷⁷ the Trial Chamber was satisfied that this term referred to the 'youngest soldiers, by their appearance, including individuals under 15'¹⁵⁷⁸ and that Mr Ntaganda's escort comprised of *kadogos*.¹⁵⁷⁹ In reaching this finding, the Trial Chamber relied on the evidence of several witnesses who testified that this term referred to 'young soldiers who were young in age',¹⁵⁸⁰ 'anybody who is aged 18 or under is a child',¹⁵⁸¹ 'under the age of 18',¹⁵⁸² 'someone who is not yet an adult',¹⁵⁸³ 'young soldiers, the underage soldiers',¹⁵⁸⁴ 'child soldier[s], namely, someone who is less than 15 years old',¹⁵⁸⁵ 'the smallest ones',¹⁵⁸⁶ 'young people who were [...] 14 to 15 years old',¹⁵⁸⁷ 'childhood',¹⁵⁸⁸ or '[I]ess than

¹⁵⁷⁴ [Conviction Decision](#), paras 104, 387.

¹⁵⁷⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 245, 248, fn. 671.

¹⁵⁷⁶ [Conviction Decision](#), fn. 1100. *See also* P-0010: [T-48](#), p. 15, lines 1-11; [T-50](#), p. 3, lines 9-20.

¹⁵⁷⁷ The Trial Chamber noted that 'sometimes, commanders chose *kadogos* as their bodyguards', and that a number of witnesses, including Mr Ntaganda, referred to 'escorts' and 'bodyguards' without distinction between both terms. The Trial Chamber therefore decided to use these terms interchangeably in the Conviction Decision. *See* [Conviction Decision](#), para. 380.

¹⁵⁷⁸ [Conviction Decision](#), para. 359.

¹⁵⁷⁹ [Conviction Decision](#), paras 380, 387, 389, 398, 403-405, 414, 416, 815, 832, fns 995, 999, 1079, 1098, 1100, 1102, 1110-1111, 1114, 1133, 1147, 1183, 1508.

¹⁵⁸⁰ [Conviction Decision](#), fn. 995. *See also* P-0014: [T-136](#), p. 38, lines 1-3, 5-14.

¹⁵⁸¹ [Conviction Decision](#), fn. 995. *See also* P-0014: [T-136](#), p. 38, line 14.

¹⁵⁸² [Conviction Decision](#), fn. 995. *See also* P-0769: [T-120](#), p. 24, lines 23-25; P-0055: [T-71](#), p. 68, lines 14-22; P-0976: DRC-OTP-2054-2599, p. 2674, lines 1-8.

¹⁵⁸³ [Conviction Decision](#), fn. 995. *See also* P-0055: [T-71](#), p. 68, lines 21-22.

¹⁵⁸⁴ [Conviction Decision](#), fn. 995. *See also* P-0017: [T-59](#), p. 43, lines 12-21.

¹⁵⁸⁵ [Conviction Decision](#), fn. 995. *See also* P-0030: [T-146](#), p. 62, lines 12-19.

¹⁵⁸⁶ [Conviction Decision](#), fn. 995. *See also* P-0768: [T-34](#), p. 49, lines 12-15; P-0010: [T-46](#), p. 40, lines 24-25.

¹⁵⁸⁷ [Conviction Decision](#), fn. 995. *See also* P-0886: [T-40](#), p. 44, lines 17-22.

¹⁵⁸⁸ [Conviction Decision](#), fn. 995. *See also* P-0901: [T-29](#), p. 52, lines 15-16.

15 years of age'.¹⁵⁸⁹ While some witnesses referred to *kadogos* as being individuals under 18 years old, other witnesses clearly stated that there were individuals under the age of 15 years among the *kadogos*. In light of the totality of the relevant evidence, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that the *kadogos* included individuals under the age of 15.¹⁵⁹⁰ Therefore, the Trial Chamber did not err in relying on P-0010's testimony that the unnamed individual was a *kadogo* to find that he was under the age of 15.

779. Regarding the size of this unnamed individual identified by P-0010, Mr Ntaganda argues that the Trial Chamber did not 'accurately describe the subject's size' as depicted on the video images, in which 'he can clearly be seen looking into the bed of a pick-up truck with jacked-up suspension'.¹⁵⁹¹ The Trial Chamber noted that the said individual shown in the video images 'was significantly smaller than the soldiers around him and barely taller than the wheel of the vehicle on which he can be seen loading his weapon'.¹⁵⁹²

780. A review of the relevant video images reveals that when approaching the vehicle, a white pick-up, the unnamed individual appears to be as tall as the wheel of the vehicle.¹⁵⁹³ However, when he gets closer to the bed of the pick-up truck a few seconds later, the top of his head reaches slightly over the side of the bed of the vehicle.¹⁵⁹⁴ The Appeals Chamber notes that the Trial Chamber's description of the individual's size as being 'barely taller than the wheel of the vehicle on which he can be seen loading his weapon' appears inaccurate in this respect. However, the Trial Chamber's description that the individual was significantly smaller in height and size than the other individuals that are standing next to him is correct.¹⁵⁹⁵ The comparison of the size of the unnamed individual to other individuals – in this case soldiers – is more significant in this context. Therefore, the Appeals Chamber finds that the inaccuracy in the assessment of the individual's size in relation to the wheel of the

¹⁵⁸⁹ [Conviction Decision](#), fn. 995. See also P-0963: [T-80](#), p. 10, lines 7-8.

¹⁵⁹⁰ See [Conviction Decision](#), para. 359.

¹⁵⁹¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 244.

¹⁵⁹² [Conviction Decision](#), fn. 1100.

¹⁵⁹³ DRC-OTP-0120-0293, at 00:37:34 to 00:37:35.

¹⁵⁹⁴ DRC-OTP-0120-0293, at 00:37:37.

¹⁵⁹⁵ DRC-OTP-0120-0293, at 00:37:40.

vehicle does not undermine the Trial Chamber’s finding on the age of this individual based on the testimony of P-0010.

781. With respect to the individual called Tipe, Mr Ntaganda argues that the video images do not ‘manifestly show’ that this person was under 15.¹⁵⁹⁶ He avers that, although the person looks young, ‘no reasonable trier of fact could have concluded that there is no reasonable possibility’ that this person was 15 and the Trial Chamber was required to explain ‘how doubt could be excluded’.¹⁵⁹⁷ He adds that the Trial Chamber’s finding is ‘inadequately reasoned’ and that P-0898’s testimony supporting that finding is uncorroborated, which weighs against accepting it, ‘especially given its highly incriminating content’.¹⁵⁹⁸

782. The Appeals Chamber finds that Mr Ntaganda merely disagrees with the Trial Chamber’s finding without showing an error. The Appeals Chamber recalls that, in light of rule 63(4) of the Rules, ‘there is no strict legal requirement that [] video excerpts [have] to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them’.¹⁵⁹⁹ The Appeals Chamber further held that ‘[d]epending on the circumstances, a single piece of evidence, such as a video image of a person, may suffice to establish a specific fact’.¹⁶⁰⁰ In the present case, the Trial Chamber examined and described the video images presented to P-0898, noting ‘in particular, the facial features’ of Tipe.¹⁶⁰¹ The Trial Chamber held that ‘while allowing for a wide margin of error’, it found ‘beyond reasonable doubt that this individual was manifestly under 15 years of age around May 2003’.¹⁶⁰² Mr Ntaganda does not show an error in the Trial Chamber’s finding.

783. Regarding the requirement to exclude doubt,¹⁶⁰³ the Appeals Chamber notes the Trial Chamber’s detailed explanation of why it was satisfied that Tipe was under the age of 15 and why it made this finding beyond reasonable doubt.¹⁶⁰⁴ Mr Ntaganda has

¹⁵⁹⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 246.

¹⁵⁹⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 246 (emphasis in original).

¹⁵⁹⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 247.

¹⁵⁹⁹ [Lubanga Appeal Judgment](#), para. 218.

¹⁶⁰⁰ [Lubanga Appeal Judgment](#), para. 218.

¹⁶⁰¹ [Conviction Decision](#), para. 388.

¹⁶⁰² [Conviction Decision](#), para. 388.

¹⁶⁰³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 246.

¹⁶⁰⁴ [Conviction Decision](#), para. 388.

therefore not demonstrated that the Trial Chamber erred in failing ‘to explain how doubt could be excluded’.¹⁶⁰⁵

784. Moreover, the Trial Chamber properly reasoned why it found P-0898’s account about his own age at the time of the events to be credible and why it relied on his age as a comparative point to assess the age of other individuals enlisted by the UPC/FPLC.¹⁶⁰⁶ In light of the witness’s consistent testimony that he was between 13 and a half and 14 years of age and the corresponding information contained in documentary evidence, and ‘absent any specific challenge concerning the witness’s date of birth’,¹⁶⁰⁷ the Trial Chamber found that the witness was under 15 years at the time of the relevant events.¹⁶⁰⁸

785. The Trial Chamber also found P-0898’s age assessments of other individuals he observed or was in contact with in the context of his involvement with the UPC/FPLC, who were in the same age range as him to be ‘generally reliable’ and ‘credible’.¹⁶⁰⁹ In reaching this finding, the Trial Chamber noted that ‘the witness acknowledged on several occasions that he was not in a position to provide the precise age of a person he was not related to, which, according to the witness, only parents can do, and based his assessments on the size and other physical features of [other] relevant individuals’.¹⁶¹⁰ It also noted the witness’s testimony that amongst Mr Ntaganda’s bodyguards he identified a *kadogo* named ‘Tipe’, whom the witness estimated to be ‘around his age’, ‘because of [his] size’.¹⁶¹¹

786. The Trial Chamber relied also on the evidence of other witnesses ‘who were in regular contact with, or had sufficient opportunities to observe, individuals serving within Mr Ntaganda’s escort’ to support its finding that such escort ‘comprised kadogos, including individuals under 15 years of age’.¹⁶¹² The Trial Chamber noted P-0014’s testimony about seeing ‘three bodyguards of Mr Ntaganda whom he assessed to be aged between 13 and 15’; P-0017’s testimony on seeing in Mandro training

¹⁶⁰⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 246.

¹⁶⁰⁶ See [Conviction Decision](#), para. 202, fn. 1114.

¹⁶⁰⁷ [Conviction Decision](#), para. 202.

¹⁶⁰⁸ [Conviction Decision](#), paras 202, 388, fn. 966.

¹⁶⁰⁹ [Conviction Decision](#), para. 203.

¹⁶¹⁰ [Conviction Decision](#), para. 203 (footnote omitted).

¹⁶¹¹ [Conviction Decision](#), para. 388, fn. 1102. See also P-0898: [T-154](#), p. 23, lines 20-23.

¹⁶¹² [Conviction Decision](#), para. 389-390.

camp ‘two male bodyguards of Mr Ntaganda whom he estimated to be under 15’; P-0030’s testimony that he saw ‘Mr Ntaganda and Floribert Kisembo coming with their bodyguards when they visited Thomas Lubanga at his residence’, and that these bodyguards’ age varied from 12 to 15 years; and P-0290’s testimony that individuals, of whom the ‘youngest “may have been 13 years old”’ were among the individuals guarding Mr Ntaganda’s compound.¹⁶¹³ The Trial Chamber added that the evidence of P-0768, P-0055, P-0901 and P-0041 supported its finding that individuals under 15 years were acting as escort to Mr Ntaganda.¹⁶¹⁴ The Appeals Chamber notes that Mr Ntaganda does not show that the Trial Chamber’s reliance on that evidence was unreasonable.

787. Mr Ntaganda further argues that the Trial Chamber erred in finding P-0017’s age estimate in relation to an individual depicted in a video extract to be irrelevant and contends that what is ‘required is a reasonable possibility’ that that individual is the same person as the person identified as Lamama and that there is ‘the possibility that the person is 15 years of age or older’.¹⁶¹⁵ The Appeals Chamber is not convinced by this argument. The Trial Chamber noted the witness’s assessment of the individual appearing in a video extract and observed that ‘there is no evidence to the effect that this person is the same person as the person identified by P-0010 as Lamama’.¹⁶¹⁶

788. The Appeals Chamber observes that P-0017 was presented with extracts of a video recording of events in Mongbwalu and was asked to identify certain individuals and to estimate the age of one of them.¹⁶¹⁷ The Trial Chamber correctly noted that P-0017 provided contradictory statements about the age of that individual: he first testified that the individual was 15 years or above and later stated that, ‘based on the person’s size, his height and the facial looks, the person could be 14, 15 or more’.¹⁶¹⁸ The Appeals Chamber considers that it was reasonable for the Trial Chamber not to

¹⁶¹³ [Conviction Decision](#), para. 390, referring to P-0014: [T-136](#), pp. 34-36, 38-39; P-0017: [T-58](#), pp. 24-26, 32-34; P-0030: [T-144](#), pp. 28, 34-36, DRC-OTP-2054-2951, at 2974; P-0290: [T-67](#), pp. 3-4, 7, 9-10, 12.

¹⁶¹⁴ [Conviction Decision](#), para. 390, referring to P-0768: [T-34](#), pp. 47-49, 54; P-0055: [T-71](#), pp. 68, 70, 84; P-0901: [T-29](#), pp. 55-56; P-0041: DRC-OTP-0147-0002, at 0029, para. 173, DRC-OTP-2054-5199, pp. 5261-5162.

¹⁶¹⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 241 (emphasis in original omitted).

¹⁶¹⁶ [Conviction Decision](#), fn. 1099, referring to DRC-OTP-2058-0251.

¹⁶¹⁷ P-0017: [T-62](#), p. 48, lines 9-13.

¹⁶¹⁸ [Conviction Decision](#), fn. 1099, referring to P-0017: [T-62](#), pp. 52-53; DRC-OTP-2058-0251, at 00:48:22. See also P-0017: [T-62](#), p. 48, lines 7-10, p. 52, line 11 to p. 53, line 6.

consider P-0017's inconclusive evidence about the age of that individual in the context of P-0010's evidence, which it found credible regarding the identification and age of Lamama.¹⁶¹⁹

789. Finally, the Appeals Chamber finds no merit in Mr Ntaganda's argument that the Trial Chamber failed to address 'any of the evidential shortcomings' raised in his Closing Brief.¹⁶²⁰ In that regard, the Appeals Chamber notes that, apart from listing the numbers of paragraphs of his closing brief, Mr Ntaganda does not develop the specific challenges he made. Furthermore, contrary to his contention, the Trial Chamber did address his evidentiary challenges, in relation to the evidence of P-0963, P-0017, P-0030, P-0768, P-0055 and P-0016.¹⁶²¹

4. Overall conclusion

790. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's finding that there were individuals under the age of 15 within Mr Ntaganda's escort, the Appeals Chamber rejects this ground of appeal.

J. Tenth ground of appeal: Enlistment of individuals under the age of 15 years

791. Under the tenth ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in finding that individuals under the age of 15 years, in particular P-0883 and P-0898, were enlisted in the UPC/FPLC and actively participated in the hostilities.¹⁶²²

1. Relevant part of the Conviction Decision

792. The Trial Chamber found that 'individuals under the age of 15, including P-0883 and P-0898, were trained along with other UPC/FPLC recruits at the various UPC/FPLC training camps'.¹⁶²³ The Trial Chamber was satisfied that the recruitment

¹⁶¹⁹ [Conviction Decision](#), fn. 1099.

¹⁶²⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 248, referring to [Mr Ntaganda's Closing Brief](#), paras 1389-1398, 1439-1491.

¹⁶²¹ See [Conviction Decision](#), fns. 995 (referring to [Mr Ntaganda's Closing Brief](#), para. 1449 in relation to P-0963), 1106 (referring to [Mr Ntaganda's Closing Brief](#), para. 301 in relation to P-0017), 1107 (referring to [Mr Ntaganda's Closing Brief](#), paras 1473-1474 in relation to P-0030), 1109 (referring to [Mr Ntaganda's Closing Brief](#), paras 295, 1452 in relation to P-0768), 1111 (referring to [Mr Ntaganda's Closing Brief](#), paras 1453, 1475, 1528 in relation to P-0055 and P-0901), 1112 (referring to [Mr Ntaganda's Closing Brief](#), paras 1484-1485 in relation to P-0041), 1113 (referring to [Mr Ntaganda's Closing Brief](#), para. 1478 in relation to P-0016).

¹⁶²² [Mr Ntaganda's Appeal Brief – Part II](#), paras 250, 253, 257.

¹⁶²³ [Conviction Decision](#), para. 1120, referring to para. 362. See also fn. 966.

of individuals under the age of 15 into the UPC/FPLC constituted enlistment into an armed group for the purpose of article 8(2)(e)(vii) of the Statute and that, ‘by virtue of being trained at UPC/FPLC camps, individuals under the age of 15 were enlisted or conscripted into the UPC/FPLC ranks’.¹⁶²⁴

793. The Trial Chamber further found that individuals under the age of 15 participated in the First Operation and in the assault on Bunia in May 2003 and that constituted active participation in hostilities for the purpose of article 8(2)(e)(vii) of the Statute.¹⁶²⁵

2. *Summary of submissions*

(a) **Mr Ntaganda’s submissions**

794. Mr Ntaganda argues that the Trial Chamber erred in finding P-0883’s testimony on her date of birth to be credible, despite her lying about her abduction.¹⁶²⁶ Furthermore, Mr Ntaganda argues that the Trial Chamber erred in finding P-0898’s testimony to be reliable, in particular on the point that ‘he was under 15 when he was enlisted and participated in hostilities’, despite evidence contradicting his statements.¹⁶²⁷

(b) **The Prosecutor’s submissions**

795. The Prosecutor submits that the Trial Chamber’s finding that P-0883 and P-0898 were under the age of 15 years at the time of the events was reasonable.¹⁶²⁸ She avers that the Trial Chamber addressed the inconsistencies with respect to P-0883’s testimony about her abductors and found that these inconsistencies ‘were insufficient to cast doubt’ on the witness’s ‘overall credibility’.¹⁶²⁹ With respect to P-0898, the Prosecutor submits that the Trial Chamber’s reasonable finding about the witness’s age was based on ‘several pieces of corroborating evidence: school records, an electoral card, a citizenship certificate and a birth certificate’.¹⁶³⁰

¹⁶²⁴ [Conviction Decision](#), paras 1123-1124.

¹⁶²⁵ [Conviction Decision](#), paras 1125, 1128, 1133, *referring to* paras 511, 655.

¹⁶²⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 251-252, 260, 267-268.

¹⁶²⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 253-256.

¹⁶²⁸ [Prosecutor’s Response to Appeal – Part II](#), para. 191.

¹⁶²⁹ [Prosecutor’s Response to Appeal – Part II](#), para. 192.

¹⁶³⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 195.

(c) The victims' observations

796. Victims Group 1 submit that this ground of appeal ‘differs significantly from the corresponding ground outlined in the Notice of Appeal’.¹⁶³¹ They argue that, in the notice of appeal, Mr Ntaganda ‘described this ground of appeal as a challenge against the Chamber’s findings that “children under the age of fifteen years were used to participate actively in hostilities, or that Mr. Ntaganda possessed the necessary *mens rea*”’, without mentioning P-0883, P-0898 or the ‘charges of enlistment and conscription in Counts 14 and 15’.¹⁶³² If this ground of appeal exceeds the scope of the ground pleaded in the notice of appeal, Victims Group 1 invite the Appeals Chamber ‘to consider whether the requirements for a variation of grounds of appeal set out in regulation 61 of the Regulations of the Court and in the jurisprudence of the Court are met’.¹⁶³³

797. Victims Group I submit that, if the Appeals Chamber decides to consider the merits of this ground of appeal, the Trial Chamber’s reliance on P-0883’s and P-0898’s evidence and other evidence was reasonable to find that they were under the age of 15 at the time of the events.¹⁶³⁴

(d) Mr Ntaganda’s response to the victims

798. Mr Ntaganda responds that the ‘text underlying Ground 10 in the Notice of Appeal was sufficiently explicit to give ample prior notice of the content to be expected in this section’.¹⁶³⁵ He avers that, even if Victims Group 1’s claim is correct, (i) this ground of appeal is ‘well-substantiated’ and disregarding it ‘would not be in the interests of justice’; and (ii) Victims Group 1 managed to respond to it in detail, which shows that they were not prejudiced by ‘any defective notice’.¹⁶³⁶

3. Determination by the Appeals Chamber

799. As a preliminary issue, the Appeals Chamber notes Victims Group 1’s contention that Mr Ntaganda’s arguments developed in his appeal brief for this ground of appeal exceed the scope of the issues set out in the notice of appeal and that

¹⁶³¹ [Observations of Victims Group 1 on Appeal – Part II](#), para. 32.

¹⁶³² [Observations of Victims Group 1 on Appeal – Part II](#), para. 32 (emphasis in original omitted).

¹⁶³³ [Observations of Victims Group 1 on Appeal – Part II](#), para. 32.

¹⁶³⁴ [Observations of Victims Group 1 on Appeal – Part II](#), para. 32.

¹⁶³⁵ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 65.

¹⁶³⁶ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 65.

Mr Ntaganda did not request a variation of this ground of appeal under regulation 61 of the Regulations of the Court.¹⁶³⁷ The Appeals Chamber notes that Mr Ntaganda does not mention P-0883 or P-0898 in the notice of appeal. He also does not refer to the issue of enlistment but only to the participation of individuals under the age of 15 in hostilities.¹⁶³⁸

800. The Appeals Chamber does not consider that by mentioning the two witnesses and the issue of enlistment in the appeal brief Mr Ntaganda *de facto* varied a ground of appeal within the meaning of regulation 61 and that his present arguments expand the scope of this ground of appeal. This is because the main issue raised in this ground of appeal in both the notice of appeal and the appeal brief relates to the age of the concerned individuals involved in the relevant events. In that regard, the issue of the participation of these individuals in hostilities and the Trial Chamber's 'misapplication of the standard of proof' described in the appeal brief is also mentioned in the notice of appeal¹⁶³⁹ and the issue of enlistment directly relates to this matter. Therefore, the Appeals Chamber rejects Victims Group 1's contention that the submissions for this ground advanced in the appeal brief exceed the scope of this ground as set out in the notice of appeal.

801. Turning to the merits of Mr Ntaganda's challenge under this ground of appeal, the Appeals Chamber notes his argument that the Trial Chamber erred in not finding that P-0883 lied under oath about her abduction, in not discussing this lie when assessing the witness's testimony on her age and in finding her account reliable.¹⁶⁴⁰

802. The Appeals Chamber notes at the outset that the Trial Chamber addressed specific issues of witness credibility, in particular the issue of birth dates provided in official documents.¹⁶⁴¹ It held that, given the 'reported conditions of production of most of these documents', it 'attached a very low probative value' to such documents.¹⁶⁴² It added that, when such documents were 'produced on the basis of the witness's account alone, or that of their parents, and [...] no further verification as to

¹⁶³⁷ [Observations of Victims Group 1 on Appeal – Part II](#), para. 32.

¹⁶³⁸ [Mr Ntaganda's Notice of Appeal](#), p. 14.

¹⁶³⁹ [Mr Ntaganda's Notice of Appeal](#), p. 14; [Mr Ntaganda's Appeal Brief – Part II](#), paras 250, 257.

¹⁶⁴⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 250-252, 257.

¹⁶⁴¹ [Conviction Decision](#), para. 86.

¹⁶⁴² [Conviction Decision](#), para. 86.

the accuracy of the provided information was effectuated’, the Trial Chamber would afford ‘limited or no corroboratory value’.¹⁶⁴³ The Appeals Chamber notes that the Trial Chamber followed these principles when assessing the documentary evidence relevant to both witnesses about their date of birth.

803. Regarding P-0883, the Trial Chamber first discussed the general credibility of her evidence. It found that her account was clear and rich in detail, and that her narrative ‘was also consistent throughout examination-in-chief and cross-examination’ and mainly focused on her personal experience.¹⁶⁴⁴ The Trial Chamber noted that the witness ‘refrained from general comments or approximations’ and that ‘aspects of her testimony [were] consistent with the experience of UPC/FPLC recruits in other camps’.¹⁶⁴⁵

804. The Trial Chamber further assessed her account regarding her date of birth, which it found to be credible, and concluded that the witness was ‘under the age of 15 at the time of her alleged abduction, in October 2002’.¹⁶⁴⁶ It then turned to the witness’s account of her abduction.¹⁶⁴⁷ The Trial Chamber thoroughly assessed the witness’s evidence on her age at the time of the relevant events, her abduction and her training experience in camp Bule.¹⁶⁴⁸ The Trial Chamber noted discrepancies between the witness’s testimony and her two victim application forms on the issue of her abduction¹⁶⁴⁹ and the witness’s explanations for these discrepancies,¹⁶⁵⁰ and concluded that it could not ‘rely on the witness’s accounts concerning her abduction and the period immediately following the abduction’.¹⁶⁵¹

805. Despite its rejection of these aspects of P-0883’s evidence, the Trial Chamber found her testimony on the existence of a UPC/FPLC training camp in Bule to be

¹⁶⁴³ [Conviction Decision](#), para. 86.

¹⁶⁴⁴ [Conviction Decision](#), para. 175.

¹⁶⁴⁵ [Conviction Decision](#), para. 175. As for the experience of UPC/FPLC recruits in other camps, the Trial Chamber referred to the testimony of P-0758, P-0769, P-0888, P-0898, P-0901, P-0907, and P-0963. See [Conviction Decision](#), fn. 420.

¹⁶⁴⁶ [Conviction Decision](#), para. 179. See also fn. 966.

¹⁶⁴⁷ [Conviction Decision](#), paras 180-185.

¹⁶⁴⁸ [Conviction Decision](#), paras 108-181, 183.

¹⁶⁴⁹ [Conviction Decision](#), para. 180.

¹⁶⁵⁰ [Conviction Decision](#), paras 181-182.

¹⁶⁵¹ [Conviction Decision](#), para. 185.

credible.¹⁶⁵² In reaching this finding, the Trial Chamber found that the ‘witness’s position as a recruit at the time of these events, the time passed since then, as well as the fact that the details she provided are broadly consistent with the testimony of other former recruits’.¹⁶⁵³

806. The Appeals Chamber finds no error in the Trial Chamber’s approach to the assessment of the witness’s credibility on the different issues discussed during her testimony. The Appeals Chamber recalls that trial chambers have ‘the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses’ testimonies’.¹⁶⁵⁴ It is ‘within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the “fundamental features” of the evidence’.¹⁶⁵⁵ Mr Ntaganda does not explain why the Trial Chamber should have qualified inconsistencies in the witness’s evidence as lies or ‘perjury’¹⁶⁵⁶ and how this alleged failure affects the reasonableness of the Trial Chamber’s detailed analysis of the witness’s credibility.

807. Mr Ntaganda claims that the Trial Chamber misappreciated P-0883’s evidence in finding that there was no indication of the witness’s involvement in producing a tampered version of an original school record.¹⁶⁵⁷ He refers to ‘circumstantial indications’ of the ‘direct or indirect’ involvement of the witness in tampering with this school record in order to match the date of birth with the one given to the Trial Chamber during her testimony.¹⁶⁵⁸ According to Mr Ntaganda, this shows that the Trial Chamber misappreciated the evidence or applied ‘an erroneous standard of proof’.¹⁶⁵⁹

808. The Appeals Chamber finds that Mr Ntaganda misreads the Conviction Decision and that his reference to ‘circumstantial indications’ of a ‘direct or indirect’

¹⁶⁵² [Conviction Decision](#), para. 186.

¹⁶⁵³ [Conviction Decision](#), para. 186 (footnote omitted).

¹⁶⁵⁴ [Bemba et al. Appeal Judgment](#), para. 95, referring to [Lubanga Appeal Judgment](#), para. 23, quoting [Kupreškić et al. Appeal Judgment](#), para. 31.

¹⁶⁵⁵ [Bemba et al. Appeal Judgment](#), para. 95, referring to [Lubanga Appeal Judgment](#), para. 23, quoting [Kupreškić et al. Appeal Judgment](#), para. 31.

¹⁶⁵⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 251.

¹⁶⁵⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 252.

¹⁶⁵⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 252.

¹⁶⁵⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 252.

involvement of the witness in tampering with the school record is speculative. The Trial Chamber found that ‘P-0883 consistently provided the same date of birth during her testimony’,¹⁶⁶⁰ making her ‘under the age of 15 at the time of her alleged abduction, in October 2002’.¹⁶⁶¹

809. The Appeals Chamber notes that the Trial Chamber assessed in great detail the witness’s testimony, including on her electoral card and different birth certificates,¹⁶⁶² and the two school records.¹⁶⁶³ It observed that ‘the witness’s accounts concerning the steps undertaken to obtain the various documentary evidence are very detailed, consistent throughout her testimony’ and it considered them plausible.¹⁶⁶⁴ It also found that she was credible when answering the ‘Defence questions about her names and her parents’ names’.¹⁶⁶⁵ The Trial Chamber further noted one exception during her testimony ‘where, when confronted with the information in her preparation session note providing that the witness had indicated a different day of birth, and asked what her real date of birth was, the witness responded by saying “I don’t know”’.¹⁶⁶⁶ Taking into consideration the witness’s personal situation, and the clarifications she provided for her confusion, the Trial Chamber was of the view that this exception did not affect the witness’s credibility regarding her date of birth.¹⁶⁶⁷

810. With respect to the witness’s testimony on the issuance of the two birth certificates, the Trial Chamber noted different ways of issuing such documents: ‘on the basis of the witness’s accounts alone for the electoral card and on the basis of the hospital’s certificate for the document from the *État civil*’, and considered that these documents could not ‘serve as independent corroboration’.¹⁶⁶⁸ The Trial Chamber observed that birth certificates issued by the *État civil* ‘appear[ed] to be issued without further verifications regarding dates of birth’.¹⁶⁶⁹ Moreover, the Trial Chamber noted Mr Ntaganda’s challenges with respect to the hospital certificate and

¹⁶⁶⁰ [Conviction Decision](#), para. 176.

¹⁶⁶¹ [Conviction Decision](#), para. 179.

¹⁶⁶² [Conviction Decision](#), para. 177.

¹⁶⁶³ [Conviction Decision](#), para. 178.

¹⁶⁶⁴ [Conviction Decision](#), fn. 434.

¹⁶⁶⁵ [Conviction Decision](#), fn. 434, referring to P-0883: [T-169](#), pp. 30-31, 38-40, 58-60; [Mr Ntaganda’s Closing Brief](#), paras 1198-1199.

¹⁶⁶⁶ [Conviction Decision](#), fn. 421, referring to P-0883: [T-169](#), p. 70.

¹⁶⁶⁷ [Conviction Decision](#), fn. 421, referring to P-0883: [T-170](#), pp. 17-18.

¹⁶⁶⁸ [Conviction Decision](#), para. 177.

¹⁶⁶⁹ See [Conviction Decision](#), fn. 428.

therefore attached ‘only limited weight to this document for the purpose of corroboration of the witness’s evidence concerning her date of birth’.¹⁶⁷⁰

811. Regarding the school records, the Trial Chamber noted that the first school record of 1997 from the school attended by the witness, listed ‘various students’ names, together with their respective dates of birth and the names of their fathers’, and that the witness’s name appeared ‘as having a different month and year of birth than that provided by the witness’.¹⁶⁷¹ The Trial Chamber observed that on a second school record, that was ‘otherwise identical’ to the 1997 record, the date of birth had been changed ‘to a date that correspond[ed] to the date of birth provided by the witness’.¹⁶⁷²

812. The Appeals Chamber notes that the Trial Chamber found the existence of two different versions of the same school record and ‘potential modifications made to items of evidence’ to be ‘concerning’.¹⁶⁷³ However, the Trial Chamber was of the view that ‘absent any indication as to the circumstances surrounding these alterations’ and as there was ‘no indication’ of the witness’s involvement ‘in any way’, it could not draw any conclusion from these documents.¹⁶⁷⁴ The Trial Chamber also observed that ‘the year of birth originally appearing on the document would make the witness one year younger than she reports, and, as such, has no impact on the question whether the witness was under 15 at the time of the events described during her testimony’.¹⁶⁷⁵

813. The Appeals Chamber sees no error in the Trial Chamber’s approach and finds that it was reasonable for the Trial Chamber to consider that no conclusions could be drawn from those documents and to find the witness’s evidence regarding her age reliable despite the alteration of the school record.¹⁶⁷⁶ The Appeals Chamber also finds that the Trial Chamber’s observation about the lack of impact of the change of date on the question whether the witness was under 15 is undoubtedly relevant in the

¹⁶⁷⁰ [Conviction Decision](#), para. 177.

¹⁶⁷¹ See [Conviction Decision](#), para. 178, referring to DRC-OTP-2082-0368, line 7952.

¹⁶⁷² [Conviction Decision](#), para. 178, referring to DRC-OTP-2097-0540, p. 0541; [Mr Ntaganda Closing Brief](#), para. 1201.

¹⁶⁷³ [Conviction Decision](#), para. 178.

¹⁶⁷⁴ [Conviction Decision](#), para. 178.

¹⁶⁷⁵ [Conviction Decision](#), para. 178.

¹⁶⁷⁶ See [Conviction Decision](#), paras 178-179.

present context, and that Mr Ntaganda fails to explain why this observation ‘does nothing to reduce’ the indications of the witness’s involvement in producing the allegedly tampered version.¹⁶⁷⁷

814. Turning to Mr Ntaganda’s challenge regarding P-0898, the Appeals Chamber notes his argument that the witness’s testimony on the ‘existence of school report cards in his name’ during the relevant period and the authorities using ‘the marks from the second semester to fabricate marks for the first semester’ is contradicted by D-0201, who denied that this happened in respect of P-0898.¹⁶⁷⁸ Mr Ntaganda avers that, given this contradictory evidence, the Trial Chamber ‘was required to reject’ the testimony of D-0201 and its explanation in footnote 498 of the Conviction Decision failed to address this issue.¹⁶⁷⁹

815. The Appeals Chamber notes that the Trial Chamber found P-0898’s testimony to be credible.¹⁶⁸⁰ With respect to the question whether the witness’s school records and marks, which covered the full school year suggesting that the witness attended school during that period, contradicted his account of ‘having been with the UPC for most of the 2002-2003 school year’,¹⁶⁸¹ the Trial Chamber found that (i) the witness plausibly explained why the records included marks for each term; and (ii) the testimony of P-0551, D-0201 or P-0918 did not call into question P-0898’s account.¹⁶⁸² The Trial Chamber further noted that P-0898’s account was consistent when discussing the dates regarding ‘his departures from and returns to school’.¹⁶⁸³

816. The Appeals Chamber finds no merit in Mr Ntaganda’s contention about the Trial Chamber reaching these conclusions, despite failing to reject the allegedly contradictory testimony of D-0201. The Trial Chamber considered that D-0201’s account ‘on the consequences of a student’s absence for a school record was very general’ and it did not ‘exclude modifications on an individual basis’.¹⁶⁸⁴ The Appeals

¹⁶⁷⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 252.

¹⁶⁷⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 254.

¹⁶⁷⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 254-255.

¹⁶⁸⁰ [Conviction Decision](#), paras 208, 234.

¹⁶⁸¹ [Conviction Decision](#), para. 206.

¹⁶⁸² [Conviction Decision](#), para. 206, fn. 498, *referring, inter alia, to* [Mr Ntaganda Closing Brief](#), paras 1237-1244.

¹⁶⁸³ [Conviction Decision](#), para. 206.

¹⁶⁸⁴ [Conviction Decision](#), fn. 498.

Chamber notes that the witness confirmed P-0898's account that during the period of 2002 to 2003 the schools in Bunia were not functioning properly.¹⁶⁸⁵ More importantly, the Trial Chamber noted that D-0201 'was not able to confirm that P-0898 attended school during the relevant time-frame'¹⁶⁸⁶ and the witness's explanation that 'absences from school could not be justified for reasons related to military service' seemed 'implausible considering the circumstances at the relevant time'.¹⁶⁸⁷ It is apparent from the Trial Chamber's analysis of D-0201's testimony on the issue of school attendance that it did consider parts of it to contradict the evidence of P-0898 and found other parts to be implausible. The Appeals Chamber thus finds that, contrary to Mr Ntaganda's contention, the Trial Chamber did address potential inconsistencies between the evidence of P-0898 and D-0201, and it sees no error in this approach.

817. Mr Ntaganda further submits that the Trial Chamber's 'lack of awareness of its own contradictory findings' regarding the authenticity of the registration lists reveals its 'disregard of relevant evidence that had to be taken into account'.¹⁶⁸⁸ In Mr Ntaganda's view, while the Trial Chamber questioned the authenticity of registration lists, which 'may have been forged' by P-0911, it found P-0898's recognition of such a document prepared upon his arrival at the training camp to be reliable.¹⁶⁸⁹

818. The Trial Chamber considered that P-0898's account of the registration process was 'consistent'.¹⁶⁹⁰ The Trial Chamber noted the witness's recollection that, at the training camp 'in Mandro, recruits were required to provide information, including their names, names of parents, where they came from, level of education, and date of birth for the registration list that was held by the admin' and that the 'register was drawn up upon completion of the training'.¹⁶⁹¹

¹⁶⁸⁵ See D-0201: [T-246](#), p. 51, lines 9-12, p. 78, lines 19-21. See also [Observations of Victims Group 1 on Appeal – Part II](#), para. 45.

¹⁶⁸⁶ [Conviction Decision](#), fn. 498. See also D-0201: [T-246](#), p. 86, line 24 to p. 87, line 19.

¹⁶⁸⁷ [Conviction Decision](#), fn. 498. See also D-0201: [T-246](#), p. 73, line 17, to p. 74, line 1.

¹⁶⁸⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 256.

¹⁶⁸⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 256.

¹⁶⁹⁰ [Conviction Decision](#), para. 205.

¹⁶⁹¹ [Conviction Decision](#), fn. 493. See also P-0898: [T-153](#), p. 59, lines 1-5; [T-155](#), p. 10, lines 17-23, p. 18, lines 9-18.

819. The Appeals Chamber finds that Mr Ntaganda misreads the Conviction Decision. Contrary to Mr Ntaganda's contention, the Trial Chamber did not make contradictory findings regarding the registration lists. During his testimony, P-0898 was asked about the registration process when joining the UPC.¹⁶⁹² The witness was shown two registration lists¹⁶⁹³ and was asked whether he recognised some names listed on these documents.¹⁶⁹⁴ The witness was not examined on the origin or the authenticity of these registration lists. When Mr Ntaganda's Lead Counsel objected to the witness being only asked about names appearing on the second document shown to him but not about its origins, Counsel for the Prosecutor responded that he would not explore the origins or authenticity of the lists with this witness.¹⁶⁹⁵ As the issue of authenticity was not explored in relation to this witness, the Trial Chamber did not make any finding on this issue or on the content of the registration lists in finding P-0898's testimony credible.

820. This is the context in which the Trial Chamber considered that P-0898's testimony was not 'affected' by its conclusion regarding the authenticity of these registration lists, which were discussed in relation to the testimony of P-0911, who was questioned about the creation and content of these lists.¹⁶⁹⁶ With respect to these lists, the Trial Chamber found that the witness's account about the 'alleged duplicates of the lists', 'where he stored the list referring to P-0898' and the circumstances in which he retrieved the lists and gave them to the Office of the Prosecutor was 'unclear' and 'unpersuasive'.¹⁶⁹⁷ The Trial Chamber seriously doubted 'the authenticity of the lists provided' by the witness and decided that it would not rely on them when assessing the evidence.¹⁶⁹⁸ The Trial Chamber found P-0911 not to be credible and decided not to rely on 'his testimony and the documentary evidence introduced through [him]'.¹⁶⁹⁹ In these circumstances, it is apparent that the issue of

¹⁶⁹² P-0898: [T-153](#), p. 59, lines 1-5.

¹⁶⁹³ P-0898: [T-153](#), p. 62, line 6, p. 65, line 14.

¹⁶⁹⁴ P-0898: [T-153](#), p. 62, line 6 to p. 63, line 7, p. 65, line 7 to p. 66, line 4.

¹⁶⁹⁵ P-0898: [T-153](#), p. 66, line 11 to p. 68, line 17.

¹⁶⁹⁶ See [Conviction Decision](#), para. 230. See also P-0911: [T-157](#), p. 24, line 11 to p. 38, line 6; [T-159](#), p. 61, line 15 to p. 62, line 10.

¹⁶⁹⁷ [Conviction Decision](#), para. 230.

¹⁶⁹⁸ [Conviction Decision](#), para. 235.

¹⁶⁹⁹ [Conviction Decision](#), para. 235.

the authenticity of the registration lists had no bearing on the credibility of P-0898's testimony.

4. *Overall conclusion*

821. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's finding that individuals under the age of 15 years were enlisted in the UPC/FPLC and actively participated in the hostilities, the Appeals Chamber rejects this ground of appeal.

K. Eleventh ground of appeal: Rape and sexual enslavement of individuals under the age of 15

822. Under the eleventh ground of appeal, Mr Ntaganda submits that it was unreasonable for the Trial Chamber to find that the rape and sexual enslavement of three individual occurred or that Mr Ntaganda knew about these incidents. The relevant incidents related to: (i) a person named Nadège, based on P-0758's testimony; (ii) P-0883; and (iii) a person named Mave, based on the testimony of P-0901, P-0907 and P-0887.¹⁷⁰⁰

1. *Relevant part of the Conviction Decision*

823. The Trial Chamber found that a girl named Nadège, aged around nine years, who had been taken to the Lingo training camp, was raped.¹⁷⁰¹ The Trial Chamber relied on the testimony of P-0758, which it considered reliable given the details the witness provided in her testimony concerning sexual violence she witnessed at Lingo training camp.¹⁷⁰²

824. With respect to P-0883, the Trial Chamber found that it could not rely on her account regarding her alleged abduction and the period thereafter.¹⁷⁰³ However, it found her testimony that there was a UPC/FPLC training camp in Bule, that she had been under 15 years old at the relevant time and had been raped by 'many soldiers' at the camp in Bule to be credible.¹⁷⁰⁴

¹⁷⁰⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 258-259, 269, 271.

¹⁷⁰¹ [Conviction Decision](#), para. 410.

¹⁷⁰² [Conviction Decision](#), para. 410, fn. 1170.

¹⁷⁰³ [Conviction Decision](#), para. 185, fn. 1166.

¹⁷⁰⁴ [Conviction Decision](#), paras 179, 186-187, 409.

825. In addition, the Trial Chamber found that a girl named Mave, who was under 15 years of age and an escort to Floribert Kisembo, ‘was raped by many different soldiers on a regular basis, including at the *Appartements* camp in Mongbwalu’.¹⁷⁰⁵ The Trial Chamber relied on the testimony of P-0887 and P-0907 in reaching this finding.¹⁷⁰⁶

826. Finally, the Trial Chamber concluded that Mr Ntaganda ‘was aware’ that individuals under the age of 15 years would be ‘enlisted, conscripted and used to participate actively in hostilities within the UPC/FPLC ranks’ and that ‘they would be raped and subjected to sexual slavery’.¹⁷⁰⁷

2. *Summary of submissions*

(a) **Mr Ntaganda’s submission**

827. Mr Ntaganda argues that, despite having found that P-0758 lied about her own age and her conscription into the FPLC, the Trial Chamber failed to address these lies when assessing her credibility.¹⁷⁰⁸ Mr Ntaganda further argues that the Trial Chamber erred in accepting P-0883’s testimony about her rapists being members of the UPC/FPLC, without discussing the impact of her lie about her abduction on the rest of her testimony.¹⁷⁰⁹ Moreover, Mr Ntaganda submits that the Trial Chamber’s conclusion that a person named Mave was under 15 years old is ‘manifestly unreasonable’.¹⁷¹⁰

828. Mr Ntaganda further challenges the Trial Chamber’s failure to make a finding on his knowledge of the conduct of Kisembo’s forces or Kisembo himself and notes the absence of evidence of such knowledge in relation to rape and sexual slavery committed by the UPC/FPLC in early March 2003.¹⁷¹¹

(b) **The Prosecutor’s submissions**

829. The Prosecutor submits that Mr Ntaganda repeats his arguments made at trial without showing that the Trial Chamber erred in relying on P-0758’s testimony to

¹⁷⁰⁵ [Conviction Decision](#), para. 411.

¹⁷⁰⁶ [Conviction Decision](#), para. 411, fn. 1172.

¹⁷⁰⁷ [Conviction Decision](#), para. 1198.

¹⁷⁰⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 259, 262.

¹⁷⁰⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 260, 267-268, 271.

¹⁷¹⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 261, 269, 271.

¹⁷¹¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 270.

find that Nadège, a girl of nine years old at the time of the events, was raped at Lingo training camp.¹⁷¹² The Prosecutor further argues that the Trial Chamber’s assessment of P-0883’s credibility and the reliability of her testimony was reasonable.¹⁷¹³ The Prosecutor further avers that the Trial Chamber did not err in its approach to the determination of the age of Mave, as such determination is ‘fact-sensitive and does not require particular expertise’.¹⁷¹⁴ The Prosecutor argues that the Trial Chamber ‘relied on direct and reliable testimonial evidence’ and addressed “‘conflicting evidence” about her age’.¹⁷¹⁵

830. The Prosecutor further argues that Mr Ntaganda’s contention regarding the Trial Chamber’s findings about his *mens rea* ‘misapprehends the evidence and misunderstands the law’.¹⁷¹⁶

(c) The victims’ observations

831. Victims Group 1 submit that the Trial Chamber did not err in finding that three child soldiers, namely, P-0883, Mave and Nadège had been victims of rape and sexual slavery.¹⁷¹⁷

(d) Mr Ntaganda’s response to the victims

832. Mr Ntaganda argues that Victims Group 1 misunderstand his argument about corroboration.¹⁷¹⁸ In the present case, he argues that: (i) ‘the lack of corroboration as “a recurring theme” is raised’ ‘in the context of the Trial Chamber’s repeated failure to properly and reasonably assess the evidence’; (ii) the Trial Chamber failed to address ‘serious credibility and reliability challenges’ to the evidence; and (iii) it failed to ‘explai[n] [...] why corroboration played no role’.¹⁷¹⁹ Mr Ntaganda reiterates that the Trial Chamber erred in relying on P-0883’s testimony as the witness’s statements are ‘strongly suggestive of not just mistake, but deception’ and the Trial

¹⁷¹² [Prosecutor’s Response to Appeal – Part II](#), para. 201.

¹⁷¹³ [Prosecutor’s Response to Appeal – Part II](#), para. 204.

¹⁷¹⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 209.

¹⁷¹⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 209.

¹⁷¹⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 210.

¹⁷¹⁷ [Observations of Victims Group 1 on Appeal – Part II](#), paras 48-64.

¹⁷¹⁸ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 66.

¹⁷¹⁹ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), paras 67-69.

Chamber only announced its conclusion about the general credibility of the witness without more detail.¹⁷²⁰

833. Mr Ntaganda further submits that the Trial Chamber erred in its finding about Mave's age, as only P-0907 provided an age estimate and this is 'another example of the Prosecution having the opportunity to corroborate a material fact and yet refraining [...] from doing so' by not asking P-0901 about Mave's age.¹⁷²¹

3. *Determination by the Appeals Chamber*

834. Mr Ntaganda argues that it was unreasonable for the Trial Chamber to find that Nadège was raped, based on P-0758's testimony, and that it did not assess that witness's credibility in a holistic fashion.¹⁷²² Mr Ntaganda argues that, when assessing P-0758's credibility in relation to the rape of Nadège at an FPLC camp, the Trial Chamber: (i) failed to address her lies about her own age and conscription into the FPLC; and (ii) did not mention that it 'declined to place any reliance' on P-0758's testimony about being raped [REDACTED].¹⁷²³ Mr Ntaganda alleges that P-0758's first victim application in the *Lubanga* case was rejected in that case because she was not under the age of 15 years.¹⁷²⁴ He argues that P-0761, [REDACTED], 'lied under oath' in denying being present and assisting P-0758 in filling out a second victim application form, which provided a different date of birth, and that he could not clearly indicate [REDACTED].¹⁷²⁵ He adds that P-0758 also lied [REDACTED].¹⁷²⁶ Mr Ntaganda submits that no other witness mentions the existence of a person named Nadège or her rape.¹⁷²⁷

835. The Appeals Chamber finds that, contrary to Mr Ntaganda's contention,¹⁷²⁸ the Trial Chamber assessed P-0758's evidence in a 'holistic' manner. The Trial Chamber explained in detail why it found aspects of her evidence on her date of birth and the

¹⁷²⁰ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), paras 70-71.

¹⁷²¹ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 75.

¹⁷²² [Mr Ntaganda's Appeal Brief – Part II](#), paras 266, 271.

¹⁷²³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 259, 262, 265.

¹⁷²⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 263.

¹⁷²⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 263.

¹⁷²⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 264.

¹⁷²⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 265.

¹⁷²⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 266, 271.

timing of her abduction unreliable,¹⁷²⁹ while it found her testimony about her experience within the UPC/FPLC and sexual violence she witnessed at the Lingo training camp to be reliable.¹⁷³⁰ It also addressed inconsistencies in her testimony and ‘documentary evidence and other information related to her’.¹⁷³¹

836. The Appeals Chamber is also unconvinced by Mr Ntaganda’s contention that the Trial Chamber failed to reconcile its rejection of P-0758’s testimony about her rape and to discuss her ‘lies’ when assessing the credibility of her account of the rape of Nadège at an FPLC camp.¹⁷³² The Trial Chamber was aware of the impact of the unreliable aspects of her evidence, which is demonstrated by its decision to ‘determine on a case-by-case basis which remaining aspects of P-0758’s testimony can be relied upon’.¹⁷³³

837. In that regard, the Trial Chamber first assessed the general credibility of P-0758. It noted that, throughout her testimony, the witness provided ‘short answers, and frequently asked for questions to be repeated or clarified’, ‘indicated when she was not able to answer a question and mainly testified about’ her personal experience and avoided making ‘general or personal comments or approximations’.¹⁷³⁴

838. The Trial Chamber addressed inconsistencies in the witness’s testimony with regard to ‘documentary evidence and other information related to her’, as well as victim application forms ‘completed on her behalf’: two in the *Lubanga* proceedings and one in the reparation proceedings in the present case.¹⁷³⁵ The Trial Chamber duly noted that: (i) P-0758 had applied in 2006 to participate as a victim in the *Lubanga* case; (ii) her application was rejected; and (iii) after presenting a second application in 2007, the witness was authorised to participate in the *Lubanga* proceedings as a victim.¹⁷³⁶ More importantly, the Trial Chamber noted that her 2007 victim application and two birth certificates from October 2006 and January 2008 ‘appear to

¹⁷²⁹ [Conviction Decision](#), paras 151-158.

¹⁷³⁰ [Conviction Decision](#), paras 159-160, fn. 1170.

¹⁷³¹ [Conviction Decision](#), para. 150.

¹⁷³² [Mr Ntaganda’s Appeal Brief – Part II](#), paras 259, 262, 265.

¹⁷³³ [Conviction Decision](#), para. 160.

¹⁷³⁴ [Conviction Decision](#), para. 149.

¹⁷³⁵ [Conviction Decision](#), para. 150.

¹⁷³⁶ [Conviction Decision](#), para. 150.

be exclusively based on the information provided by P-0758 or P-0761'.¹⁷³⁷ It considered that such evidence was 'of limited value to assist in establishing' the witness's date of birth.¹⁷³⁸ The Trial Chamber did not rely on this evidence and concluded that the witness's evidence about her date of birth was unreliable.¹⁷³⁹ Hence, contrary to Mr Ntaganda's contention,¹⁷⁴⁰ the Trial Chamber was aware of the inconsistencies in the application forms and duly considered them when assessing the witness's credibility.

839. The Trial Chamber also found her evidence about the timing of her abduction to be unreliable, as it was inconsistent with documentary evidence.¹⁷⁴¹ Regarding P-0758's efforts to be recognised as a victim, the Trial Chamber was fully aware of P-0761's role in assisting P-0758 in that process. It noted with concern that P-0761 'first denied his involvement' in assisting P-0758 in completing her victim applications.¹⁷⁴² It also noted that the information provided in her 2006 application about her date of birth and the timing of her abduction 'changed in the subsequent victim application forms'.¹⁷⁴³ With respect to the abduction of P-0758, the Trial Chamber found that the accounts of the witness and of P-0806, P-0761 and P-0773 regarding the circumstances of her abduction and 'her school situation at the relevant time, are not fully compatible'.¹⁷⁴⁴ The Trial Chamber also noted that some events described by P-0758 such as the arrest of police officers, the battle in Bunia under Floribert Kisembo's command and her departure from the UPC/FPLC may have taken place in 2003 rather than in 2002.¹⁷⁴⁵

840. Given these inconsistencies in the timing and circumstances of her abduction and being mindful of the witness's 'particular difficulties in remembering specific dates and timeframes, including in light of her increased vulnerability', the Trial Chamber concluded that it would not rely on the witness's 'status as a child soldier' because it could not establish beyond reasonable doubt that she 'was under 15 years

¹⁷³⁷ [Conviction Decision](#), para. 153.

¹⁷³⁸ [Conviction Decision](#), para. 153.

¹⁷³⁹ [Conviction Decision](#), paras 152-153, 158, 160.

¹⁷⁴⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 263.

¹⁷⁴¹ [Conviction Decision](#), para. 154.

¹⁷⁴² [Conviction Decision](#), para. 155.

¹⁷⁴³ [Conviction Decision](#), para. 155.

¹⁷⁴⁴ [Conviction Decision](#), para. 157 (footnote omitted), fn. 375.

¹⁷⁴⁵ [Conviction Decision](#), para. 156.

old when she joined the UPC/FPLC'.¹⁷⁴⁶ Consequently, the Trial Chamber did not rely on her 'conscription, and the reported acts of sexual violence she personally suffered' at the relevant time.¹⁷⁴⁷ In this context, as counts 6 and 9, to which her evidence was relevant, concern only victims under 15 years,¹⁷⁴⁸ it was not necessary for the Trial Chamber to discuss the sexual violence she personally suffered.

841. Moreover, the Appeals Chamber finds that the fact that no other witness testified about the existence of a person named Nadège or her rape,¹⁷⁴⁹ does not, in and of itself, undermine the Trial Chamber's decision to rely on P-0758's evidence. The Trial Chamber found that the witness's account about 'the time she allegedly spent within the UPC/FPLC was generally coherent, spontaneous, detailed on certain issues, and largely consistent with the testimony of other witnesses who had comparable experiences'.¹⁷⁵⁰ In reaching this finding, the Trial Chamber noted, *inter alia*, that the witness provided 'names and ages of specific victims of sexual violence, including details of injuries sustained by one of these girls', details about Mr Ntaganda's visit to Lingo camp, 'training', 'living conditions', 'discipline at the camps', and 'sexual violence allegedly committed by UPC/FPLC soldiers'.¹⁷⁵¹ Therefore, the Appeals Chamber finds no error in the Trial Chamber's reliance on P-0758's testimony concerning the sexual violence she witnessed at Lingo training camp¹⁷⁵² to conclude that a girl named Nadège, 'who was around nine years old at the time', had been taken to the Lingo camp for training and was raped.¹⁷⁵³ Accordingly, the Appeals Chamber rejects Mr Ntaganda's arguments regarding P-0758's evidence on the rape of Nadège.

842. Regarding P-0883, Mr Ntaganda argues that the Trial Chamber erred in accepting the witness's uncorroborated testimony about her rapists being members of

¹⁷⁴⁶ [Conviction Decision](#), paras 158, 160.

¹⁷⁴⁷ [Conviction Decision](#), paras 160, 970.

¹⁷⁴⁸ [Conviction Decision](#), para. 970. *See also* [Prosecutor's Response to Appeal – Part II](#), para. 203.

¹⁷⁴⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 265.

¹⁷⁵⁰ [Conviction Decision](#), para. 159 (footnote omitted).

¹⁷⁵¹ [Conviction Decision](#), fn. 379, referring to P-0758: [T-160](#), p. 89; [T-161](#), pp. 10-12, 15, 18-23, 30-44; [T-162](#), pp. 36-38, 40.

¹⁷⁵² [Conviction Decision](#), para. 410, fn. 1170.

¹⁷⁵³ [Conviction Decision](#), para. 410.

the UPC/FPLC, as the Trial Chamber failed to discuss the impact of her lie about her abduction on the rest of her testimony.¹⁷⁵⁴

843. The Appeals Chamber recalls that under Mr Ntaganda's tenth ground of appeal it found no error in the Trial Chamber's reliance on P-0883's evidence regarding her date of birth and being under 15 years old at the relevant time, despite finding that her account on her abduction by the UPC and the period thereafter was unreliable.¹⁷⁵⁵ Mr Ntaganda appears to be equating the witness's alleged lies about her abduction to 'an article 70 offence' and argues that the Trial Chamber failed to address this in its assessment of the witness's testimony on her age.¹⁷⁵⁶ The Appeals Chamber has already addressed the matter of the Trial Chamber's assessment of the alleged inconsistencies in the witness evidence and rejected Mr Ntaganda's challenge in that regard.¹⁷⁵⁷

844. Moreover, the Trial Chamber provided a thorough analysis of the witness's evidence on her rape. Relying on the 'witness's description of the relevant event' and of the 'consequences thereof', in particular, on 'her health and that of her child born in 2004',¹⁷⁵⁸ it noted the witness's account about 'having been raped by many soldiers' during her time at Bule camp and that 'anyone who wanted to do so could rape you' was 'nuanced and not necessarily incriminating on all aspects'.¹⁷⁵⁹ The Appeals Chamber does not find that Mr Ntaganda has demonstrated any error in the Trial Chamber's reliance on P-0883's account about her rape during her stay at Bule camp and about her being under 15 at the relevant time.

845. Mr Ntaganda further submits that the Trial Chamber's conclusion that the age of a person named Mave as being under the age of 15 years is 'manifestly unreasonable', lacks reasoning and 'displays an egregious disregard of the caution necessary in making age determinations'.¹⁷⁶⁰ Mr Ntaganda argues that the Trial Chamber's

¹⁷⁵⁴ [Mr Ntaganda's Appeal Brief – Part II](#), paras 260, 267-268, 271.

¹⁷⁵⁵ See paragraphs 813, 821 above.

¹⁷⁵⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 268.

¹⁷⁵⁷ See paragraphs 803-813 above.

¹⁷⁵⁸ [Conviction Decision](#), para. 187.

¹⁷⁵⁹ [Conviction Decision](#), paras 187, 409.

¹⁷⁶⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 261, 269, 271.

reliance on the testimony of P-0887, P-0901, and P-0907 is unreasonable as they provided inconsistent estimates of age and conflicting testimony.¹⁷⁶¹

846. The Trial Chamber found that a girl named Mave and aged under 15 years was an escort to Floribert Kisembo and ‘was raped by many different soldiers on a regular basis, including at the *Appartements* camp in Mongbwalu’.¹⁷⁶² In reaching this finding, the Trial Chamber relied primarily on the testimony of P-0887 and P-0907.¹⁷⁶³ It also took into account the testimony of P-0901 only for the identification of Mave as one of Floribert Kisembo’s bodyguards but not for her age at the time of the events.¹⁷⁶⁴ Indeed, the witness identified two Maves: one was part of Mr Ntaganda’s escort¹⁷⁶⁵ and the other was one of Floribert Kisembo’s bodyguards but he did not provide any age for this Mave.¹⁷⁶⁶ The Trial Chamber considered P-0901 to be credible¹⁷⁶⁷ and noted that ‘[h]is evidence was generally precise and, for issues of which he had personal knowledge, the witness provided details and explained the basis of knowledge for his statements’.¹⁷⁶⁸

847. P-0907 testified to having followed training in Mandro camp and having ‘worked as a bodyguard for UPC/FPLC commanders’.¹⁷⁶⁹ The Trial Chamber found the witness to be credible¹⁷⁷⁰ and noted that aspects of his evidence were consistent with the testimony of other witnesses on similar issues.¹⁷⁷¹ In assessing Mave’s age, P-0907 indicated that she was very young based on the way she played with other children, and the look of her face.¹⁷⁷² The witness further stated that ‘it was “common knowledge” that Mave had been raped several times by soldiers and she began to suffer from fistula’.¹⁷⁷³ The witness also testified that he was present when Floribert Kisembo gave a speech to a gathering of soldiers in March 2003, in Mamedi, where he told the soldiers that Mave had a fistula and prohibited the further rape of Mave,

¹⁷⁶¹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 261, 269.

¹⁷⁶² [Conviction Decision](#), para. 411.

¹⁷⁶³ [Conviction Decision](#), para. 411, fn. 1172.

¹⁷⁶⁴ [Conviction Decision](#), fn. 1135.

¹⁷⁶⁵ P-0901: [T-29](#), p. 57, lines 1-9.

¹⁷⁶⁶ [Conviction Decision](#), fn. 1135. *See also* P-0901: [T-29](#), p. 58, lines 11-13, p. 59, lines 10-17.

¹⁷⁶⁷ [Conviction Decision](#), para. 215.

¹⁷⁶⁸ [Conviction Decision](#), para. 210.

¹⁷⁶⁹ [Conviction Decision](#), para. 216.

¹⁷⁷⁰ [Conviction Decision](#), para. 224.

¹⁷⁷¹ [Conviction Decision](#), para. 217.

¹⁷⁷² [Conviction Decision](#), fn. 1135. *See also* P-0907: [T-89](#), p. 57, lines 3-9.

¹⁷⁷³ [Conviction Decision](#), fn. 1172. *See also* P-0907: [T-89](#), p. 55, lines 20-21.

referring to Mave as a ‘child’, ‘no more than 12 years old’, and ‘not even a teenage girl’.¹⁷⁷⁴

848. The Trial Chamber further noted that P-0887 described Mave as ‘very young’ and that her ‘breasts hadn’t even started to develop’.¹⁷⁷⁵ The witness stated that ‘many soldiers “slept with” Mave, “treated her as a [...] soldier’s woman”, had sexual relations with her’ and she knew this because she also spoke to her.¹⁷⁷⁶

849. The Appeals Chamber notes that the Trial Chamber was of the view that P-0887 and P-0907 ‘had a good opportunity to observe Mave, and therefore also to assess her age’ and considered that the evidence ‘as a whole, establishes that the escort called Mave was under 15 years of age’.¹⁷⁷⁷

850. The Trial Chamber further noted that P-0887’s and P-0907’s evidence on the ‘actual acts of rape [of Mave] [was] not based on direct observations’.¹⁷⁷⁸ Nonetheless, the Trial Chamber observed that P-0907 learned about rapes of Mave from a speech given by Floribert Kisembo, which the witness personally witnessed and which supports his statement that Mave’s rapes ‘were “common knowledge”’ and ‘P-0887’s testimony about the statements made by UPC/FPLC soldiers’.¹⁷⁷⁹

851. The Appeals Chamber finds that the Trial Chamber conducted a detailed and cautious assessment of the witnesses’ evidence on Mave’s age and the sexual violence she suffered. Therefore, the Appeals Chamber considers the Trial Chamber’s findings that Mave was an escort assigned to Floribert Kisembo, that she was under the age of 15 and that she was raped and sexually enslaved to be reasonable.

852. Finally, Mr Ntaganda argues that the ‘alleged rape of Mave occurred after the defeat and dispersal of FPLC forces by the Ugandan army in early March 2003’, when ‘Kisembo led his group to Mamedi, and Mr. Ntaganda and others were in

¹⁷⁷⁴ [Conviction Decision](#), fns 1135, 1172. *See also* P-0907: [T-89](#), p. 55, lines 21-25, p. 56, lines 15-18, p. 57, lines 5-7.

¹⁷⁷⁵ [Conviction Decision](#), fn. 1135. *See also* P-0887: [T-93](#), p. 40, lines 2-5.

¹⁷⁷⁶ [Conviction Decision](#), fn. 1172. *See also* P-0887: [T-93](#), p. 40, lines 6-12, p. 41, lines 4-6.

¹⁷⁷⁷ [Conviction Decision](#), fn. 1135.

¹⁷⁷⁸ [Conviction Decision](#), fn. 1172.

¹⁷⁷⁹ [Conviction Decision](#), fn. 1172.

Goma’.¹⁷⁸⁰ He avers that the Trial Chamber failed to make a finding on his knowledge of the conduct of Kisembo’s forces or Kisembo himself and there was no evidence for such knowledge.¹⁷⁸¹ He adds that there is no evidence supporting a finding that he knew about rape and sexual slavery committed by the UPC/FPLC in this period of time or that ‘he would have foreseen that the rape of “Mave” would occur “in the ordinary course of events”’.¹⁷⁸²

853. The Appeals Chamber recalls that the Trial Chamber found that Mave was raped ‘by many different soldiers on a regular basis, including at the *Appartements* camp in Mongbwalu’, which was ‘Mr Ntaganda’s base’ at that location.¹⁷⁸³ Furthermore, it is clear from the Trial Chamber’s findings that the speech of March 2003, in which Floribert Kisembo instructed the soldiers not to touch Mave anymore,¹⁷⁸⁴ was given after a presumably long period of time when she had been ‘raped by many different soldiers on a regular basis’, which led to her health problems.¹⁷⁸⁵ The actual rapes were at least committed before March 2003, when the camp in which they occurred was Mr Ntaganda’s base.¹⁷⁸⁶

854. The Trial Chamber found also that ‘female members of the UPC/FPLC were regularly raped and subjected to sexual violence during their service’ by ‘male UPC/FPLC soldiers and commanders’, and that this was a ‘common practice’.¹⁷⁸⁷ The Trial Chamber was satisfied on the basis of testimonial evidence that ‘Mr Ntaganda was among the commanders who inflicted rape on his female bodyguards’ and that sexual crimes within his escort were ‘left largely unpunished’.¹⁷⁸⁸ On the basis of ‘received reliable evidence of sexual violence committed against child soldiers under the age of 15’,¹⁷⁸⁹ the Trial Chamber found that ‘the only reasonable conclusion is that Mr Ntaganda knew that rapes and sexual violence were occurring within the UPC/FPLC ranks, and that female recruits and soldiers under the age of 15 were not

¹⁷⁸⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 270.

¹⁷⁸¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 270.

¹⁷⁸² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 270.

¹⁷⁸³ [Conviction Decision](#), paras 411, 527.

¹⁷⁸⁴ [Conviction Decision](#), para. 411.

¹⁷⁸⁵ [Conviction Decision](#), para. 411.

¹⁷⁸⁶ [Conviction Decision](#), para. 527.

¹⁷⁸⁷ [Conviction Decision](#), paras 407, 1196.

¹⁷⁸⁸ [Conviction Decision](#), paras 407, 412, 1196.

¹⁷⁸⁹ [Conviction Decision](#), para. 1196, *referring to* paras 408-411.

excluded from this practice'.¹⁷⁹⁰ The Trial Chamber concluded that Mr Ntaganda 'was aware that, in the ordinary course of events, and during the relevant period [...], children under the age of 15 years would [...] be raped and subjected to sexual slavery [...], and was aware of the relevant circumstances'.¹⁷⁹¹

855. The Appeals Chamber considers that these findings and the underlying evidence show Mr Ntaganda's personal involvement in the rapes, that rapes were 'common knowledge' and that Mr Ntaganda knew of the sexual violence inflicted on individuals under the age of 15 that were part of the UPC/FPLC.¹⁷⁹²

4. *Overall conclusion*

856. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's findings that the rape and sexual enslavement of a person named Nadège, P-0883 and a person named Mave occurred and that Mr Ntaganda knew about these incidents, the Appeals Chamber rejects this ground of appeal.

L. Twelfth ground of appeal: Mr Ntaganda's knowledge that individuals under 15 years old were enlisted, conscripted or used to participate in hostilities

857. Under the twelfth ground of appeal, Mr Ntaganda submits that the Trial Chamber erred in inferring 'to the exclusion of all other reasonable inferences' that he intended and knew that 'individuals under the age of 15 would be, or were being, recruited or conscripted into the FPLC and, thereafter, used to participate [...] actively in hostilities'.¹⁷⁹³

1. *Relevant part of the Conviction Decision*

858. The Trial Chamber found that Mr Ntaganda 'was aware that, in the ordinary course of events, and during the relevant period [...], children under the age of 15 years would be enlisted, conscripted and used to participate actively in hostilities within the UPC/FPLC ranks'.¹⁷⁹⁴

¹⁷⁹⁰ [Conviction Decision](#), para. 1197.

¹⁷⁹¹ [Conviction Decision](#), para. 1198.

¹⁷⁹² See paragraphs 1063-1065 below.

¹⁷⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 277. See also para. 272.

¹⁷⁹⁴ [Conviction Decision](#), para. 1198.

859. The Trial Chamber found that some of the ‘children’ within Mr Ntaganda’s personal escort were “‘manifestly” under 15 years of age’ and referred to the ‘frequency and proximity of their contacts’ ‘on a daily basis’ with Mr Ntaganda.¹⁷⁹⁵ It was satisfied that ‘the only reasonable conclusion [was] that Mr Ntaganda knew that some of his escorts were below the age of 15 years and that, during this period, they were active members of the UPC/FPLC, ensuring his protection and participating in various military activities’.¹⁷⁹⁶

860. The Trial Chamber further found that Mr Ntaganda was involved in ‘large scale recruitment drives conducted by the UPC/FPLC’ and that ‘on at least three occasions, Mr Ntaganda made calls for young people to join the UPC/FPLC ranks and follow military training’.¹⁷⁹⁷ The Trial Chamber noted that in his address to the population Mr Ntaganda called ‘*everybody* to enrol, explicitly inviting individuals from all gender, age, or size to join’.¹⁷⁹⁸ The Trial Chamber concluded that Mr Ntaganda ‘necessarily knew that the UPC/FPLC would recruit, train, and deploy children under 15 years of age in the context of its military campaign against the RCD-K/ML and the Lendu community’.¹⁷⁹⁹

2. *Summary of the submissions*

(a) **Mr Ntaganda’s submissions**

861. Mr Ntaganda submits that none of the statements attributed to him by the Trial Chamber made during recruitment meetings show ‘any intention’ to recruit persons under the age of 15.¹⁸⁰⁰ Mr Ntaganda further alleges that this ‘reasonable possibility’ is reinforced by evidence that the UPC/FPLC’s age assessment of recruits was done on the basis of a ‘physical maturity test’ but the Trial Chamber ignored the evidence provided by D-0210.¹⁸⁰¹

¹⁷⁹⁵ [Conviction Decision](#), paras 1191-1192.

¹⁷⁹⁶ [Conviction Decision](#), para. 1192.

¹⁷⁹⁷ [Conviction Decision](#), para. 1193.

¹⁷⁹⁸ [Conviction Decision](#), para. 1193 (emphasis in original).

¹⁷⁹⁹ [Conviction Decision](#), para. 1194.

¹⁸⁰⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 275.

¹⁸⁰¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 276, fn. 728. *See also* para. 277.

(b) The Prosecutor’s submissions

862. The Prosecutor submits that Mr Ntaganda ‘disregards the evidence and misconstrues’ the Conviction Decision.¹⁸⁰² The Prosecutor argues that the Trial Chamber’s finding on Mr Ntaganda’s knowledge, as an indirect co-perpetrator, ‘about the crimes committed against child soldiers was based on a substantial body of evidence’ such as: (i) Mr Ntaganda’s ‘proximity and daily contact with his own escorts’; (ii) Mr Ntaganda’s ‘participation in recruitment initiatives, calling to enrol persons of all ages, gender and size and asking parents to give their children’; (iii) ‘the consistent inhuman treatment of all UPC soldiers (including child soldiers under the age of 15)’; (iv) ‘the sexual violence and regular rape of female members of the UPC (including child soldiers under the age of 15) by male UPC soldiers and commanders, including by Ntaganda, and his own chief escort’; and (v) the lack of punishment by Mr Ntaganda and Kisembo for these crimes and Mr Ntaganda taking ‘advantage of the vulnerability of these children and the coercive environment in which the UPC operated’.¹⁸⁰³ The Prosecutor further avers that Mr Ntaganda ‘underplays his crucial role in recruitment rallies’ and ‘ignores his primary responsibility in training UPC recruits, his regular visits to training centres, his own personal training of recruits and his role in deciding on the deployment of soldiers’.¹⁸⁰⁴

(c) The victims’ observations

863. Victims Group 1 argue that the Trial Chamber did not err in defining and applying the ‘*mens rea* requirements for indirect co-perpetration’.¹⁸⁰⁵ They further aver that Mr Ntaganda fails to substantiate his arguments and merely disagrees with the Trial Chamber’s detailed consideration of the evidence without showing an error.¹⁸⁰⁶

3. Determination by the Appeals Chamber

864. The Appeals Chamber recalls that under Mr Ntaganda’s ninth ground of appeal, it found no error in the Trial Chamber’s finding that Mr Ntaganda’s escort within the

¹⁸⁰² [Prosecutor’s Response to Appeal – Part II](#), para. 212.

¹⁸⁰³ [Prosecutor’s Response to Appeal – Part II](#), para. 213 (footnote omitted).

¹⁸⁰⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 214 (footnotes omitted).

¹⁸⁰⁵ [Observations of Victims Group 1 on Appeal – Part II](#), paras 67-68.

¹⁸⁰⁶ [Observations of Victims Group 1 on Appeal – Part II](#), paras 69-74; [T-271](#), p. 66, line 6 to p. 69, line 8.

UPC/FPLC included individuals who were under 15 years of age.¹⁸⁰⁷ It also recalls that under the tenth ground of appeal, it found the Trial Chamber’s finding that individuals under the age of 15 years were enlisted in the UPC/FPLC and actively participated in the hostilities to be reasonable.¹⁸⁰⁸

865. With respect to recruitment, the Trial Chamber found that the ‘UPC/FPLC extensively recruited individuals of all ages, in particular “young people”, including individuals under the age of 15’.¹⁸⁰⁹ It was satisfied that, although Mr Ntaganda ‘denied having attended recruitment drives or campaigns’, the evidence showed his involvement ‘in the recruitment process’.¹⁸¹⁰ Relying on the evidence of P-0918, P-0769, P-0010,¹⁸¹¹ the Trial Chamber found that, on at least three occasions,¹⁸¹² Mr Ntaganda ‘made [...] calls for young people and children to join UPC/FPLC ranks’ and ‘follow military training’ including *kadogos*.¹⁸¹³

866. The Trial Chamber noted that the first occasion was in August 2002 at a rally in Mudzipela, where Mr Ntaganda told those present that ““young people” needed to follow military training and that parents should send their children to the UPC/FPLC in order to be able to defend themselves against the Lendu’.¹⁸¹⁴ The Trial Chamber found P-0918’s evidence on that issue credible because she was present at the rally where ‘she personally saw Mr Ntaganda giving his speech, described the context of her presence at the rally, [...] the vehicle in which Mr Ntaganda arrived, [...] the content of this speech, and [...] distinguished between information she had on the day of the rally and information she only learnt later’.¹⁸¹⁵

867. In addition, the Trial Chamber relied on P-0769’s testimony about another speech also in Mudzipela, where Mr Ntaganda addressed students telling them that the ‘UPC/FPLC needed “intellectual *cadre* to support the movement”, and that the

¹⁸⁰⁷ See paragraph 790 above.

¹⁸⁰⁸ See paragraph 821 above.

¹⁸⁰⁹ [Conviction Decision](#), para. 347.

¹⁸¹⁰ [Conviction Decision](#), para. 355. See also para. 1193.

¹⁸¹¹ [Conviction Decision](#), paras 357-359, fns 989-993.

¹⁸¹² [Conviction Decision](#), paras 356, 830, 1193. See also paras 357-359.

¹⁸¹³ [Conviction Decision](#), paras 356, 830, 1193.

¹⁸¹⁴ [Conviction Decision](#), para. 357.

¹⁸¹⁵ [Conviction Decision](#), fn. 989.

‘UPC/FPLC would send recruits to study for this purpose’.¹⁸¹⁶ It also noted that Mr Ntaganda called upon ‘all families’ to ‘give young people to bolster the UPC’.¹⁸¹⁷

868. With respect to the evidence of P-0010, the Trial Chamber noted that the witness testified that on another occasion, in Mabanga, ‘Mr Ntaganda called upon people to enrol in the UPC/FPLC and undergo training to fight for their country, including “children” and “kadogos”’.¹⁸¹⁸

869. The Appeals Chamber notes that, apart from arguing that these alleged statements do not show ‘any direct intention to recruit individuals under the age of 15’,¹⁸¹⁹ Mr Ntaganda does not specifically challenge the evidence of P-0918, P-0769, or P-0010 with regard to this issue. Instead, he challenges the meaning of the terms ‘young people’ and ‘*kadogos*’, which the Appeals Chamber already addressed and rejected in his ninth ground of appeal with respect to the Trial Chamber’s finding that his personal escorts included individuals under the age of 15.¹⁸²⁰

870. With respect to the screening process, Mr Ntaganda argues that the Trial Chamber’s ‘ignored’ or ‘misappreciated’ the evidence that the ‘UPC/FPLC applied a physical maturity test’ to exclude individuals under 15.¹⁸²¹ The Prosecutor submits that the Trial Chamber rejected Mr Ntaganda’s contentions regarding his alleged ‘non-participation in recruitment rallies’, the term *kadogos* being ‘related to the size of the person’ and the ‘so-called “physical maturity test” that UPC recruits allegedly underwent’.¹⁸²²

871. The Trial Chamber found that, upon their arrival at a ‘training location, recruits were screened based on their physical ability, and age as such was not a bar for them to receive training’.¹⁸²³ In reaching this finding, the Trial Chamber considered Mr Ntaganda’s evidence and relied on the evidence of D-0080 and P-0768.¹⁸²⁴ The Trial Chamber observed that P-0768 stated that ‘to his knowledge “there was no age limit.

¹⁸¹⁶ [Conviction Decision](#), para. 358.

¹⁸¹⁷ [Conviction Decision](#), para. 358.

¹⁸¹⁸ [Conviction Decision](#), para. 359.

¹⁸¹⁹ See [Mr Ntaganda’s Appeal Brief – Part II](#), para. 277.

¹⁸²⁰ See paragraph 790 above.

¹⁸²¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 276.

¹⁸²² [Prosecutor’s Response to Appeal – Part II](#), para. 214.

¹⁸²³ [Conviction Decision](#), para. 361.

¹⁸²⁴ [Conviction Decision](#), fn. 998.

There was no particular criterion for the recruitment of children. There were young people, old people. Anyone who came to the training camp was welcome in our different units”’.¹⁸²⁵ The witness testified on the recruitment and training of individuals under the age of 15 at the UPC training camps and stated that Mr Ntaganda was responsible for the training.¹⁸²⁶

872. The Trial Chamber also noted D-0080’s prior recorded testimony, which ‘confirmed’ the ‘screening procedure based on physical abilities’.¹⁸²⁷ The witness stated that [REDACTED].¹⁸²⁸ According to the witness, [REDACTED].¹⁸²⁹

873. The Trial Chamber considered also Mr Ntaganda’s evidence on the screening process but found inconsistencies within his testimony.¹⁸³⁰ It noted that he first testified that the ‘new recruits were not asked about their age, as they had no identity documents and could lie about their age’.¹⁸³¹ However, the Trial Chamber noted that during his cross-examination Mr Ntaganda stated that ‘new recruits *were* asked about their age, and that those under 18 were sent away’ but he added that questioning the recruits about their age ‘was not reliable and that an assessment of the recruit’s physical ability was relied upon’.¹⁸³² The Trial Chamber further noted his testimony during direct examination where he explained the ‘link between “being above 18 and the criteria of the ability to carry ammunitions or any other objects”’ as follows: ““a person who would be able to carry a weapon and a box of ammunition or one of their comrades who is injured at the battlefield would be somebody who cannot be less than 18””.¹⁸³³ The Trial Chamber rejected Mr Ntaganda’s submissions to that effect and found that ‘the screening process was exclusively based on physical abilities, as

¹⁸²⁵ [Conviction Decision](#), fn. 998.

¹⁸²⁶ See P-0768: [T-34](#), p. 48, lines 22-24, p. 49, lines 16-21, p. 50, line 19 to p. 51, line 6, p. 52, lines 11-14.

¹⁸²⁷ See [Conviction Decision](#), fn. 998, referring to DRC-D18-0001-6163, p. 6169. In relation to prior recorded testimony under rule 68 of the Rules, the Trial Chamber held that when assessing this type of evidence, it would, *inter alia*, consider ‘whether the evidence contained therein is corroborated by any other evidence admitted into the record’. See [Conviction Decision](#), para. 58, fn. 135.

¹⁸²⁸ DRC-D18-0001-6163, p. 6169, para. 49.

¹⁸²⁹ DRC-D18-0001-6163, p. 6169, para. 50.

¹⁸³⁰ [Conviction Decision](#), fn. 998.

¹⁸³¹ [Conviction Decision](#), fn. 998.

¹⁸³² [Conviction Decision](#), fn. 998 (emphasis in original).

¹⁸³³ [Conviction Decision](#), fn. 998.

opposed to age'.¹⁸³⁴ In reaching this finding, the Trial Chamber noted the evidence of D-0080 and P-0768.¹⁸³⁵

874. The Appeals Chamber notes that Mr Ntaganda is not challenging the evidence of D-0080 and P-0768 on that issue. Rather, Mr Ntaganda repeats arguments he presented at trial about the UPC/FPLC's approach being reasonable given the lack of 'identification documents' and 'potential recruits' lying about their age because they were 'eager to be trained'.¹⁸³⁶ In this regard, he refers to the evidence of P-0046, P-0016, P-0116, P-0769, P-0911, and D-0057 that mainly concern the broad context in which individuals under the age of 15 would be associated with armed groups, including the UPC at the time of the events.¹⁸³⁷ The Appeals Chamber finds that a review of this evidence does not undermine the reasonableness of the Trial Chamber's finding that Mr Ntaganda referred to people of all ages, including individuals under 15, in his speeches.¹⁸³⁸

875. Turning to Mr Ntaganda's reference to the evidence of D-0210, which was dismissed by the Trial Chamber,¹⁸³⁹ the Appeals Chamber notes that the Trial Chamber explicitly addressed Mr Ntaganda's contention about the screening process and explained why it did not rely on the evidence of D-0210.¹⁸⁴⁰ The Trial Chamber noted that the witness stated that 'he and two other individuals of the same age tried to join the UPC/FPLC at the training camp in Mandro' but they were turned away by 'Mugisa' because they were told there was no training for "little children".¹⁸⁴¹ The Trial Chamber noted that the witness estimated that his attempt to join the UPC took place in 2000 or 2001, at the start of the summer school holidays in July.¹⁸⁴² The Trial

¹⁸³⁴ [Conviction Decision](#), fn. 998.

¹⁸³⁵ [Conviction Decision](#), fn. 998.

¹⁸³⁶ See [Mr Ntaganda's Appeal Brief – Part II](#), para. 276. See also [Mr Ntaganda's Closing Brief](#), para. 1513.

¹⁸³⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 276, referring to evidence DRC-OTP-0152-0274, at 0274; P-0046: [T-102](#), p. 65, lines 3-9; P-0911: [T-157](#), p. 40 line 1; P-0769: [T-120](#), p. 48, lines 5-7; P-0016: DRC-OTP-2054-1625, at 1688; P-0116: DRC-OTP-2054-4494, at 4594; [T-196](#), p. 20, line 23 to p. 23, line 5; D-0057: [T-246](#), p. 13, lines 8-10.

¹⁸³⁸ With regard to P-0911, the Trial Chamber found this witness not credible and held that it would not 'rely on his testimony and the documentary evidence introduced through this witness. See [Conviction Decision](#), para. 235.

¹⁸³⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 276, fn. 728.

¹⁸⁴⁰ See [Conviction Decision](#), fns 966, 998.

¹⁸⁴¹ [Conviction Decision](#), fn. 966.

¹⁸⁴² [Conviction Decision](#), fn. 966.

Chamber, noting its finding that the ‘UPC/FPLC only operated a training centre at Mandro during the course of 2002’, considered that the events described by the witness occurred in 2002, ‘when the witness was, according to his testimony 14 years old’.¹⁸⁴³

876. Nonetheless, the Trial Chamber considered that D-0210’s evidence did ‘not affect its finding, considering that the witness did not state that he was asked about his age, but instead only referred to size as a reason for being rejected’ which was ‘consistent’ with its finding on the screening process of new recruits.¹⁸⁴⁴ The Trial Chamber after ‘having assessed that his evidence does not indicate that age was in fact the reason he was turned away’, decided not to rely on the witness’s testimony that ‘he and others were turned away at Mandro when attempting to enrol in training at aged 14’.¹⁸⁴⁵ The Appeals Chamber finds that Mr Ntaganda does not show that the Trial Chamber disregarded the evidence of D-0210 and that this evidence undermines its conclusion. Accordingly, the Appeals Chamber finds that the Trial Chamber’s finding on the screening process was reasonable.

4. Overall conclusion

877. Having rejected the entirety of Mr Ntaganda’s arguments challenging the Trial Chamber’s assessment of the evidence underlying its inferences on his intent and knowledge of individual under the age of 15 were enlisted, conscripted or used to participate in hostilities, the Appeals Chamber rejects this ground of appeal.

M. Thirteenth ground of appeal: Whether the Trial Chamber erred in convicting Mr Ntaganda as a member of a common plan

878. Under the thirteenth ground of appeal Mr Ntaganda raises a number of arguments aimed at demonstrating that the Trial Chamber erred in its approach to the common plan and the crimes committed in implementation of this plan.¹⁸⁴⁶

¹⁸⁴³ [Conviction Decision](#), fn. 966.

¹⁸⁴⁴ [Conviction Decision](#), fn. 966, *referring to* para. 361.

¹⁸⁴⁵ [Conviction Decision](#), fn. 998.

¹⁸⁴⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 283-309.

M Ntaganda also argues that the Trial Chamber erred in convicting him for the actions of Hema civilians in Mongbwalu.¹⁸⁴⁷

879. This ground of appeal and the two grounds of appeal that follow concern the theory of indirect co-perpetration. Judge Morrison and Judge Eboe-Osuji entertain considerable reservations concerning the application and scope of the Trial Chamber’s judgment in respect of Mr Ntaganda’s criminal responsibility in utilizing this theory and the concept of ‘control of the crime’.¹⁸⁴⁸ They are set out in separate opinions. In their view, the issues and scope of application of ‘indirect co-perpetration’ and ‘control of the crime’ theories are not settled in international criminal law. Judge Morrison’s reservations do not lead him to a conclusion that the Conviction Decision needs to be set aside because of the limits of appellate review and because the Trial Chamber was expressly following the earlier jurisprudence of the court which was fully apparent at the time of the case the appellant had to meet, not least in the determination of the Appeals Chamber in the *Lubanga* Appeal Judgment. On the other hand, Judge Eboe-Osuji considers that Mr Ntaganda’s conviction should be set aside insofar as it is based on the theory of indirect co-perpetration. He would, however, confirm the conviction for those crimes that he considers Mr Ntaganda to have directly committed.

880. Judge Ibáñez Carranza also writes separately in support of the theory of ‘indirect co-perpetration’ and ‘control of the crime’.¹⁸⁴⁹ In her view, indirect co-perpetration is a mode of liability enshrined in article 25(3)(a) of the Rome Statute that constitutes one of the most appropriate tools to deal with the type of mass criminality associated with international crimes under the jurisdiction of this Court.

1. Whether Mr Ntaganda received notice of a common plan to destroy the Lendu

(a) Summary of submissions

881. Mr Ntaganda submits that in convicting him, the ‘[Trial] Chamber held that the common plan “to drive out all the Lendu from the localities targeted during their

¹⁸⁴⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 310-316.

¹⁸⁴⁸ [Annex 2](#), Separate opinion of Judge Howard Morrison on Mr Ntaganda’s appeal; [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji.

¹⁸⁴⁹ [Annex 3](#), Separate opinion of Judge Luz del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal.

military campaigns” actually meant “the destruction and disintegration of the Lendu community”¹⁸⁵⁰ and that he had had no notice during the trial that he was being tried on this basis.¹⁸⁵¹ He argues that his ability to prepare his defence was materially impaired.¹⁸⁵² Mr Ntaganda submits that ‘[i]n convicting an Accused, a Trial Chamber cannot exceed the scope of a common plan as pleaded in an indictment’.¹⁸⁵³ He contends that this is a legal error that invalidates his convictions as an indirect co-perpetrator.¹⁸⁵⁴

882. The Prosecutor argues that Mr Ntaganda misunderstands the Trial Chamber’s findings and that the description of the common plan in the Conviction Decision is consistent with the manner with which the common plan was charged.¹⁸⁵⁵ The Prosecutor contends that the references to the co-perpetrators’ intent to destroy and disintegrate the Lendu community only serve to show that the common plan included an element of criminality, as charged.¹⁸⁵⁶

(b) Relevant parts of the charging documents and the Conviction Decision

883. The Prosecutor alleged in the UDCC that

From on or about 6 August 2002 to 31 December 2003, Bosco NTAGANDA contributed to a plan to assume the military and political control of Ituri, occupy the non-Hema dominated areas in Ituri and expel the non-Hema civilian population, particularly the Lendu, Ngiti and *non-originaires* (the “non-Hema civilian population”) by means which included the commission of the following crimes: murder or attempted murder, attacks against a civilian population, rape, sexual slavery, persecution, pillaging, forcible transfer of the population, enlistment and conscription of children under the age of 15 and their use to participate actively in hostilities, attacks against protected objects and, destruction of property (the “Common Plan”).¹⁸⁵⁷

884. The Pre-Trial Chamber made the following findings in the Confirmation Decision:

¹⁸⁵⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 278, referring to [Conviction Decision](#), paras 805-806, 809-810; [T-270](#), p. 90, lines 10-15.

¹⁸⁵¹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 278-279.

¹⁸⁵² [Mr Ntaganda’s Appeal Brief – Part II](#), paras 281-282.

¹⁸⁵³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 280.

¹⁸⁵⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 282.

¹⁸⁵⁵ [Prosecutor’s Response to Appeal – Part II](#), paras 216-217; [T-271](#), p. 51, lines 7-10; p. 52, lines 4-7.

¹⁸⁵⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 218; [T-271](#), p. 52, lines 7-10.

¹⁸⁵⁷ [UDCC](#), para. 1 (footnotes omitted).

From 6 August 2002 onwards and throughout the period relevant to the charges, Mr. Ntaganda was part of a common plan amongst members of the UPC/FPLC to assume military and political control over Ituri. As part of the common plan, Mr. Ntaganda and others sought to take over non-Hema dominated areas and expel the non-Hema civilian population, particularly the Lendu, from Ituri. Further, the Chamber is satisfied that the common plan contained an element of criminality, as evidenced by the crimes described previously in Sections C and D [of the Confirmation Decision].¹⁸⁵⁸

885. When describing Mr Ntaganda's alleged essential contribution to the common plan, the Pre-Trial Chamber found that Mr Ntaganda, *inter alia*:

(i) repeatedly told his subordinates to eliminate all Lendu, without distinguishing between those who were taking a direct part in hostilities and those who were not; (ii) armed young Hema civilians and instructed them to kill and chase away the Lendu [...].¹⁸⁵⁹

886. In the Conviction Decision, the Trial Chamber found that 'Mr Ntaganda and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo, worked together and agreed in the common plan to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML'.¹⁸⁶⁰

(c) Determination by the Appeals Chamber¹⁸⁶¹

887. The Appeals Chamber notes that, according to the Trial Chamber, the common plan to which Mr Ntaganda and other military leaders of the UPC/FPLC agreed was 'to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML'.¹⁸⁶² Formulated in this manner, the common plan established by the Trial Chamber falls within the scope of the common plan charged by the Prosecutor (to 'expel the non-Hema civilian population, particularly the Lendu, Ngiti and *non-originaires*'¹⁸⁶³) and confirmed by the Pre-Trial

¹⁸⁵⁸ [Confirmation Decision](#), para. 105 (footnote omitted).

¹⁸⁵⁹ [Confirmation Decision](#), para. 112 (footnotes omitted).

¹⁸⁶⁰ [Conviction Decision](#), para. 808 (footnote omitted).

¹⁸⁶¹ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

¹⁸⁶² [Conviction Decision](#), para. 808 (footnote omitted).

¹⁸⁶³ [UDCC](#), para. 1 (footnotes omitted).

Chamber ('expel the non-Hema civilian population, particularly the Lendu, from Ituri'¹⁸⁶⁴).

888. It is true that the Trial Chamber also found that 'the co-perpetrators meant the destruction and disintegration of the Lendu community'.¹⁸⁶⁵ However, the Appeals Chamber is not persuaded that this is an expansion of the common plan charged by the Prosecutor. Rather, the purpose of this finding is to demonstrate the link between the common plan and the crimes committed by UPC/FPLC. The Trial Chamber found that '[b]y way of this agreement' the co-perpetrators meant the destruction of the Lendu community, which involved the targeting of civilians through killing, rape and other crimes.¹⁸⁶⁶ It found that 'these acts were performed targeting the Lendu communities specifically in order [to] prevent their return to the assaulted localities'.¹⁸⁶⁷ These findings do not ascribe the objective of destroying the Lendu community to the common plan.

889. The Appeals Chamber also notes that the concluding paragraphs of the section in the Conviction Decision regarding the common plan use the words 'this agreement' or the 'plan' 'to drive out all the Lendu from the localities' targeted during the military campaign.¹⁸⁶⁸ It is thus clear that the Trial Chamber found the common plan to comprise the objective of driving out the Lendu from the targeted localities and not the objective of the destruction of the Lendu community.

890. Additionally, the Appeals Chamber observes that, although not in the context of the common plan, the UDCC and the Confirmation Decision contain allegations of Mr Ntaganda pursuing the objective of the destruction of the Lendu community. In particular, it is alleged in the UDCC that 'Bosco NTAGANDA instructed UPC/FPLC forces to eliminate the Lendu, civilians and fighting forces alike'.¹⁸⁶⁹ Similarly, the Pre-Trial Chamber found that Mr Ntaganda: '(i) repeatedly told his subordinates to eliminate all Lendu, without distinguishing between those who were taking a direct part in hostilities and those who were not; (ii) armed young Hema civilians and

¹⁸⁶⁴ [Confirmation Decision](#), para. 105.

¹⁸⁶⁵ [Conviction Decision](#), para. 809. *See also* paras 810-811.

¹⁸⁶⁶ [Conviction Decision](#), para. 809.

¹⁸⁶⁷ [Conviction Decision](#), para. 809.

¹⁸⁶⁸ [Conviction Decision](#), paras 810-811.

¹⁸⁶⁹ [UDCC](#), para. 68.

instructed them to kill and chase away the Lendu [...].¹⁸⁷⁰ Therefore, even if these allegations are not directly related to the common plan, Mr Ntaganda was charged with, and put on notice of, the allegation that he pursued the objective of eliminating the Lendu.

891. The Appeals Chamber therefore rejects Mr Ntaganda's arguments that the Trial Chamber convicted him for participation in a common plan that was not charged and that this impaired his ability to prepare his defence.

2. *Whether the Trial Chamber erred in its approach to the common plan and the crimes committed in implementation of this plan*

(a) **Reliance on the evidence of P-0014 and P-0041 in relation to the meeting in Kampala in June 2002**

(i) *Relevant part of the Conviction Decision*

892. In the legal findings section on the 'Common plan' in the Conviction Decision, the Trial Chamber examined 'whether [Mr Ntaganda] entered in a common plan with the other alleged co-perpetrators'.¹⁸⁷¹ In this context, the Trial Chamber referred, *inter alia*, to its findings regarding a meeting in Kampala:

In June 2002, during a meeting held amongst political leaders of the emerging UPC/FPLC in Kampala, including Thomas Lubanga, it was stated that one of the objectives of the UPC/FPLC was to drive out the non-natives, identifying the first target as the Nande, and then, the Lendu. In the context of side discussions, reference was also made to using the rape of enemy women as a means of waging war.¹⁸⁷²

893. The findings concerning this meeting were based, *inter alia*, on the evidence of two witnesses: P-0014 and P-0041.¹⁸⁷³

(ii) *Summary of submissions*

894. Mr Ntaganda argues that the evidence of the meeting in Kampala from P-0014 and P-0041 is contradictory and 'insufficient to sustain a finding'.¹⁸⁷⁴ He argues that

¹⁸⁷⁰ [Confirmation Decision](#), para. 112 (footnote omitted).

¹⁸⁷¹ [Conviction Decision](#), para. 781.

¹⁸⁷² [Conviction Decision](#), para. 799 (footnote omitted), referring to paras 290, 293.

¹⁸⁷³ [Conviction Decision](#), paras 290-293.

¹⁸⁷⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 285.

P-0014's testimony regarding a 'side discussion' at this meeting is uncorroborated hearsay.¹⁸⁷⁵

895. The Prosecutor argues that Mr Ntaganda 'misunderstands evidentiary principles regarding corroboration'.¹⁸⁷⁶ She submits that it was not required that P-0014 and P-0041 give identical evidence on the meeting in Kampala and that they were consistent on 'fundamental details regarding the meetings'.¹⁸⁷⁷

*(iii) Determination by the Appeals Chamber*¹⁸⁷⁸

896. The Appeals Chamber notes that Mr Ntaganda made a number of specific arguments on the alleged inconsistencies in P-0014 and P-0041's testimony on the meeting in a footnote.¹⁸⁷⁹ This is inconsistent with regulation 36(3) of the Regulations of the Court, which provides that '[n]o substantial submissions may be placed in the footnotes of a document'. The Appeals Chamber disapproves of such practice and notes that it may dismiss *in limine* submissions made in this manner. However, it will exceptionally consider the arguments put in the footnote in this instance.

897. The two witnesses upon whose evidence the Trial Chamber relied to make findings in respect of the meeting in Kampala were P-0014 and P-0041. The Trial Chamber 'consider[ed] these two witnesses to have a strong basis of knowledge for the events of the meeting, noting also that their testimony on this issue was rich in details'.¹⁸⁸⁰ It also found that, in view of P-0014's 'explanations concerning his basis of knowledge', he was 'a primary source of information to establish the emerging UPC/FPLC's objectives as stated at that time'.¹⁸⁸¹

898. Mr Ntaganda lists a number of topics of the discussions during the meeting, which, in his view, were referred to in the evidence of one of these witnesses and not

¹⁸⁷⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 285.

¹⁸⁷⁶ [Prosecutor's Response to Appeal – Part II](#), para. 230.

¹⁸⁷⁷ [Prosecutor's Response to Appeal – Part II](#), paras 231-232.

¹⁸⁷⁸ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

¹⁸⁷⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 285, fn. 753.

¹⁸⁸⁰ [Conviction Decision](#), para. 290, fn. 741.

¹⁸⁸¹ [Conviction Decision](#), para. 293, fn. 753.

in the evidence of the other.¹⁸⁸² Mr Ntaganda argues on this basis that the accounts of the two witnesses ‘differ to such an extent that it appears they are describing different meetings’.¹⁸⁸³

899. As pointed out by Mr Ntaganda, each of the two witnesses included in their account some detail not included in the account of the other. This is reflected in the Trial Chamber’s findings related to the meeting in Kampala. Many of these findings are based on the testimony of P-0014, either alone or together with documentary evidence,¹⁸⁸⁴ presumably due to the absence of reference to such facts in the evidence of P-0041.

900. The Appeals Chamber, however, notes that the two witnesses gave consistent accounts of important aspects of the meeting in question. In particular, they both stated that: in June 2002, a meeting was held in Kampala;¹⁸⁸⁵ Thomas Lubanga, John Tinanzabo, Richard Lonema, Paul Avochi and others attended;¹⁸⁸⁶ Thomas Lubanga headed the group;¹⁸⁸⁷ the meeting ‘aimed at discussing the reorganisation of Ituri, notably how the emerging UPC/FPLC would take control of the district’.¹⁸⁸⁸ Given the consistency of the two witnesses’ evidence on these aspects of the meeting in Kampala, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to rely on this evidence. The Appeals Chamber is not persuaded by Mr Ntaganda’s argument that these witnesses describe different meetings. Notably, he does not point to any other meeting being held at the same time in Kampala, attended by the same persons, which either of the two witnesses described.

901. Mr Ntaganda also argues that [REDACTED]; he submits that he raised this issue in his closing brief and that it was not addressed in the Conviction Decision.¹⁸⁸⁹

¹⁸⁸² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 285, fn. 753.

¹⁸⁸³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 285, fn. 753.

¹⁸⁸⁴ [Conviction Decision](#), para. 290, fn. 742; para. 293, fn. 750-757.

¹⁸⁸⁵ [Conviction Decision](#), para. 290; P-0014: [T-137](#), p. 17; DRC-OTP-0066-0002, para. 55; DRC-OTP-2054-0429, at 0470-0471; P-0041: DRC-OTP-0147-0002, para. 50.

¹⁸⁸⁶ [Conviction Decision](#), para. 290, fn. 741; P-0014: DRC-OTP-0066-0002, para. 56; DRC-OTP-2054-0429, at 0470-0472; P-0041: DRC-OTP-0147-0002, para. 51.

¹⁸⁸⁷ [Conviction Decision](#), para. 290; P-0014: DRC-OTP-0066-0002, para. 58; DRC-OTP-2054-0429, at 0470-0471; P-0041: DRC-OTP-0147-0002, para. 51.

¹⁸⁸⁸ [Conviction Decision](#), para. 293; P-0041: DRC-OTP-0147-0002, paras 54-55; DRC-OTP-2054-5199, at 5204; P-0014: DRC-OTP-0066-0002, para. 57; DRC-OTP-2054-0429, at 0473.

¹⁸⁸⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 285, fn. 753, referring to [Mr Ntaganda’s Closing Brief](#), para. 57.

To the extent Mr Ntaganda's arguments are developed in his closing brief, rather than within his appeal brief, the Appeals Chamber will not consider them as to do so would allow the page limit for the appeal to be circumvented. In addition, he does not explain how the issue he raises affects the Trial Chamber's findings on the meeting in Kampala in June 2002 or the reliability of the evidence on which the Trial Chamber based these findings. He thus does not identify any specific error.

902. In view of the foregoing, the Appeals Chamber is not persuaded that the evidence of the meeting in Kampala in June 2002 is contradictory and 'insufficient to sustain a finding', as argued by Mr Ntaganda.¹⁸⁹⁰

(b) Whether the evidence of the meeting in Kampala and the meeting of mid-February 2003 is evidence of a common plan

(i) Summary of submissions

903. Mr Ntaganda argues that the evidence of the meeting in Kampala 'is not evidence of a common plan involving Mr. Ntaganda, Mr. Kisémbó, and the military leaders of the UPC/FPLC to destroy the Lendu population'.¹⁸⁹¹ Referring to a number of documents, Mr Ntaganda submits that a contemporaneous record does not refer to a plan to destroy the Lendu but rather refers to 'all Iturians'.¹⁸⁹² Mr Ntaganda submits that there is no evidence that, during '[t]he only other meeting between the co-perpetrators identified in the Judgment', in mid-February 2003, the co-perpetrators discussed driving out the Lendu.¹⁸⁹³

904. The Prosecutor submits that this evidence was relied upon 'to find that there was an ethnic motivation underlying the formation of the UPC – a factor relevant to [the Trial Chamber's] overall finding regarding the common plan'.¹⁸⁹⁴ She submits

¹⁸⁹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 285.

¹⁸⁹¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 285 (emphasis in original omitted), referring to [Conviction Decision](#), paras 290-293.

¹⁸⁹² [Mr Ntaganda's Appeal Brief – Part II](#), para. 285, referring to DRC-OTP-0066-0031; DRC-OTP-0066-0039; DRC-OTP-0066-0047; DRC-OTP-0066-0048.

¹⁸⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 286.

¹⁸⁹⁴ [Prosecutor's Response to Appeal – Part II](#), para. 230.

that the relevant documents indicate that the RCD-K/ML was to be chased out of Ituri by force.¹⁸⁹⁵

(ii) *Determination by the Appeals Chamber*¹⁸⁹⁶

905. The Appeals Chamber reiterates that the Trial Chamber did not find that the objective of destroying the Lendu population was part of the common plan established in the Conviction Decision.¹⁸⁹⁷ The Appeals Chamber will therefore address the present argument of Mr Ntaganda in so far as it may relate to the alleged plan to *drive out* the Lendu.

906. The Trial Chamber relied on documentary evidence related to the meeting in Kampala, including the documents referred to by Mr Ntaganda, to find, *inter alia*, that the RCD-K/ML and the APC were accused of ‘siding with the Lendu combatants, notably by providing them weapons and support, “hunting” the Hema on their behalf, and favouring the Nande to the detriment of Iturians’.¹⁸⁹⁸ The Trial Chamber also noted that these documents ‘contrast the Iturians, or “native soldiers”, to the “negative forces”’ and indicate that the RCD-K/ML should be chased out of Ituri by force.¹⁸⁹⁹ Having considered the documents in question, the Appeals Chamber agrees that they do not specifically refer to a plan to drive out the Lendu. However, they refer to a criticism about the RCD-K/ML’s support for the Lendu combatants and the objective of driving out the RCD-K/ML.

907. The Appeals Chamber notes that the Trial Chamber’s finding that, at the meeting in Kampala, ‘it was stated that one of the objectives of the UPC/FPLC was to drive out the non-natives, identifying the first target as the Nande, and then, the Lendu’ was based on the evidence of P-0014.¹⁹⁰⁰ Consistent with that evidence, the Trial Chamber found that the objective of driving out the non-natives or *jajambus* was

¹⁸⁹⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 233.

¹⁸⁹⁶ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

¹⁸⁹⁷ *See* paragraphs 888-889 above.

¹⁸⁹⁸ [Conviction Decision](#), para. 291, *referring to* DRC-OTP-0066-0031, at 0033; DRC-OTP-0066-0047; DRC-OTP-0066-0048.

¹⁸⁹⁹ [Conviction Decision](#), paras 291-292, *referring to* DRC-OTP-0066-0031, at 0037; DRC-OTP-0066-0039, at 0046; DRC-OTP-0066-0048.

¹⁹⁰⁰ [Conviction Decision](#), paras 799, 290, 293, *referring to* P-0014: DRC-OTP-2054-0612, at 0648.

identified at the meeting in Kampala, and that the targets were defined as first the Nande and then the Lendu.¹⁹⁰¹ The Trial Chamber noted P-0014's testimony that the UPC's political agenda was to dislodge all non-natives of Ituri, 'whereas the reality was that they simply sought to eliminate or subjugate their enemies, and among others, the Lendus'.¹⁹⁰² The Appeals Chamber considers that the above-mentioned documents referring to the RCD-K/ML's support for the Lendu combatants and to the objective of chasing the RCD-K/ML out of Ituri are not inconsistent with this testimony.

908. While agreeing with Mr Ntaganda that the documentary evidence related to the meeting in Kampala, that was available to the Trial Chamber, does not refer to the objective of driving the Lendu out of the targeted localities, the Appeals Chamber, for the reasons set out above, finds that it was reasonable for the Trial Chamber, based on the evidence of P-0014, to find that this objective was discussed at the meeting.

909. Turning to Mr Ntaganda's general argument that the evidence of the meeting in Kampala is not evidence of a common plan involving him, Mr Kisémbó, and the *military* leaders of the UPC/FPLC,¹⁹⁰³ the Appeals Chamber notes that there is no suggestion in the Conviction Decision that this meeting was one in which the co-perpetrators agreed to a common plan. In the finding of the Trial Chamber, the common plan involved 'Mr Ntaganda and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisémbó',¹⁹⁰⁴ of whom only Thomas Lubanga is identified as a participant in the meeting in Kampala.¹⁹⁰⁵ The Trial Chamber found that meeting relevant to the issue of a common plan.¹⁹⁰⁶ Given the participation of Thomas Lubanga and the consistency of the objectives set out at the meeting with the ensuing events, described by the Trial Chamber in its analysis, the Appeals Chamber finds that it was reasonable for the Trial Chamber to rely on the evidence of the meeting for its finding on the common plan.

¹⁹⁰¹ [Conviction Decision](#), paras 799, 290, 293.

¹⁹⁰² [Conviction Decision](#), fn. 753, referring to P-0014: [T-137](#), p. 37.

¹⁹⁰³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 285.

¹⁹⁰⁴ [Conviction Decision](#), para. 808.

¹⁹⁰⁵ [Conviction Decision](#), para. 799.

¹⁹⁰⁶ [Conviction Decision](#), para. 808.

910. Mr Ntaganda raises another issue regarding the meeting in Kampala. He submits that ‘uncorroborated hearsay evidence of a “side discussion”, which allegedly took place “in the corridors” with “limited” anonymous participants, [cannot] demonstrate a common plan among co-perpetrators to use rape as a weapon of war’.¹⁹⁰⁷ Mr Ntaganda contends that there is no evidence that the co-perpetrators were aware that this discussion had taken place.¹⁹⁰⁸

911. Based on the testimony of P-0014, the Trial Chamber found that ‘[i]n the context of side discussions, reference was also made to using the rape of enemy women as a means of waging war’.¹⁹⁰⁹ The Appeals Chamber notes that, other than arguing that this is uncorroborated hearsay, Mr Ntaganda does not explain why it was an error for the Trial Chamber to rely on the evidence of P-0014 regarding what was said at a meeting [REDACTED]. Regarding the argument that this evidence does not demonstrate a common plan, the Appeals Chamber reiterates that the Trial Chamber does not appear to have considered the meeting in Kampala to be a meeting of the co-perpetrators agreeing to a common plan. It did, however, rely on the evidence of what was discussed at this meeting in reaching its determination as to the existence of a common plan.¹⁹¹⁰ The Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to do so. For the same reason, the argument of Mr Ntaganda regarding the co-perpetrators’ awareness of that meeting also fails.

912. In view of the foregoing, the Appeals Chamber finds that Mr Ntaganda has not demonstrated an error in the Trial Chamber’s reliance on the evidence of the meeting in Kampala in June 2002 to establish that the co-perpetrators agreed on a common plan ‘to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML’.¹⁹¹¹

913. Regarding Mr Ntaganda’s argument with respect to the meeting held in mid-February 2003,¹⁹¹² the Appeals Chamber notes that the Trial Chamber referred to this meeting when analysing the UPC/FPLC’s leaders’ planning of a military campaign

¹⁹⁰⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 285.

¹⁹⁰⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 285.

¹⁹⁰⁹ [Conviction Decision](#), paras 799, 293, referring to P-0014: [T-136](#), pp. 57, 59.

¹⁹¹⁰ [Conviction Decision](#), para. 799.

¹⁹¹¹ [Conviction Decision](#), para. 808.

¹⁹¹² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 286.

involving the commission of crimes against the Lendu community, which it relied on to support its finding on the common plan.¹⁹¹³ It found that ‘Lubanga gave the instruction to open the Main Road between Mongbwalu and Bunia, which meant to take control of localities [...] where the Lendu population who had fled from the area of Mongbwalu [were] concentrated’.¹⁹¹⁴ There is no suggestion that this was a meeting at which the common plan was agreed upon. Mr Ntaganda fails to identify an error in the Trial Chamber’s reliance on this meeting.

914. In so far as Mr Ntaganda argues, in relation to this meeting and the above-mentioned meeting in Kampala in June 2002, that the evidence of these meetings is not direct evidence of the existence of a common plan, the Appeals Chamber notes that it is not argued on appeal that direct evidence is required to establish a common plan. By merely arguing that the evidence of those two meetings is not direct evidence of a common plan, Mr Ntaganda does not identify any error in the Trial Chamber’s findings.

(c) Whether a common plan may be inferred from the subsequent concerted action of the co-perpetrators

(i) Summary of submissions

915. Mr Ntaganda submits that ‘the Prosecution did not produce evidence from witnesses present at meetings at which the common plan was agreed; minutes of such meetings, or a manifesto detailing the plan, or evidence of speeches, written orders, or correspondence showing what was agreed, when, and by whom’.¹⁹¹⁵ He contends that in the absence of direct evidence, the Trial Chamber was required to consider whether the existence of the common plan to destroy the Lendu population could be inferred from ‘the subsequent concerted action of the co-perpetrators’.¹⁹¹⁶ Mr Ntaganda argues that instead the Trial Chamber inferred the existence of the common plan from ‘any evidence of criminal behaviour [...] by any member of the UPC/FPLC including the

¹⁹¹³ [Conviction Decision](#), para. 796, referring to paras 549, 551-553.

¹⁹¹⁴ [Conviction Decision](#), para. 796, referring to para. 549.

¹⁹¹⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 284 (footnotes omitted); [T-270](#), p. 91, lines 3-7.

¹⁹¹⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 287-291; [T-270](#), p. 91, lines 7-20; [T-271](#), p. 74, line 12 to p. 75, line 9.

rank and file’,¹⁹¹⁷ which, he submits, is precluded by ‘[p]rinciples of individual criminal culpability’.¹⁹¹⁸

916. The Prosecutor argues that the Trial Chamber’s approach was correct and that the existence of a common plan may be inferred from the facts, including from events on the ground.¹⁹¹⁹ She contends that Mr Ntaganda has failed to identify any error in the Trial Chamber’s findings.¹⁹²⁰ The Prosecutor submits that the Trial Chamber relied on direct evidence of orders implementing the common plan, as well as ‘evidence of the founding motives of the UPC, of how UPC soldiers were trained and how they conducted themselves during the First and Second Operations, and how the UPC leadership reacted to this conduct’.¹⁹²¹

917. Victims Group 2 argue that ‘the Trial Chamber was not obliged to take into account subsequent concerted action by the co-perpetrators’.¹⁹²² In response, Mr Ntaganda contends that this submission is wrong as, in the absence of direct evidence of the common plan, ‘it is the concerted action of the co-perpetrators that can give rise to an inference that these individuals were acting pursuant to a plan to which they had all agreed’.¹⁹²³

*(ii) Determination by the Appeals Chamber*¹⁹²⁴

918. The Appeals Chamber notes that, contrary to Mr Ntaganda’s submissions, there is no requirement for the trial chamber to establish the existence of a common plan on the basis of ‘the subsequent concerted action of the co-perpetrators’.¹⁹²⁵ The Appeals Chamber agrees that such subsequent concerted action may be a relevant consideration in determining whether the co-perpetrators acted with a common

¹⁹¹⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 288 (emphasis in original omitted); [T-270](#), p. 91, line 24 to p. 92, line 8.

¹⁹¹⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 291.

¹⁹¹⁹ [Prosecutor’s Response to Appeal – Part II](#), paras 221-223.

¹⁹²⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 224.

¹⁹²¹ [Prosecutor’s Response to Appeal – Part II](#), paras 225-226; [T-271](#), p. 52, lines 12-14; p. 53, lines 6-15.

¹⁹²² [Observations of Victims Group 2 on Appeal – Part II](#), para. 89; [T-271](#), p. 71, lines 17-19.

¹⁹²³ [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), paras 84-85.

¹⁹²⁴ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

¹⁹²⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 287-291; [T-270](#), p. 91, lines 7-20; [T-271](#), p. 74, line 12 to p. 75, line 9.

purpose.¹⁹²⁶ Indeed, the fact that co-perpetrators act in unison will often be a strong indicator that, by so acting, they may be implementing a common plan to which they agreed. However, even in the absence of direct evidence of the agreement between the co-perpetrators, subsequent concerted action is not the only basis on which the trial chamber may infer the existence of a common plan. Therefore, there is no legal impediment to inferring the common plan from the wider circumstances, including the events on the ground.¹⁹²⁷

919. Furthermore, the Appeals Chamber notes that when determining whether there was a common plan to drive out the Lendu from the targeted localities, the Trial Chamber did not only rely on ‘evidence of criminal behaviour [...] by any member of the UPC/FPLC’,¹⁹²⁸ but, as will be discussed later in this judgment, it relied on evidence of meetings, specific orders and instructions to the troops,¹⁹²⁹ that are indicative of the subsequent action of the co-perpetrators.

920. Regarding Mr Ntaganda’s argument that the Trial Chamber erroneously relied on ‘any evidence of criminal behaviour’, also by individual soldiers,¹⁹³⁰ the Appeals Chamber recalls that the form of criminal responsibility considered by the Trial Chamber with respect to most of the crimes in the present case involved a common plan ‘executed through other persons, who function as a tool of all of the co-

¹⁹²⁶ See [Lubanga Confirmation Decision](#), para. 345. See also, in a different legal framework and under the doctrine of joint criminal enterprise, which the Appeals Chamber considers, in the present context, to be sufficiently similar to serve as guidance, [Tadić Appeal Judgment](#), para. 227 (‘The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.’); [Vasiljević Appeal Judgment](#), para. 109; [Krajišnik Appeal Judgment](#), para. 163, fn. 418.

¹⁹²⁷ See [Dorđević Appeal Judgment](#), para. 138 (‘the Appeals Chamber emphasises that in order to conclude on the existence of a common purpose, it is *not required* to establish that a plurality of persons acted in unison. What is required to be established is “that a plurality of persons shared the common criminal purpose”. The existence of such a common criminal purpose, particularly one that has not been previously arranged or formulated but materialised extemporaneously, *may be inferred* “from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise”. In other words, it is not necessary to establish that joint criminal enterprise members acted in unison in order to reach a conclusion on the existence of the common purpose’, footnotes omitted, emphasis in original); [Šainović et al Appeal Judgment](#), para. 611 (‘Such a common plan, design, or purpose may “be inferred from the facts”, including events on the ground’; footnote omitted); [Blagojević and Jokić Trial Judgment](#), para. 699 (‘The existence of an agreement or understanding for the common plan, design or purpose need not be express, but may be inferred from *all the circumstances*’; emphasis added).

¹⁹²⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 288 (emphasis in original omitted).

¹⁹²⁹ See paragraphs 930, 934-939 below.

¹⁹³⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 288, 291.

perpetrators'.¹⁹³¹ In such circumstances, the conduct of those other persons may be a relevant consideration in determining whether the alleged common plan existed. It is not an error for a trial chamber to rely on evidence of such conduct to infer the existence of a common plan.

921. Regarding the Trial Chamber's reliance on the evidence of direct perpetration of crimes, Mr Ntaganda argues that '[w]hether crimes were committed, or whether orders to illegally target were given by individual commanders, is not necessarily probative of the existence of a common plan'.¹⁹³² However, the ICTY ruling, referred to by Mr Ntaganda in support of his argument, concerns a case where the trial chamber found that 'another reasonable inference' was available on the evidence, namely that certain crimes were not an intended part of the common plan.¹⁹³³ The ICTY trial chamber did not exclude evidence of the commission of crimes as irrelevant. Rather, it considered that evidence to be insufficient in the light of an alternative reasonable inference available on the evidence in that case.

922. In view of the foregoing, the Appeals Chamber finds that the Trial Chamber was not required to infer the existence of a common plan from the evidence of a subsequent concerted action of the co-perpetrators. Nor was it an error for it to rely on the evidence of commission of crimes by individual soldiers.

(d) Whether Salumu Mulenda was one of the co-perpetrators

(i) Summary of submissions

923. Mr Ntaganda argues that the Trial Chamber failed to specify whether or not it considered Salumu Mulenda to be a co-perpetrator and, as a result, the relevance of the findings concerning Salumu Mulenda is 'unclear and insufficiently reasoned'.¹⁹³⁴

924. The Prosecutor responds that the Trial Chamber did not err, as Salumu Mulenda was a commander in the UPC's hierarchy, who acted pursuant to orders of members

¹⁹³¹ [Conviction Decision](#), para. 772, referring to [Ongwen Confirmation Decision](#), para. 38.

¹⁹³² [Mr Ntaganda's Appeal Brief – Part II](#), para. 289, referring to [Karadžić Trial Judgment](#), para. 3466.

¹⁹³³ [Karadžić Trial Judgment](#), para. 3466.

¹⁹³⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 292.

of the common plan, and that ‘[h]is conduct was thus attributable to the co-perpetrators’.¹⁹³⁵

(ii) *Determination by the Appeals Chamber*¹⁹³⁶

925. The Appeals Chamber notes that the Trial Chamber took note of Salumu Mulenda’s conduct in its legal findings on the common plan. In particular, the Trial Chamber considered Salumu Mulenda’s orders to UPC/FPLC troops and briefings that he gave to the troops.¹⁹³⁷ The Trial Chamber did not specifically indicate that Salumu Mulenda was among the ‘other military leaders of the UPC/FPLC’ who agreed in the common plan.¹⁹³⁸ The Appeals Chamber, however, reiterates that the form of criminal responsibility considered by the Trial Chamber involved a common plan ‘executed through other persons, who function as a tool of all of the co-perpetrators’.¹⁹³⁹ Therefore and given the Trial Chamber’s extensive analysis of the ways in which Salumu Mulenda contributed to the charged criminal activities of the UPC/FPLC,¹⁹⁴⁰ it is clear that the Trial Chamber considered his conduct to be part of the execution of the common plan.

(e) **Relevance of the UPC’s goal to establish peace and protect civilians**

(i) *Summary of submissions*

926. Mr Ntaganda submits that the Trial Chamber failed to ‘consider whether conclusions other than a plan for the destruction of the Lendu community were reasonably available’.¹⁹⁴¹ He also argues that the evidence cited in support of the common plan in the Conviction Decision was insufficient.¹⁹⁴² Mr Ntaganda submits that the Trial Chamber accepted, and partially ignored,¹⁹⁴³ evidence of pacification

¹⁹³⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 228.

¹⁹³⁶ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (see [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

¹⁹³⁷ [Conviction Decision](#), paras 802-803.

¹⁹³⁸ [Conviction Decision](#), para. 808.

¹⁹³⁹ [Conviction Decision](#), para. 772, referring to [Ongwen Confirmation Decision](#), para. 38.

¹⁹⁴⁰ [Conviction Decision](#), paras 802-803. See also, for example, paras 475, 483, 487-488, 493, 500, 558.

¹⁹⁴¹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 288, 295. See also [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 86.

¹⁹⁴² [Mr Ntaganda’s Appeal Brief – Part II](#), paras 290-291.

¹⁹⁴³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 300.

efforts, speeches and other acts, which in his view showed that the UPC's goal was to establish peace and protect civilians, and that it failed to explain why, in light of this contrary evidence, the existence of a common plan for the destruction of the Lendu was the only reasonable inference available.¹⁹⁴⁴

927. The Prosecutor submits that the Trial Chamber correctly found that the UPC's desire for peace and protection of civilians 'was in parallel to its goal to actively chase away the RCD-K/ML and those perceived as non-Iturians', and that Mr Ntaganda's alternative explanations 'were implausible on the evidence'.¹⁹⁴⁵ The Prosecutor argues that the Trial Chamber's conclusion on the existence of the common plan 'is further supported by its findings concerning the context and manner in which the UPC operated, and in which violent acts were perpetrated against the Lendu'.¹⁹⁴⁶

(ii) *Relevant part of the Conviction Decision*

928. When discussing whether the contextual elements of crimes against humanity were established, the Trial Chamber considered documents produced by the UPC/FPLC, which promoted peace or denounced the crimes committed against the local population of Ituri, as well as evidence of the stated ambition of the UPC/FPLC to 'defend the population' as a whole.¹⁹⁴⁷ Despite this evidence, the Trial Chamber was satisfied that the relevant contextual element of crimes against humanity was established, that is 'the course of conduct took place pursuant to a policy of the UPC/FPLC to attack and chase away the Lendu civilians as well as those who were perceived as non-Iturians'.¹⁹⁴⁸ In its discussion of the common plan, relevant to the present ground of appeal, the Trial Chamber referred to its conclusions on the UPC/FPLC's policy.¹⁹⁴⁹

¹⁹⁴⁴ [Mr Ntaganda's Appeal Brief – Part II](#), paras 295-300; [T-270](#), p. 93, lines 8-12; [T-272](#), p. 77, lines 2-19.

¹⁹⁴⁵ [Prosecutor's Response to Appeal – Part II](#), para. 234.

¹⁹⁴⁶ [Prosecutor's Response to Appeal – Part II](#), para. 235.

¹⁹⁴⁷ [Conviction Decision](#), paras 686-687.

¹⁹⁴⁸ [Conviction Decision](#), para. 689.

¹⁹⁴⁹ [Conviction Decision](#), para. 801, referring to section V.A.1.a)(3) of [Conviction Decision](#).

*(iii) Determination by the Appeals Chamber*¹⁹⁵⁰

929. The Appeals Chamber recalls its findings under the fourth ground of Mr Ntaganda's appeal regarding a challenge, similar to the present one, to the Trial Chamber's alleged failure to consider the evidence referred to by Mr Ntaganda in the above-mentioned discussion of the UPC/FPLC's policy.¹⁹⁵¹ Consistent with its findings under the fourth ground of appeal and given that the evidence invoked under the present ground of appeal is the same or similar, the Appeals Chamber is not persuaded that the Trial Chamber failed to properly consider the evidence in question.

930. The Appeals Chamber further notes that the Trial Chamber's finding on the common plan is based on a number of considerations: the gathering on an ethnic basis of future members of UPC/FPLC in 2000;¹⁹⁵² the setting up of 'a well-functioning armed force' with a disciplinary system ensuring the execution of orders within its ranks;¹⁹⁵³ the commission of crimes 'in a systematic way' against the civilian population, predominantly Lendu;¹⁹⁵⁴ the fact that '[t]he killing of a Lendu, and the looting of Lendu property, were not considered punishable offences by UPC/FPLC soldiers, and rapes went unpunished';¹⁹⁵⁵ the meeting of June 2002 in Kampala, at which the objective to drive out the Lendu was stated;¹⁹⁵⁶ teaching recruits that the Lendu and the Ngiti were the enemy;¹⁹⁵⁷ the objective of the UPC/FPLC to chase away the RCD-K/ML, but also the Lendu civilians and those perceived to be non-Iturians;¹⁹⁵⁸ and orders to kill the Lendu.¹⁹⁵⁹ In view of these considerations, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that

¹⁹⁵⁰ As set out in paragraph 879 above, Judge Eboe-Osui entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osui). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

¹⁹⁵¹ Regarding the creation of the CTPR ([Mr Ntaganda's Appeal Brief – Part II](#), para. 296), the Arua peace negotiations ([Mr Ntaganda's Appeal Brief – Part II](#), para. 297), Thomas Lubanga explaining in Bunia the goal of restoring peace, the plan to give weapons to Lendu combatants ([Mr Ntaganda's Appeal Brief – Part II](#), para. 298), efforts to comprise FPLC units of soldiers from different ethnic backgrounds, the ideology to protect the civilian population, the speech by Chief Kahwa at Mandro Camp, the speeches at Rwampara ([Mr Ntaganda's Appeal Brief – Part II](#), para. 299), *see* paragraphs 363, 388-394 above.

¹⁹⁵² [Conviction Decision](#), para. 782, referring to para. 310.

¹⁹⁵³ [Conviction Decision](#), para. 785, referring to paras 705-709, 332.

¹⁹⁵⁴ [Conviction Decision](#), para. 797.

¹⁹⁵⁵ [Conviction Decision](#), para. 800, referring to para. 332.

¹⁹⁵⁶ [Conviction Decision](#), para. 799, referring to paras 290, 293.

¹⁹⁵⁷ [Conviction Decision](#), para. 800, referring to para. 373.

¹⁹⁵⁸ [Conviction Decision](#), para. 801, referring to section V.A.1.a)(3).

¹⁹⁵⁹ [Conviction Decision](#), para. 790, referring to para. 416; para. 803, referring to paras 558, 560.

the UPC/FPLC military leaders acted with a common plan to drive out the Lendu from the targeted localities. It was also reasonable for the Trial Chamber not to specifically discuss and discount another inference, alternative to the common plan, despite the evidence to which Mr Ntaganda refers under this ground of appeal.

(f) Whether the co-perpetrators agreed to the commission of specific crimes

(i) Summary of submissions

931. Mr Ntaganda argues that the Trial Chamber ‘felt entitled to hang any crime’ under ‘the broadest of umbrellas’ which it created.¹⁹⁶⁰ He submits that ‘there is no direct evidence that the co-perpetrators came together to agree’ that all those crimes should be committed.¹⁹⁶¹ Mr Ntaganda contends that the Trial Chamber’s findings are based on inference with no explanation ‘why the co-perpetrators’ intent for each of these crimes was the only reasonable conclusion available’ and that the Trial Chamber’s reasoning ‘falls far below that required by article 74(5)’ of the Statute.¹⁹⁶²

932. The Prosecutor submits that Mr Ntaganda’s argument fails to appreciate that the Trial Chamber’s findings were based on a detailed analysis of the co-perpetrators’ plan for a military campaign and an assessment that the co-perpetrators agreed that the common plan should include each of the types of crimes charged in counts 1-5, 7-8, 10-13 and 17-18.¹⁹⁶³

(ii) Relevant part of the Conviction Decision

933. The Trial Chamber found that

the co-perpetrators, by virtue of this agreement [the common plan] to drive out all the Lendu from the localities that they attacked, meant beyond reasonable doubt: (i) for civilians to be attacked and killed (Counts 1, 2 and 3); (ii) for their property to be appropriated and destroyed (Counts 11 and 18); (iii) for civilians to be raped and subjected to sexual slavery (Counts 4, 5, 7 and 8); (iv) for civilians to be forcibly displaced (Counts 12 and 13); and (v) for protected objects to be attacked (Count 17). Moreover, the Chamber finds beyond

¹⁹⁶⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 302-303.

¹⁹⁶¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 304.

¹⁹⁶² [Mr Ntaganda’s Appeal Brief – Part II](#), paras 304-305. *See also* [Mr Ntaganda’s Response to Observations of Victims on Appeal – Part II](#), para. 88.

¹⁹⁶³ [Prosecutor’s Response to Appeal – Part II](#), para. 236.

reasonable doubt that the co-perpetrators meant for the abovementioned conduct to be targeted towards the Lendu civilian population as such (Count 10).¹⁹⁶⁴

(iii) *Determination by the Appeals Chamber*¹⁹⁶⁵

934. In its review of findings relevant to the common plan, the Trial Chamber specifically referred to various considerations relevant to the crimes charged in the present case. Regarding the inclusion in the common plan of the crimes of murder and attacks against civilians, the Trial Chamber referred to its findings that: the recruits were given orders to kill the Lendu;¹⁹⁶⁶ ‘soldiers who participated in the Second Operation, notably the killings in Kobu, were not punished for their conduct’;¹⁹⁶⁷ the killing of a Lendu was not considered punishable conduct;¹⁹⁶⁸ ‘[d]uring both the First and Second Operation, UPC/FPLC troops adapted their behaviour depending on the ethnicity of the individuals they were interacting with; Lendu were to be killed, while members of other ethnic groups could be released and stay alive’;¹⁹⁶⁹ ‘UPC/FPLC military leadership ordered troops to attack using the expression “*kupiga na kuchaji*”, which was understood to mean attacking the Lendu civilians [...]’.¹⁹⁷⁰

935. With respect to the inclusion in the common plan of the objective of appropriation and destruction of property, the Trial Chamber referred to the findings that: the looting of Lendu property was not considered a punishable offence by UPC/FPLC soldiers;¹⁹⁷¹ the expression ‘*kupiga na kuchaji*’ was understood to also mean looting the property of the Lendu civilians;¹⁹⁷² and ‘looted items which were considered of high quality or value were usually given to the commanders under threat of punishment’.¹⁹⁷³

¹⁹⁶⁴ [Conviction Decision](#), para. 810.

¹⁹⁶⁵ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (see [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

¹⁹⁶⁶ [Conviction Decision](#), para. 790, referring to para. 416.

¹⁹⁶⁷ [Conviction Decision](#), para. 797, referring to para. 639. See also para. 800, referring to para. 332.

¹⁹⁶⁸ [Conviction Decision](#), para. 800, referring to para. 332.

¹⁹⁶⁹ [Conviction Decision](#), para. 804, referring to paras 528, 546, 625. See also para. 805.

¹⁹⁷⁰ [Conviction Decision](#), para. 801, referring to para. 415. See also para. 802, referring to para. 493; para. 803, referring to para. 561; para. 807.

¹⁹⁷¹ [Conviction Decision](#), para. 800, referring to para. 332.

¹⁹⁷² [Conviction Decision](#), para. 801, referring to para. 415. See also para. 807.

¹⁹⁷³ [Conviction Decision](#), para. 801, referring to para. 515.

936. The Trial Chamber relied on the following findings showing the inclusion in the common plan of the objective of raping civilians and/or subjecting them to sexual slavery: that rapes went unpunished;¹⁹⁷⁴ that acts of sexual violence were a tool to achieve the UPC/FPLC's objectives;¹⁹⁷⁵ that in the context of side discussions in June 2002 in Kampala, 'reference was also made to using the rape of enemy women as a means of waging war';¹⁹⁷⁶ that a particularly violent method was used for rapes and that UPC/FPLC soldiers forced detained victims to sexually assault each other.¹⁹⁷⁷

937. Regarding the objective of forcibly displacing civilians, the Trial Chamber referred to its findings that during the meeting in Kampala in 2002 'it was stated that one of the objectives of the UPC/FPLC was to drive out the non-natives, identifying the first target as the Nande, and then, the Lendu';¹⁹⁷⁸ that the UPC/FPLC aimed to chase away Lendu civilians as well as those who were perceived as non-Iturians;¹⁹⁷⁹ that, '[t]o achieve this, UPC/FPLC military leadership ordered troops to attack' Lendu civilians and loot their property;¹⁹⁸⁰ that instructions were given to the troops to drive out all the Lendu and to prevent the return of the Lendu inhabitants of Buli by torching the village.¹⁹⁸¹

938. Finally, the findings listed above are relevant to the Trial Chamber's finding that, by virtue of their agreement, 'the co-perpetrators meant for the abovementioned conduct to be targeted towards the Lendu population as such'.¹⁹⁸²

939. The Appeals Chamber considers these findings to be sufficiently detailed and specific to the crimes in question. It notes that, contrary to Mr Ntaganda's argument, the findings relate to 'more than just the commission of crimes'¹⁹⁸³ and include meetings, specific orders and instructions to the troops. The Appeals Chamber therefore considers that it was reasonable for the Trial Chamber to infer from the findings listed above that the co-perpetrators meant for these crimes to be committed

¹⁹⁷⁴ [Conviction Decision](#), para. 800, referring to para. 332.

¹⁹⁷⁵ [Conviction Decision](#), para. 805.

¹⁹⁷⁶ [Conviction Decision](#), para. 799, referring to para. 293. See also para. 805.

¹⁹⁷⁷ [Conviction Decision](#), para. 806, referring to paras 545, 623, 943, 944.

¹⁹⁷⁸ [Conviction Decision](#), para. 799, referring to paras 290, 293.

¹⁹⁷⁹ [Conviction Decision](#), para. 801, referring to section V.A.1.a)(3).

¹⁹⁸⁰ [Conviction Decision](#), para. 801, referring to para. 415.

¹⁹⁸¹ [Conviction Decision](#), para. 803, referring to paras 560, 609.

¹⁹⁸² [Conviction Decision](#), para. 810.

¹⁹⁸³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 305.

by virtue of the common plan. It was not an error for the Trial Chamber to base this conclusion on inference. In view of the foregoing considerations, the Appeals Chamber finds that Mr Ntaganda has not demonstrated that the Trial Chamber's reasoning fell 'far below that required by article 74(5)' of the Statute.¹⁹⁸⁴ Notably, Mr Ntaganda does not set out any alternative conclusion that, in his view, the Trial Chamber should have considered, such that its failure to consider that conclusion would amount to an error.

(g) Foreseeability of commission of crimes against children

(i) Summary of submissions

940. Mr Ntaganda submits that the Trial Chamber's reasoning in support of its finding that the co-perpetrators foresaw that crimes against children under the age of 15 were a virtual certain consequence of effecting the common plan is manifestly insufficient.¹⁹⁸⁵ He argues that '[t]he sole reason for extending liability to these additional crimes was "the circumstances prevailing at the time"'.¹⁹⁸⁶

941. The Prosecutor argues that the Trial Chamber's conclusion that the co-perpetrators foresaw with virtual certainty that the crimes in question would occur was used 'as shorthand for its specific findings throughout the Judgment'.¹⁹⁸⁷ The Prosecutor also argues that the Trial Chamber's findings relevant to Mr Ntaganda's *mens rea* for crimes against children under the age of 15 are based on 'the same factors that Ntaganda identifies from ICTY and ICTR case law as relevant to a finding that co-perpetrators could foresee crimes occurring as a virtually certain consequence of implementing a common plan'.¹⁹⁸⁸ She submits that Mr Ntaganda 'erroneously claims the Chamber did not consider' these factors.¹⁹⁸⁹

942. Victims Group 1 submit that the Trial Chamber duly considered the factors referred to by Mr Ntaganda, for instance the relationship and communications among

¹⁹⁸⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 305.

¹⁹⁸⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 306-309.

¹⁹⁸⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 306.

¹⁹⁸⁷ [Prosecutor's Response to Appeal – Part II](#), para. 237, referring to [Conviction Decision](#), paras 787-792, 811.

¹⁹⁸⁸ [Prosecutor's Response to Appeal – Part II](#), para. 238.

¹⁹⁸⁹ [Prosecutor's Response to Appeal – Part II](#), para. 238, referring to [Conviction Decision](#), paras 1190-1198.

the co-perpetrators, their level of knowledge of and involvement in the crimes, the accused person's movements, his knowledge of past actions of the perpetrators, as well as the scale, gravity and frequency of the crimes.¹⁹⁹⁰ In response, Mr Ntaganda argues that '[a] properly reasoned Judgment does not consist of a series of factual findings, and then a series of legal conclusions, with no link between the two'.¹⁹⁹¹ He suggests that Victims Group 1 engaged in retroactive speculation as to which findings the Trial Chamber had in mind, in the absence of reasoning and analysis to transform its factual findings into legal conclusions.¹⁹⁹²

(ii) *Relevant part of the Conviction Decision*

943. The Trial Chamber found that

as of at least the beginning of August 2002, the co-perpetrators were virtually certain that the implementation of their plan to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML would lead to: (i) the recruitment and active use in hostilities of children under the age of 15 within the UPC/FPLC (Counts 14, 15 and 16); and (ii) the rape and sexual slavery of these children (Counts 6 and 9). Indeed, the Chamber finds that, in the circumstances prevailing in Ituri at the time, the occurrence of these crimes was not simply a risk that they accepted, but crimes they foresaw with virtual certainty.¹⁹⁹³

(iii) *Determination by the Appeals Chamber*¹⁹⁹⁴

944. The Appeals Chamber notes that, in its analysis of findings relevant to the existence of a common plan, the Trial Chamber noted that: at a meeting in June 2002 in Kampala, political leaders of the emerging UPC/FPLC decided that they should mobilise children to join the UPC and 'large scale recruitment efforts followed';¹⁹⁹⁵ political and military leaders of the UPC/FPLC, including Mr Ntaganda, had children under the age of 15 as part of their personal escorts;¹⁹⁹⁶ the military leaders employed methods to ensure that their commands would be obeyed by the recruits, including the

¹⁹⁹⁰ [Observations of Victims Group 1 on Appeal – Part II](#), paras 85-86.

¹⁹⁹¹ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 91.

¹⁹⁹² [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 91.

¹⁹⁹³ [Conviction Decision](#), para. 811.

¹⁹⁹⁴ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

¹⁹⁹⁵ [Conviction Decision](#), para. 787, referring to para. 347 and section IV.A.3.a).

¹⁹⁹⁶ [Conviction Decision](#), para. 788, referring to sections IV.A.3.c)(1)(b) and IV.A.3.c)(2).

youngest ones;¹⁹⁹⁷ female members of the UPC/FPLC, including those under 15 years of age, were regularly raped or subjected to sexual violence, which was left largely unpunished;¹⁹⁹⁸ and the military leaders ‘did not create the necessary conditions to ensure a safe environment for the female members of the UPC/FPLC, in which they would not be sexually abused’.¹⁹⁹⁹

945. The Appeals Chamber considers that, although the Trial Chamber did not expressly set out its understanding of ‘virtual certainty’ in the present context, it is clear that its conclusion is informed by the above-listed findings, which appear in the preceding section of the Conviction Decision.²⁰⁰⁰ These findings show, *inter alia*, the co-perpetrators’ knowledge of and participation in the crimes, the frequency of the crimes in issue and the co-perpetrators’ failure to prevent and punish those crimes. Mr Ntaganda himself lists these factors as relevant to the determination of whether the occurrence of crimes was foreseeable.²⁰⁰¹ Therefore, contrary to Mr Ntaganda’s averment, the Trial Chamber’s reasoning is not limited to ‘the circumstances prevailing in Ituri at the time’, but is also based on other relevant factors. Mr Ntaganda has failed to demonstrate that the Trial Chamber erred by failing to provide adequate reasons.²⁰⁰²

(h) Other arguments regarding the existence of a common plan

946. Mr Ntaganda refers to his arguments regarding the use of the term ‘*kupiga na kuchaji*’ and submits that the Trial Chamber’s ‘misrepresentation of the evidence of the meaning of this phrase [...] undermines its inference of a common plan on the basis of its use by Mr. Ntaganda and Kisembo’.²⁰⁰³ The Appeals Chamber recalls its finding under the fifth ground of appeal that the Trial Chamber’s conclusion that the phrase *kupiga na kuchaji* ‘was an expression commonly used in UPC/FPLC commanders’ orders to soldiers, and that it was understood by the soldiers to mean

¹⁹⁹⁷ [Conviction Decision](#), para. 790, referring to paras 322, 374-377, 409.

¹⁹⁹⁸ [Conviction Decision](#), para. 792, referring to paras 332, 407, 411-412.

¹⁹⁹⁹ [Conviction Decision](#), para. 792.

²⁰⁰⁰ [Conviction Decision](#), para. 811.

²⁰⁰¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 308.

²⁰⁰² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 306.

²⁰⁰³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 293, referring to paras 76-90.

attacking all the Lendu, including civilians, and to loot their property’ was reasonable.²⁰⁰⁴

947. Referring to the Trial Chamber’s and Prosecution witnesses’ use of the term ‘Lendu’ rather than ‘Lendu combatants’, Mr Ntaganda argues that it is ‘unrealistic’ ‘[t]o hang criminal liability on the non-addition of the word “combatants” in a battlefield context’.²⁰⁰⁵

948. The Appeals Chamber notes that Mr Ntaganda only lists instances of various witnesses’ and the Trial Chamber’s allegedly incorrect use of the term ‘Lendu’ in contexts in which they could only have meant Lendu combatants and appears to argue that the Trial Chamber should not have hung criminal liability on that. However, he does not identify any of the Trial Chamber’s conclusions regarding the common plan or, more generally, his criminal responsibility, which are based on these instances of the allegedly incorrect use of the term ‘Lendu’. Nor does he explain how the findings on his criminal responsibility are affected by this allegedly erroneous use of the term. The Appeals Chamber dismisses the present argument for Mr Ntaganda’s failure to identify an error.²⁰⁰⁶

3. *Responsibility for crimes perpetrated by Hema civilians*

(a) **Summary of submissions**

949. Mr Ntaganda argues that the Trial Chamber erred in convicting him for the actions of Hema civilians in Mongbwalu, as the evidence was insufficient to demonstrate their almost automatic compliance with orders from the co-perpetrators or an inability to exercise free will.²⁰⁰⁷ He submits that the Trial Chamber failed to engage in an analysis of whether near automatic compliance arose through the training of the Hema civilians, payment for committing crimes or punishments for the non-execution of crimes.²⁰⁰⁸ Mr Ntaganda contends that there is no evidence of the

²⁰⁰⁴ See paragraph 472 above.

²⁰⁰⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 294.

²⁰⁰⁶ See also paragraph 998 below.

²⁰⁰⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 310-313; [T-270](#), p. 94, lines 5-7.

²⁰⁰⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 314.

co-perpetrators ‘using the apparatus of power to steer Hema civilians to the point that they had no choice but to commit crimes’.²⁰⁰⁹

950. The Prosecutor submits that the ‘[Trial] Chamber clearly distinguished between the co-perpetrators’ control of the Hema civilians and their control over the UPC soldiers’.²⁰¹⁰ She argues that the Trial Chamber carried out a normative assessment of the relationship between the Hema civilians and the UPC/FPLC leadership.²⁰¹¹ The Prosecutor submits that the Trial Chamber’s conclusions that there were generally coercive circumstances at the time, which impacted the Hema civilians, and that those civilians followed orders from the UPC leadership, were based on the evidence.²⁰¹²

(b) Relevant part of the Conviction Decision

951. In the relevant part of the Conviction Decision, the Trial Chamber found that

with regard to [some of the] killings and looting in Mongbwalu, the Hema civilians functioned as a tool in the hands of the co-perpetrators, controlled through soldiers of the UPC/FPLC, an organisation which was itself a tool in the hands of the co-perpetrators, as established above. In this specific instance, the co-perpetrators were able to realise the material elements of certain crimes, in pursuance of the common plan, through these Hema civilians, whose will had become irrelevant. In these circumstances, the Chamber concludes that the conduct of the Hema civilians in the execution of the crimes must be attributed to the co-perpetrators as if it were their own.²⁰¹³

(c) Determination by the Appeals Chamber²⁰¹⁴

952. Mr Ntaganda submits that the Hema civilians did not form part of the UPC/FPLC and that this was thus not a situation where ‘the existence of an organisation [was] used to subjugate the will of the direct perpetrators’.²⁰¹⁵ Without challenging the criteria applied by the Trial Chamber, he argues that the finding ‘that the co-perpetrators controlled the actions of these civilians to such a degree that their

²⁰⁰⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 316.

²⁰¹⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 240.

²⁰¹¹ [Prosecutor’s Response to Appeal – Part II](#), para. 241.

²⁰¹² [Prosecutor’s Response to Appeal – Part II](#), para. 242; [T-271](#), p. 53, lines 16-22.

²⁰¹³ [Conviction Decision](#), para. 824.

²⁰¹⁴ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see* [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

²⁰¹⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 316 (emphasis in original omitted), *referring to* [Conviction Decision](#), para. 778; *see also* [Mr Ntaganda’s Appeal Brief – Part II](#), para. 314.

will become “irrelevant”²⁰¹⁶ is weak due to insufficiency of evidence and lack of reasoning.²⁰¹⁷ In particular, Mr Ntaganda submits that one of the witnesses on whose evidence the Trial Chamber relied, P-0963, in fact stated that the Hema civilians who committed pillage in Mongbwalu ‘took advantage of the situation’; and that another witness, P-0898, testified that despite the UPC/FPLC’s instruction to stop, the civilians continued looting and killing.²⁰¹⁸

953. The principal findings in issue are that ‘the Hema civilians functioned as a tool in the hands of the co-perpetrators’ and that their ‘will had become irrelevant’.²⁰¹⁹ These conclusions are based on the Trial Chamber’s finding that ‘the Hema civilians engaged in the relevant acts in the context of the general coercive circumstances resulting from the presence of armed UPC/FPLC soldiers, who were themselves committing crimes in Mongbwalu at the same time’, as well as on the finding that ‘the conduct of these civilians followed orders of the UPC/FPLC leadership’.²⁰²⁰

954. The evidence upon which the Trial Chamber relied shows that the Hema civilians committing criminal acts in Mongbwalu followed orders of the UPC/FPLC leadership.²⁰²¹ P-0768 testified that the civilians received orders from Mr Ntaganda.²⁰²² P-0898 and P-0017 stated that the civilians followed orders of Roy Gangi, who, according to P-0898, reported to Mr Ntaganda.²⁰²³ As Mr Ntaganda rightly points out,²⁰²⁴ these witnesses did not specifically discuss in their evidence whether the will of the Hema civilians became irrelevant. However, this consistent evidence of orders issued to the civilians by either Mr Ntaganda or his subordinates supports the Trial Chamber’s conclusion that those civilians ‘functioned as a tool in the hands of the co-perpetrators’ and that their ‘will had become irrelevant’.²⁰²⁵

²⁰¹⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 311.

²⁰¹⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 312-313.

²⁰¹⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 312.

²⁰¹⁹ [Conviction Decision](#), para. 824.

²⁰²⁰ [Conviction Decision](#), para. 822.

²⁰²¹ [Conviction Decision](#), para. 822.

²⁰²² [Conviction Decision](#), para. 512, fn. 1513; P-0768: [T-33](#), p. 42.

²⁰²³ [Conviction Decision](#), para. 512, fn. 1513; P-0898: [T-154](#), pp. 13-14, 34-35; P-0017: [T-59](#), pp. 11-12.

²⁰²⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 312.

²⁰²⁵ [Conviction Decision](#), para. 824.

955. Mr Ntaganda cites the evidence of P-0963, which, in his view, contradicts the Trial Chamber's findings.²⁰²⁶ In the quoted passage of the testimony in question, P-0963 stated that the Hema civilians 'took advantage of the situation'.²⁰²⁷ However, in another part of the same passage, the witness clarified that '[s]ometimes [the Hema civilians] did more looting than the soldiers did'.²⁰²⁸ By this clarification the witness appears to have explained what 'taking advantage of the situation' meant. Therefore, contrary to Mr Ntaganda's apparent suggestion, by referring to taking advantage of the situation, the witness did not necessarily mean that the Hema civilians acted on their own volition. This is further confirmed by the witness's testimony that the civilians acted upon orders from 'company commanders, battalion commanders'.²⁰²⁹ The Appeals Chamber therefore finds that the evidence of this witness does not contradict the Trial Chamber's finding that the Hema civilians followed orders of the UPC/FPLC leadership.

956. Regarding the evidence of P-0898, to which Mr Ntaganda refers,²⁰³⁰ the Appeals Chamber notes that, contrary to Mr Ntaganda's averment, P-0898 did not state that the Hema civilians continued looting and killing despite an order to stop.²⁰³¹ The witness in fact stated that he did not know whether the civilians stopped killing and looting after they had received the order to stop.²⁰³² Therefore, the Appeals Chamber does not consider this evidence to contradict the Trial Chamber's conclusion that the Hema civilians functioned as a tool in the hands of the co-perpetrators and that their will became irrelevant.²⁰³³

957. Mr Ntaganda also challenges the Trial Chamber's finding that 'the Hema civilians engaged in the relevant acts in the context of the general coercive circumstances resulting from the presence of armed UPC/FPLC soldiers, who were themselves committing crimes in Mongbwalu at the same time'.²⁰³⁴ As correctly

²⁰²⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 312.

²⁰²⁷ P-0963: [T-78](#), p. 86, line 11.

²⁰²⁸ P-0963: [T-78](#), p. 86, lines 11-12.

²⁰²⁹ P-0963: [T-78](#), p. 86, lines 7-9.

²⁰³⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 312.

²⁰³¹ P-0898: [T-154](#), p. 14, lines 3-16.

²⁰³² P-0898: [T-154](#), p. 14, lines 12-16.

²⁰³³ [Conviction Decision](#), para. 824.

²⁰³⁴ [Conviction Decision](#), para. 822.

observed by Mr Ntaganda,²⁰³⁵ the finding of ‘coercive circumstances’ does not refer to any evidence. It does, however, refer to the presence of UPC/FPLC soldiers committing crimes. In the section of the Conviction Decision where the relevant conduct of the Hema civilians is described, the Trial Chamber found that they conducted a *ratissage* operation together with members of the UPC/FPLC and that during that operation both soldiers and Hema civilians ‘searched from house to house for items to loot, abducting, intimidating, and killing people who resisted’.²⁰³⁶ As discussed above, the Trial Chamber found that the civilians followed the orders of the UPC/FPLC leadership.²⁰³⁷ The Appeals Chamber considers that, although not specifically referenced, these findings and the evidence relied upon support the Trial Chamber’s conclusion that the Hema civilians operated ‘in the context of the general coercive circumstances resulting from the presence of armed UPC/FPLC soldiers’.²⁰³⁸ It also finds that it was reasonable for the Trial Chamber to conclude on the basis of this joint operation of the UPC/FPLC soldiers and the Hema civilians, in which the civilians followed orders, that the latter operated under coercive circumstances.

958. The Appeals Chamber further notes that in the section ‘Hema civilian supporters’, the Trial Chamber found that ‘Hema civilians participated in [military] operations under the direction of the FPLC military commanders’²⁰³⁹ and that ‘[t]hey were mobilised specifically for the purpose of assisting during FPLC operations’.²⁰⁴⁰

959. In view of the foregoing, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude on the basis of the evidence of orders to the Hema civilians and their joint operation with the UPC/FPLC soldiers that the Hema civilians ‘functioned as a tool in the hands of the co-perpetrators’ and that their ‘will had become irrelevant’.²⁰⁴¹

²⁰³⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 313.

²⁰³⁶ [Conviction Decision](#), para. 512.

²⁰³⁷ [Conviction Decision](#), para. 512.

²⁰³⁸ [Conviction Decision](#), para. 822.

²⁰³⁹ [Conviction Decision](#), para. 333, referring to P-0768: [T-33](#), p. 42; P-0898: [T-154](#), pp. 13-14; P-0963; [T-78](#), p. 86.

²⁰⁴⁰ [Conviction Decision](#), para. 333, referring to P-0017: [T-59](#), p. 8; P-0055: [T-71](#), p. 47.

²⁰⁴¹ [Conviction Decision](#), para. 824.

4. Overall conclusion

960. Having rejected the entirety of Mr Ntaganda's arguments under this ground of appeal, the Appeals Chamber, by majority, Judge Eboe-Osuji dissenting, rejects this ground of appeal.

N. Fourteenth ground of appeal: Whether Mr Ntaganda possessed the *mens rea* for the crimes committed during the First Operation

961. Under the fourteenth ground of appeal, Mr Ntaganda argues that the Trial Chamber erred when it found that he possessed the requisite *mens rea* as an indirect co-perpetrator for the crimes of UPC/FPLC soldiers committed during the First Operation.²⁰⁴²

962. The Appeals Chamber notes that in finding that Mr Ntaganda possessed the requisite *mens rea* for the First and Second Operations, the Trial Chamber relied upon several factors including: (i) Mr Ntaganda's role in the agreement and implementation of the common plan;²⁰⁴³ (ii) his senior status in the UPC/FPLC and his commanding role during the Mongbwalu assault;²⁰⁴⁴ and (iii) his 'presence, actions and directives' during the First Operation.²⁰⁴⁵ In this regard, Mr Ntaganda alleges several legal and factual errors in the Trial Chamber's analysis and conclusions, which, he argues, materially affect the Trial Chamber's finding of intent.²⁰⁴⁶

963. First, as to the findings concerning his 'presence, actions and directives', Mr Ntaganda claims that the Trial Chamber erred in relying on two directives to support its finding: (i) that the night before leaving Bunia for Mongbwalu, he had ordered UPC/FPLC troops to attack the Lendu 'using the term *kupiga na kuchaji*';²⁰⁴⁷ and (ii) that, once on the ground, during the attack on Mongbwalu, he had ordered the UPC/FPLC troops to attack 'the Lendu' without distinguishing between Lendu civilians and militia.²⁰⁴⁸ Mr Ntaganda contends that he 'never gave these two directives' and '[g]iven their place at the centre of the finding that [he] possessed the

²⁰⁴² [Mr Ntaganda's Appeal Brief – Part II](#), para. 322.

²⁰⁴³ [Conviction Decision](#), para. 1177.

²⁰⁴⁴ [Conviction Decision](#), para. 1179.

²⁰⁴⁵ [Conviction Decision](#), para. 1180.

²⁰⁴⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 317-359.

²⁰⁴⁷ [Mr Ntaganda's Appeal Brief – Part II](#), paras 321, 323-339.

²⁰⁴⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 321, 340-347.

mens rea for the 13 counts for which he was convicted, this should be reversed'.²⁰⁴⁹ Second, Mr Ntaganda claims that none of the other factors relied upon by the Trial Chamber to infer his intent for the crimes charged either collectively or individually, support its finding of *mens rea*.²⁰⁵⁰ Third, Mr Ntaganda argues that in inferring the existence of a fact upon which a conviction relies, the Trial Chamber failed 'to consider the reasonable possibility of other available conclusions, and associated relevant evidence'.²⁰⁵¹ The Appeals Chamber will address each of the alleged errors in turn.

1. *Alleged error in finding that Mr Ntaganda ordered UPC/FPLC troops to attack the Lendu using the term kupiga na kuchaji*

(a) **Summary of submissions**

(i) *Mr Ntaganda's submissions*

964. Mr Ntaganda challenges the Trial Chamber's finding that the night before leaving Bunia for Mongbwalu he ordered the troops to attack, 'using the term *kupiga na kuchaji*'.²⁰⁵² He submits that 'P-0010 is the sole source' for the Trial Chamber's finding.²⁰⁵³ Mr Ntaganda argues that this witness lied about her age, date and place of birth, her abduction by and training with the UPC, as well as her alleged [REDACTED].²⁰⁵⁴ He submits that it was a legal error to rely on 'any of her testimony, particularly when uncorroborated' and 'without any apparent caution'.²⁰⁵⁵ Mr Ntaganda contends that, although a trial chamber is entitled to believe a witness in part, this 'does not entitle it to turn a blind eye to the impact of false testimony on the reliability of the witness as a whole'.²⁰⁵⁶ In his view, the Trial Chamber was required to explain why the witness could still be believed, 'particularly when the lies and apparently truthful excerpts form part of the same narrative and are so closely intertwined'.²⁰⁵⁷

²⁰⁴⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 347.

²⁰⁵⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 348-352.

²⁰⁵¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 353-358.

²⁰⁵² [Mr Ntaganda's Appeal Brief – Part II](#), paras 323-324.

²⁰⁵³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 324.

²⁰⁵⁴ [Mr Ntaganda's Appeal Brief – Part II](#), paras 324-326, 329-331.

²⁰⁵⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 324, 327.

²⁰⁵⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 328.

²⁰⁵⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 328.

965. Mr Ntaganda argues, in relation to the *kupiga na kuchaji* allegation, that the testimony of P-0888, namely ‘that he did not remember any particular instructions or orders given to escorts’, ‘casts doubt on the veracity of P-0010’s account’ and should have been addressed by the Trial Chamber.²⁰⁵⁸ He notes that, at trial, he raised several other inconsistencies between P-0010’s testimony and the Trial Chamber’s own findings regarding the First Operation. He argues that the Trial Chamber failed to take these into account when assessing her uncorroborated evidence of the speech that Mr Ntaganda allegedly gave before the First Operation began.²⁰⁵⁹ Moreover, Mr Ntaganda maintains that, contrary to the Trial Chamber’s determination, P-0010’s testimony on the speech by Mr Ntaganda was not given spontaneously.²⁰⁶⁰ He also argues that the Trial Chamber erred in accepting P-0010’s testimony that [REDACTED] pointing to inconsistencies in her testimony and the Trial Chamber’s mischaracterisation and/or misapprehension of her testimony.²⁰⁶¹

966. In Mr Ntaganda’s view, the acceptance of P-0010’s testimony of an alleged speech in Bunia ‘was a miscarriage of justice’ in light of the errors identified.²⁰⁶²

(ii) *The Prosecutor’s submissions*

967. The Prosecutor responds that Mr Ntaganda misrepresents the Conviction Decision when stating that the Trial Chamber found that P-0010 “‘repeatedly lied on central and incriminating issues”, “lied under oath” and “misrepresented the truth””.²⁰⁶³ In her view, the Trial Chamber ‘did not affirmatively find that she lied’ rather it merely ‘acknowledged [...] the *possibility* that she may have lied on those issues’.²⁰⁶⁴ She further contends that, even if the Trial Chamber had found P-0010 to be untruthful on some aspects of her testimony, it did not err in relying on other aspects.²⁰⁶⁵ The Prosecutor submits that the Trial Chamber’s finding on P-0010’s

²⁰⁵⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 332.

²⁰⁵⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 333; *see also* [T-271](#), p. 7, lines 3-15.

²⁰⁶⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 334.

²⁰⁶¹ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 335-338.

²⁰⁶² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 339.

²⁰⁶³ [Prosecutor’s Response to Appeal – Part II](#), para. 248, *referring to* [Mr Ntaganda’s Appeal Brief – Part II](#), paras 3, 328-329.

²⁰⁶⁴ [Prosecutor’s Response to Appeal – Part II](#), para. 248 (emphasis in original).

²⁰⁶⁵ [Prosecutor’s Response to Appeal – Part II](#), para. 249.

evidence regarding Mr Ntaganda's use of the words *kupiga na kuchaji* was sufficiently reasoned.²⁰⁶⁶ She contends that this evidence was given spontaneously.²⁰⁶⁷

968. The Prosecutor submits that Mr Ntaganda's arguments regarding P-0010's credibility and reliability on certain aspects of her testimony were comprehensively addressed by the Trial Chamber and they fail to identify any errors in the Trial Chamber's assessment of the witness or in its reliance on her evidence.²⁰⁶⁸ She submits that P-0888's failure to recall the orders does not diminish the 'reliability and probative value' of P-0010's testimony on the giving of the order by Mr Ntaganda.²⁰⁶⁹ In any event, the Prosecutor contends that other evidence of Mr Ntaganda, and other commanders, giving orders to attack the Lendu or using the phrase '*kupiga na kuchaji*' corroborate P-0010's evidence.²⁰⁷⁰ Finally, the Prosecutor notes that the credibility assessment of P-0010 should be accorded appropriate deference.²⁰⁷¹

(iii) *The victims' observations*

969. Victims Group 2 note their agreement with the submissions of the Prosecutor in relation to Mr Ntaganda's challenges to the testimony of P-0010 and the Trial Chamber's reliance thereon.²⁰⁷²

(b) Relevant part of the Conviction Decision

970. In the section setting out the factual findings related to the planning of the First Operation, the Trial Chamber found that 'the night before leaving Bunia for the First Operation, Mr Ntaganda spoke to some of the UPC/FPLC troops, telling them that they were going to Mongbwalu to fight against the Lendu and ordering them to attack using the term "*kupiga na kuchaji*".²⁰⁷³ The Trial Chamber relied upon this finding in its assessment of Mr Ntaganda's intent and knowledge for each of the crimes charged.²⁰⁷⁴

²⁰⁶⁶ [Prosecutor's Response to Appeal – Part II](#), para. 250.

²⁰⁶⁷ [Prosecutor's Response to Appeal – Part II](#), para. 250.

²⁰⁶⁸ [Prosecutor's Response to Appeal – Part II](#), para. 251.

²⁰⁶⁹ [Prosecutor's Response to Appeal – Part II](#), para. 252.

²⁰⁷⁰ [Prosecutor's Response to Appeal – Part II](#), para. 252.

²⁰⁷¹ [Prosecutor's Response to Appeal – Part II](#), para. 253.

²⁰⁷² [Observations of Victims Group 2 on Appeal – Part II](#), para. 95.

²⁰⁷³ [Conviction Decision](#), para. 484.

²⁰⁷⁴ [Conviction Decision](#), paras 484, 1181.

(c) Determination by the Appeals Chamber²⁰⁷⁵

971. The Appeals Chamber notes that in support of its finding that Mr Ntaganda possessed the requisite *mens rea* for the First Operation crimes, the Trial Chamber relied, *inter alia*, on Mr Ntaganda's directive to his troops to attack the Lendu using the term *kupiga na kuchaji* on the night before leaving for Mongbwalu.²⁰⁷⁶ Mr Ntaganda challenges this finding by first referring to arguments he made under the fifth ground of his appeal concerning alleged errors in the Trial Chamber's analysis of the meaning of the phrase *kupiga na kuchaji*.²⁰⁷⁷ As the Appeals Chamber has already addressed and rejected these arguments,²⁰⁷⁸ the focus of its enquiry under this section is limited to Mr Ntaganda's second strand of argumentation, namely, that the Trial Chamber erred in relying exclusively on the evidence of P-0010 for its impugned finding despite the numerous inconsistencies in her testimony.²⁰⁷⁹

972. The Appeals Chamber notes that in seeking to impugn P-0010's credibility and the reliability of her evidence, Mr Ntaganda largely repeats arguments made before the Trial Chamber claiming that P-0010 lied under oath about her age, date and place of birth, being abducted when she was 13 years old, having trained with the UPC in the Rwampara and Mandro training camps, the military operations that she was involved in during the First Operation and her alleged rape.²⁰⁸⁰

973. With respect to the alleged inconsistencies regarding P-0010's testimony about her age and date of birth, Mr Ntaganda argues that the witness 'gave at least six different dates of birth'.²⁰⁸¹ As to the inconsistencies regarding her abduction and training, Mr Ntaganda argues that the witness falsely claimed to have been abducted

²⁰⁷⁵ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

²⁰⁷⁶ [Conviction Decision](#), para. 1181.

²⁰⁷⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 320.

²⁰⁷⁸ *See* paragraphs 459-472 above.

²⁰⁷⁹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 324-339.

²⁰⁸⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 324-326, 330-331, 333, 335-338; [Mr Ntaganda's Closing Brief](#), paras 1261-1282.

²⁰⁸¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 325.

by the UPC at 13 years old and ‘gave two detailed, equally false, yet different stories [...]’ in this regard.²⁰⁸²

974. Furthermore, Mr Ntaganda argues that P-0010 made several ‘false claims’ regarding the military operations that she was involved in during the First Operation, which in his view, indicates ‘either that P-0010 was not present during it, or gave unreliable evidence about it’.²⁰⁸³ In particular, Mr Ntaganda points to various inconsistencies between P-0010’s testimony and the Trial Chamber’s own findings on the First Operation, namely, that the UPC did not manage to capture Mongbwalu; that they took the Kobu Road to reach Mongbwalu; that the witness did not state that Mr Ntaganda went to Sayo, when in fact he did; and that Kisembo was present during the attack when actually he had arrived later.²⁰⁸⁴

975. Further still, regarding P-0010’s evidence concerning her rape, Mr Ntaganda points to the apparent inconsistency between P-0010’s testimony and her prior statement about a particular instance of rape perpetrated by [REDACTED]. In particular, Mr Ntaganda highlights an apparent discrepancy about whether the incident happened before or after the assault on Mongbwalu.²⁰⁸⁵ In his view, this inconsistency was significant given that the Trial Chamber had heard ‘corroborated, unchallenged evidence’ that he had ‘returned from Mongbwalu to Bunia by plane’ and that [REDACTED] after the First Operation’.²⁰⁸⁶ In addition, Mr Ntaganda argues that P-0010’s failure to report that she had been raped [REDACTED] in her prior statements or to a ‘close friend [D-0211] with whom she lived after the events’ is further evidence of inconsistent statements rather than delayed reporting.²⁰⁸⁷

976. The Appeals Chamber observes that central to Mr Ntaganda’s arguments is the allegation that the Trial Chamber turned ‘a blind eye to the impact of false testimony on the reliability of the witness as a whole’.²⁰⁸⁸ Mr Ntaganda concedes that a trial chamber ‘has discretion to accept some parts of a witness’ testimony and not

²⁰⁸² [Mr Ntaganda’s Appeal Brief – Part II](#), paras 326, 330-331.

²⁰⁸³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 333.

²⁰⁸⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 333.

²⁰⁸⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 335-336.

²⁰⁸⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 335-336.

²⁰⁸⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 337-338.

²⁰⁸⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 327-328.

others'.²⁰⁸⁹ However, he contends that in light of the witness's "misrepresentations of the truth" and 'rampant inconsistencies throughout her statements and testimony', P-0010's credibility was undermined to the extent that her evidence should not have been relied upon.²⁰⁹⁰

977. The Appeals Chamber recalls that as discussed under the ninth ground of appeal it found no error in the Trial Chamber's approach to inconsistencies, contradictions and inaccuracies in a witness's evidence.²⁰⁹¹ Specifically, the Appeals Chamber has found that the Trial Chamber correctly declined to enter positive findings on P-0010's age, date of birth, abduction and training with the UPC/FPLC.²⁰⁹² The Trial Chamber considered P-0010's testimony together with relevant documentary evidence which referred to five different dates of birth and two different places of birth, including one that differed from the witness's testimony, the witness's explanations for some of the discrepancies which it found to be satisfactory and 'other discrepancies' which it found to be unanswered.²⁰⁹³ On this basis, coupled with its findings relating to the circumstances of her abduction, the Trial Chamber found that it could not 'be established beyond reasonable doubt that she was under 15 at the time of the events referred to during her testimony'.²⁰⁹⁴

978. More specifically in relation to P-0010's alleged abduction, the Trial Chamber considered her testimony and an interview she gave to MONUC in 2003 and noted a number of 'discrepancies and uncertainties'.²⁰⁹⁵ This led the Trial Chamber to conclude that it 'cannot exclude the possibility that P-0010 misrepresented the truth when stating that she was abducted by the UPC when she was 13 years old, and then followed training with the UPC in the Rwampara and Mandro training camps'.²⁰⁹⁶ On

²⁰⁸⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 328. *See also* [Ngudjolo A Judgment](#), para. 168 ('a Trial Chamber may indeed rely on certain aspects of a witness's evidence and consider other aspects unreliable').

²⁰⁹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 328.

²⁰⁹¹ *See* paragraph 774 above.

²⁰⁹² *See* paragraphs 774 above. *See also* [Conviction Decision](#), paras 89-105.

²⁰⁹³ [Conviction Decision](#), para. 93.

²⁰⁹⁴ [Conviction Decision](#), para. 94.

²⁰⁹⁵ [Conviction Decision](#), paras 95-98.

²⁰⁹⁶ [Conviction Decision](#), para. 98.

this basis, it found ‘that the witness’s testimony on her abduction by and training with the UPC/FPLC, or her related experiences in this regard, cannot be relied upon’.²⁰⁹⁷

979. Mr Ntaganda characterises the Trial Chamber’s decision not to rely on these aspects of P-0010’s testimony as confirmation that P-0010 ‘lied under oath’ and that the witness was ‘someone who lies with absolute ease’.²⁰⁹⁸ The Appeals Chamber finds that, contrary to Mr Ntaganda’s argument, the Trial Chamber did not affirmatively find that P-0010 had lied regarding her age, date of birth, abduction and training with the UPC/FPLC. Rather, the Trial Chamber held that it could not establish her age beyond a reasonable doubt and that it could not *exclude the possibility* that she may have lied about her abduction and training. In particular, where the witness was forthright about providing ‘wrong information to the authorities’ about her birth date and her reasons for doing so, the Trial Chamber did not find that she lied but rather accepted her explanation as ‘satisfactory’.²⁰⁹⁹ Accordingly, the Appeals Chamber finds no merit in Mr Ntaganda’s argument.

980. In relation to the alleged inconsistencies in P-0010’s evidence about her participation in the First Operation, the Trial Chamber noted that ‘P-0010 provided detailed and coherent information about her experiences in Mr Ntaganda’s escort’ which it considered was ‘generally in line with, or corroborated by, other evidence in the case record’.²¹⁰⁰ It observed that

P-0010 provided detailed information concerning her participation in the First Operation, was able to remember the names of other UPC/FPLC commanders who were present, the weapons used, communications of Mr Ntaganda, the residence of Mr Ntaganda and the soldiers in Mongbwalu, and what was referred to as the *Appartements* area. She [...] insisted that she was present at both the first and second assault on Mongbwalu, which she was able to clearly distinguish from one another. She also remembered the items she looted.²¹⁰¹

981. The Appeals Chamber notes Mr Ntaganda’s argument that the witness cannot be believed given her ‘bizarre’ testimony that the UPC/FPLC ‘didn’t manage to take Mongbwalu’ and other discrepancies between her testimony and the Trial Chamber’s

²⁰⁹⁷ [Conviction Decision](#), para. 98.

²⁰⁹⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 329.

²⁰⁹⁹ [Conviction Decision](#), paras 93-94.

²¹⁰⁰ [Conviction Decision](#), para. 99.

²¹⁰¹ [Conviction Decision](#), para. 100 (footnotes omitted).

own findings.²¹⁰² The Appeals Chamber considers, as pointed out by the Prosecutor, that it was not unreasonable for the witness's testimony to have contained inconsistencies given the events that she was testifying to took place some 13 years earlier.²¹⁰³ Moreover, as the Trial Chamber correctly stated, inconsistencies in a witness's testimony 'do not automatically render a witness's account unreliable in its entirety'.²¹⁰⁴ Notably, the Appeals Chamber observes that Mr Ntaganda fails to demonstrate how these specific inconsistencies in P-0010's testimony affect the Trial Chamber's overall finding that the witness 'provided detailed and coherent information about her experiences in Mr Ntaganda's escort' which it considered was 'generally in line with, or corroborated by, other evidence in the case record'.²¹⁰⁵ The Appeals Chamber finds that the Trial Chamber's assessment of the witness's testimony was reasonable and is unaffected by the discrepancies highlighted by Mr Ntaganda. Mr Ntaganda's arguments are therefore rejected.

982. As to the alleged inconsistencies in P-0010's evidence concerning her rape, the Trial Chamber considered that 'the witness's hesitations as regards timing [...] do not indicate that P-0010 fabricated this aspect of her testimony and as such do not meaningfully affect the credibility of her account'.²¹⁰⁶ It further considered that the witness's 'inability to recall whether a certain event happened in Mabanga "before" or "after" the First Operation [did not] unduly undermin[e] [...] her credibility'.²¹⁰⁷ Furthermore, in finding that '[f]emale members of the UPC/FPLC were regularly raped and subjected to sexual violence [...] by male UPC/FPLC soldiers and commanders, including [...] by Mr Ntaganda himself',²¹⁰⁸ the Trial Chamber noted that P-0010's 'account on sexual violence by Mr Ntaganda is consistent between her 2015 statement, and direct and cross-examination, with the exception of the detail of the precise timing of the incident in Mabanga', which the Trial Chamber did not 'consider to meaningfully affect the credibility of her account'.²¹⁰⁹ The Appeals Chamber finds no error in the Trial Chamber's assessment of this particular

²¹⁰² [Mr Ntaganda's Appeal Brief – Part II](#), para. 333.

²¹⁰³ [Prosecutor's Response to Appeal – Part II](#), para. 251.

²¹⁰⁴ [Conviction Decision](#), para. 80.

²¹⁰⁵ [Conviction Decision](#), para. 99.

²¹⁰⁶ [Conviction Decision](#), para. 102.

²¹⁰⁷ [Conviction Decision](#), fn. 242.

²¹⁰⁸ [Conviction Decision](#), para. 407 (footnotes omitted).

²¹⁰⁹ [Conviction Decision](#), fn. 1158.

discrepancy in P-0010's testimony, given its finding on her overall credibility in relation to the rape allegations.²¹¹⁰ Moreover, the Appeals Chamber notes that, as pointed out by the Prosecutor,²¹¹¹ the witness referred to several occasions of rape [REDACTED] and not just the one in relation to which Mr Ntaganda raises doubts.²¹¹² Consequently, the Appeals Chamber finds that it was reasonable for the Trial Chamber to find that P-0010's inability to recall the precise timing of the rape did not 'unduly undermine [...] her credibility'.²¹¹³

983. The Appeals Chamber notes Mr Ntaganda's further argument that P-0010's failure to report that she had been raped [REDACTED] in her prior statements or to a 'close friend', D-0211, is further evidence of inconsistencies in her testimony.²¹¹⁴ In this regard, the Trial Chamber '[did] not take issue with the fact that the relevant acts were not reported on the first occasion' and considered 'delayed reporting' of instances of rape 'to be an understandable consequence of the victims' alleged experience' which had no effect on a witness's general credibility.²¹¹⁵ Accordingly, the Trial Chamber noted that 'it [was] understandable that P-0010 may not have informed D-0211 of the details of the sexual violence suffered, and related consequences'.²¹¹⁶ The Appeals Chamber finds that it was reasonable for the Trial Chamber to reach these conclusions especially since other witnesses corroborated the fact that UPC/FPLC commanders raped the escorts. Moreover, the Appeals Chamber finds no merit in Mr Ntaganda's argument that P-0010's previous naming of a [REDACTED] as her rapist and denial that [REDACTED] had acted improperly in her 2005 statement are indicative of prior inconsistent statements rather than delayed

²¹¹⁰ The Appeals Chamber notes the additional argument put forward by Lead Counsel for Mr Ntaganda, at the hearing, concerning D-0251's testimony contesting any claims that she had been raped by Mr Ntaganda or had any knowledge that Mr Ntaganda had had sexual intercourse with female members of his own bodyguard. In particular, the Defence argued that by rejecting D-0251's testimony and finding, instead, that she was raped by Mr Ntaganda, the Trial Chamber was 'completely incorrect'. The Appeals Chamber considers this argument to be misleading and misrepresentative of the Trial Chamber's actual finding. The Appeals Chamber recalls that, at paragraph 103 of the Conviction Decision, the Trial Chamber found D-0251's 'categorical statements on this issue' to be not credible, 'notably in light of the other evidence on the record'. Thus contrary, to Mr Ntaganda's argument the Trial Chamber did not find that she was raped by Mr Ntaganda, rather, it simply did not find the witness to be credible. See [T-271](#), p. 76, lines 1-18.

²¹¹¹ [Prosecutor's Response to Appeal – Part II](#), para. 251 (3rd bullet point).

²¹¹² P-0010: [T-47](#), p. 32, lines 19-24.

²¹¹³ [Conviction Decision](#), fn. 242.

²¹¹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 337-338.

²¹¹⁵ [Conviction Decision](#), paras 88, 102-103.

²¹¹⁶ [Conviction Decision](#), para. 103.

reporting.²¹¹⁷ In the Appeals Chamber's view, the Trial Chamber correctly reasoned that 'various reasons, including shame or fear of reprisals, stigmatization or ostracization, may explain why she may have chosen not to volunteer the identities of certain alleged perpetrators, particularly if these were well-known, powerful, and/or respected figures at the time'.²¹¹⁸ Mr Ntaganda's arguments are therefore rejected.

984. Lastly, Mr Ntaganda takes issue with the Trial Chamber's finding that P-0010's account of the speech in which he had given the order to attack the Lendu using the term *kupiga na kuchaji* was reliable. The Trial Chamber found that 'P-0010 provided the information on this specific briefing spontaneously, in the context of being questioned on a broader topic not exclusively related to the operation in Mongbwalu'.²¹¹⁹

985. Mr Ntaganda submits that no other witness corroborated P-0010's account and that P-0888's testimony that he did not recall any particular orders or instructions given to escorts is further proof of the implausibility of P-0010's account.²¹²⁰ The Appeals Chamber notes that P-0888's inability to remember particular instructions or orders given to escorts does not *per se* contradict the evidence of P-0010 which, as noted by the Prosecutor, is generally corroborated by other evidence on the record that attest to Mr Ntaganda and other commanders giving orders to UPC/FPLC troops to 'attack the Lendu' or using the phrase *kupiga na kuchaji*.²¹²¹

986. Mr Ntaganda further argues that, contrary to the Trial Chamber's finding, P-0010's evidence on the alleged order was not offered spontaneously.²¹²² The Appeals Chamber notes that in the relevant part of her testimony, the witness mentioned the speech in the context of being asked about the meaning of the phrase *kupiga na kuchaji*, whether commanders used this phrase and which specific commanders did.²¹²³ It was after responding that she could not remember which commanders

²¹¹⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 338.

²¹¹⁸ [Conviction Decision](#), para. 102.

²¹¹⁹ [Conviction Decision](#), fn. 1387.

²¹²⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 332.

²¹²¹ [Prosecutor's Response to Appeal – Part II](#), para. 252, referring to [Conviction Decision](#), para. 415, fn. 1188; P-0907: T-90, p. 8; P-0963: T-78, pp. 72-73; P-0768: [T-33](#), pp. 64-65, 801. See paragraphs 464-472 above.

²¹²² [Mr Ntaganda's Appeal Brief – Part II](#), para. 334.

²¹²³ P-0010: [T-47](#), p. 14, line 16 to p. 15, line 16.

would use this phrase that the witness was asked if Mr Ntaganda ever used it to which she responded:

Q. For instance, did you ever hear Mr Bosco use that term or not?

A. Before we went to Mongbwalu, we had a meeting where we were told we were going to go to Mongbwalu to fight against the Lendu. And as soon as we got to Mongbwalu, we were told not to spare the Lendu, to -- to strike them and to loot. And that meeting was at night. And it was that very same night that we left Bunia to go to Mongbwalu.

Q. And who gave you these instructions at that meeting? Who was speaking to you at that meeting?

A. First of all, it was the leader of the bodyguards, Claude, and then afterwards Mr Bosco.²¹²⁴

987. Considering that the witness gave information on the speech given by Mr Ntaganda in the context of being questioned on the broader meaning of the phrase *kupiga na kuchaji* and which commanders would use the term, the Appeals Chamber finds that it was reasonable for the Trial Chamber to observe that P-0010's evidence of the speech was offered spontaneously. Indeed, the witness was not specifically questioned about the particular meeting but rather brought it up herself in the context of discussing a more general topic.

(d) Conclusion

988. In sum, the Appeals Chamber finds no merit in Mr Ntaganda's arguments that P-0010's credibility was undermined by the alleged inconsistencies relied upon by him. The Appeals Chamber finds no error with the Trial Chamber's decision to reject parts of P-0010's evidence as unreliable while accepting other parts as credible. In doing so, the Appeals Chamber finds that the Trial Chamber carefully reasoned its decision and ensured that the impact of its decision to reject parts of the witness's testimony was assessed in relation to the remainder of her evidence. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's consideration of Mr Ntaganda's directive to UPC/FPLC troops to attack the Lendu using the term *kupiga na kuchaji* in its assessment of his intent and knowledge for each of the crimes charged.

²¹²⁴ P-0010: [T-47](#), p. 15, lines 7-16.

2. *Alleged error in finding that Mr Ntaganda ordered an attack on the Lendu without distinguishing between Lendu civilians and militia*

(a) **Summary of submissions**

(i) *Mr Ntaganda's submissions*

989. Mr Ntaganda challenges the Trial Chamber's finding that he ordered UPC/FPLC soldiers on the evening of the first day of the Mongbwalu assault to attack the Lendu without distinguishing between Lendu civilians and the militia.²¹²⁵ He submits that this finding is only supported by the evidence of P-0768.²¹²⁶

990. Mr Ntaganda argues that the testimony 'of P-0768 reflects the reality that Lendu combatants were not routinely distinguished from civilians with uniforms, and were also comprised of women, children, and the elderly'.²¹²⁷ Second, he contends that, for reasons advanced under the eighth ground of appeal, 'P-0768 was not in Mongbwalu on the evening of the first day of the assault'.²¹²⁸ With reference to the Trial Chamber's findings, Mr Ntaganda submits that he was also not in Mongbwalu on the evening of the first day of the assault.²¹²⁹ Relying on arguments advanced under the eighth ground of appeal, Mr Ntaganda further contends that the Trial Chamber erred in relying on the uncorroborated evidence of an accomplice witness 'in the absence of any caution'.²¹³⁰ Finally, Mr Ntaganda submits that his responsibility 'cannot hang on a failure to add the word "combatants" to "Lendu" in a wartime context'.²¹³¹

(ii) *The Prosecutor's submissions*

991. The Prosecutor responds that the Trial Chamber 'did not err in relying on the evidence of a single witness for this particular order'.²¹³² She maintains that other evidence that Mr Ntaganda and other commanders issued orders to attack the Lendu and/or used the phrase *kupiga na kuchaji* corroborates the testimony of P-0768.²¹³³

²¹²⁵ [Mr Ntaganda's Appeal Brief – Part II](#), paras 340-341.

²¹²⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 340.

²¹²⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 342 (footnotes omitted); *see also* [T-271](#), p. 19, lines 11-22.

²¹²⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 343.

²¹²⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 343; *see also* [T-271](#), p. 19, lines 2-10.

²¹³⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 344.

²¹³¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 345.

²¹³² [Prosecutor's Response to Appeal – Part II](#), para. 254.

²¹³³ [Prosecutor's Response to Appeal – Part II](#), para. 254.

She further submits that the testimony of P-0768 does not support Mr Ntaganda's claim that it was generally difficult to distinguish Lendu combatants from civilians.²¹³⁴ Finally, the Prosecutor argues that Mr Ntaganda's claim that it was unnecessary to specify 'Lendu combatants' when issuing orders to UPC/FPLC soldiers is undermined by the evidence of numerous crimes committed against Lendu civilians and that the meaning of the words must be interpreted in the context of the evidence in the case 'where ethnicity was found to be a relevant dimension to the conflict'.²¹³⁵

(b) Relevant part of the Conviction Decision

992. In the section describing the assault on Mongbwalu, the Trial Chamber found that '[o]nce the Kilo-Moto offices and the Mongbwalu airstrip had been taken over by the UPC/FPLC, Mr Ntaganda met the commanders involved in the assault [...]. He was given a report of the situation and discussed the division of tasks for the next day. Mr Ntaganda gave orders to take over the whole of Mongbwalu' and 'also ordered to attack "the Lendu" who were in Mongbwalu, without making a difference between "Lendu civilians" and the militia'.²¹³⁶ The Trial Chamber relied upon this finding in its assessment of Mr Ntaganda's intent and knowledge for the crimes charged.²¹³⁷

(c) Determination by the Appeals Chamber²¹³⁸

993. The Appeals Chamber notes that for its finding on the issuance of the alleged order by Mr Ntaganda, the Trial Chamber relied exclusively on the evidence of P-0768.²¹³⁹ In particular, P-0768 testified that on the 'evening of the first day' of the assault on Mongbwalu, Mr Ntaganda gave an order

Q: Did Mr Ntaganda at the eve of the first day, the evening of the first day, did he give you any instructions in relation to the specific object of the attack in terms of who you were attacking?

²¹³⁴ [Prosecutor's Response to Appeal – Part II](#), para. 256.

²¹³⁵ [Prosecutor's Response to Appeal – Part II](#), para. 257.

²¹³⁶ [Conviction Decision](#), para. 493 (footnotes omitted).

²¹³⁷ [Conviction Decision](#), para. 1181.

²¹³⁸ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

²¹³⁹ [Conviction Decision](#), fns 1428-1429.

A: Yes, the order was to attack all the RCD-K/ML soldiers who were in Mongbwalu and the Lendu militia. They told us -- they spoke about the Lendu. They didn't speak about the militia, they just said Lendu.

Q: Do you know if there were any Lendu civilians in Mongbwalu at that time?

A: Yes. As I mentioned, there were Lendu civilians. Lendu are also part of the population of Ituri.

Q: And when you say that Mr Ntaganda gave instructions about who to attack in terms of the Lendu, do you recall if he distinguished between attacking Lendu military or combatants and attacking Lendu civilians?

A: He didn't make a difference between civilians -- Lendu civilians and the militia. He spoke about Lendus, only Lendus, and everybody had to assess that in their own way.²¹⁴⁰

994. Mr Ntaganda argues that 'this equivocation on the part of P-0768 reflects the reality that Lendu combatants were not routinely distinguished from civilians with uniforms, and were also comprised of women, children, and the elderly'.²¹⁴¹ In this context Mr Ntaganda argues that 'UPC/FPLC troops could not have reasonably understood Mr Ntaganda's directive as being one to wipe out the Lendu community'.²¹⁴² The Appeals Chamber notes that the Trial Chamber acknowledged the fact that because the Lendu fighters did not have a common military uniform it 'made some of [them] difficult to identify'.²¹⁴³ However, P-0768 stated that although Lendu militia did not 'really have specific dress', it was possible to identify them because 'they bore weapons, firearms, some had machetes, others had spears and arrows'.²¹⁴⁴ The Appeals Chamber finds that, regardless of whether it was generally difficult to distinguish Lendu fighters from Lendu civilians not taking active part in hostilities, it was nevertheless reasonable for the Trial Chamber to find that Mr Ntaganda in his instructions to the UPC/FPLC troops, ordered them to attack the Lendu without distinction. Mr Ntaganda's argument in this regard is therefore without merit.

²¹⁴⁰ P-0768: [T-33](#), p. 37, lines 2-16.

²¹⁴¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 342.

²¹⁴² [Mr Ntaganda's Appeal Brief – Part II](#), para. 342.

²¹⁴³ [Conviction Decision](#), para. 472.

²¹⁴⁴ P-0768: [T-33](#), p. 36, line 21 to p. 37, line 1.

995. As to Mr Ntaganda's submission that he was not present in Mongbwalu on the evening of the first day of the assault,²¹⁴⁵ the Appeals Chamber notes that the Trial Chamber found that 'the UPC/FPLC attacked Mongbwalu on or about 20 November 2002' and that '[t]he attack lasted approximately three to four days'.²¹⁴⁶ The Appeals Chamber further notes that P-0768, who testified that the Mongbwalu operation took place between September and November 2002,²¹⁴⁷ [REDACTED].²¹⁴⁸

996. Contrary to Mr Ntaganda's argument, the Trial Chamber did not find that he left Bunia for Mongbwalu on 21 November 2002. In this regard, the Trial Chamber noted that 'it had received some evidence on the timing of Mr Ntaganda's arrival to (*sic*) Mongbwalu from a number of witnesses, including Mr Ntaganda himself'.²¹⁴⁹ While the Trial Chamber could not 'establish the exact day of Mr Ntaganda's arrival in the town, it [was] satisfied that Mr Ntaganda arrived in Mongbwalu once the attack on the town had already commenced and before the UPC/FPLC assault on Sayo began',²¹⁵⁰ which according to the Trial Chamber took place on or around 24 November 2002.²¹⁵¹ In light of the foregoing considerations, the Appeals Chamber finds no conflict in the findings of the Trial Chamber as to the timing of Mr Ntaganda's presence in Mongbwalu that needed to be reconciled as argued by Mr Ntaganda. Furthermore, to the extent that Mr Ntaganda challenges the presence of P-0768 in Mongbwalu at the relevant time,²¹⁵² the Appeals Chamber notes that these arguments are addressed and rejected in the determination of the eighth ground of appeal.²¹⁵³

997. Similarly, Mr Ntaganda's arguments regarding the Trial Chamber's erroneous reliance on P-0768's uncorroborated, accomplice witness evidence are addressed in the determination of the eighth ground of appeal.²¹⁵⁴ At this juncture, the Appeals Chamber points out that Mr Ntaganda's assertion that the Trial Chamber relied on the

²¹⁴⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 343.

²¹⁴⁶ [Conviction Decision](#), para. 486.

²¹⁴⁷ P-0768: [T-35](#), p. 6, line 25 to p. 7, line 6.

²¹⁴⁸ P-0768: [T-33](#), p. 34, lines 1-3.

²¹⁴⁹ [Conviction Decision](#), fn. 1411.

²¹⁵⁰ [Conviction Decision](#), fn. 1411.

²¹⁵¹ [Conviction Decision](#), para. 500.

²¹⁵² [Mr Ntaganda's Appeal Brief – Part II](#), para. 343, fn. 909.

²¹⁵³ See paragraphs 665-672 above.

²¹⁵⁴ See paragraph 655 above.

evidence of this witness without any reasoning or caution,²¹⁵⁵ is undermined by the detailed reasoning provided by the Trial Chamber, particularly at paragraphs 168-169 of the Conviction Decision. In those paragraphs, the Trial Chamber explained why it considered the account of P-0768 concerning his arrival and participation in the Mongbwalu assault to be credible. The Trial Chamber noted in this regard

168. [...] that P-0768 provided a detailed account concerning his participation in the Mongbwalu operation and his interactions with Mr Ntaganda in this context, which he upheld in cross-examination, adding further details. He was able to provide a geographic description of Mongbwalu, including the locations relevant to his account concerning the unfolding of the attack. He explained or acknowledged and corrected certain potential discrepancies or inaccuracies identified by the Defence, including, in particular, the route taken to Mongbwalu. [...] The witness also recognised himself in a video filmed when Mongbwalu was captured, and was able to identify a number of individuals and scenes depicted therein.

169. The Chamber finally notes that P-0768's participation in the Mongbwalu operation is largely corroborated by other evidence in this case and, in light of the foregoing, finds the relevant part of his testimony to be credible.²¹⁵⁶

998. Finally, the Appeals Chamber finds no merit in Mr Ntaganda's submission that his responsibility 'cannot hang on a failure to add the word "combatants" to "Lendu" in a wartime context'.²¹⁵⁷ As correctly noted by the Prosecutor,²¹⁵⁸ the words conveyed in Mr Ntaganda's order "'to attack the Lendu" who were in Mongbwalu' must be interpreted on the basis of the entirety of the factual findings and evidence on the record.²¹⁵⁹ In this case, the Appeals Chamber notes the Trial Chamber's related findings that: the UPC leadership designated the Lendu ethnic group, including civilians, as the enemy,²¹⁶⁰ songs were taught to recruits as part of their training, inciting soldiers to attack or kill the Lendu and that recruits would get everything, including women,²¹⁶¹ and the UPC/FPLC soldiers committed crimes against Lendu civilians.²¹⁶²

²¹⁵⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 344.

²¹⁵⁶ [Conviction Decision](#), paras 168-169 (footnotes omitted).

²¹⁵⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 345.

²¹⁵⁸ [Prosecutor's Response to Appeal – Part II](#), para. 257.

²¹⁵⁹ [Conviction Decision](#), para. 493.

²¹⁶⁰ [Conviction Decision](#), para. 800.

²¹⁶¹ [Conviction Decision](#), para. 373.

²¹⁶² [Conviction Decision](#), section V.C.4.

(d) Conclusion

999. In light of the foregoing, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that ‘[o]nce the Kilo-Moto offices and the Mongbwalu airstrip had been taken over by the UPC/FPLC, Mr Ntaganda met the commanders involved in the assault [...] [and] also ordered to attack “the Lendu” who were in Mongbwalu, without making a difference between “Lendu civilians” and the militia’.²¹⁶³

3. *Alleged error in the Trial Chamber’s reliance on other factors to infer Mr Ntaganda’s intent for the counts stemming from the First Operation*

(a) Summary of submissions

(i) Mr Ntaganda’s submissions

1000. Mr Ntaganda argues that the other factors relied upon by the Trial Chamber to infer his intent for the counts stemming from the First Operation do not support ‘collectively or individually’ the Trial Chamber’s finding.²¹⁶⁴ He challenges in this regard the Trial Chamber’s consideration of: (i) the murders ‘of alleged prisoners and the *Abbé*’ that occurred at the *Appartements* camp;²¹⁶⁵ (ii) the rapes that occurred in the *Appartements* camp;²¹⁶⁶ (iii) the allegation of an order given by Mr Ntaganda to shoot at a column of people in Sayo;²¹⁶⁷ and (iv) the allegation that some looted goods were brought to Mr Ntaganda’s residence in Bunia.²¹⁶⁸

(ii) The Prosecutor’s submissions

1001. The Prosecutor submits that the ‘Trial Chamber’s *mens rea* finding was reasonable and correct’.²¹⁶⁹ She maintains that Mr Ntaganda fails to identify errors in the Trial Chamber’s consideration of: (i) the murder of the *Abbé*;²¹⁷⁰ (ii) the rapes that occurred in the *Appartements* camp;²¹⁷¹ (iii) the allegation of an order given by

²¹⁶³ [Conviction Decision](#), para. 493 (footnotes omitted).

²¹⁶⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 348.

²¹⁶⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 349.

²¹⁶⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 350.

²¹⁶⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 351.

²¹⁶⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 352.

²¹⁶⁹ [Prosecutor’s Response to Appeal – Part II](#), para. 259.

²¹⁷⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 260.

²¹⁷¹ [Prosecutor’s Response to Appeal – Part II](#), para. 261.

Mr Ntaganda ‘to fire a grenade launcher at a column of fleeing civilians in Sayo’;²¹⁷² and (iv) the allegation that some looted goods were brought to Mr Ntaganda’s residence in Bunia.²¹⁷³

(b) Relevant part of the Conviction Decision

1002. In determining that Mr Ntaganda meant for the troops deployed during the First and Second Operations to engage in the conduct and cause the consequences required for the commission of the crimes, the Trial Chamber considered, among other factors: (i) the murders committed during the First Operation in Mongbwalu that occurred at the *Appartements* camps, including one specific instance when ‘two persons who had been detained at this location were beaten and killed upon specific order of Mr Ntaganda’ and the killing by Mr Ntaganda of *Abbé* Bwanalonga, a civilian of advanced age;²¹⁷⁴ (ii) Mr Ntaganda’s presence and awareness ‘that civilian women were brought to the *Appartements* camp by UPC/FPLC soldiers and commanders in Mongbwalu; these women were raped in the camp, and then thrown out, to be replaced by other women’;²¹⁷⁵ (iii) the orders issued by Mr Ntaganda, ‘either in person or over the radio, to fire the heavy weapons’ and deciding ‘which objects were to be targeted’;²¹⁷⁶ the order given during the assault on Sayo ‘to fire with a grenade launcher at the slope of the mountain’ aimed at individuals who ‘were clearly not taking any part in hostilities when they were attacked’;²¹⁷⁷ and (iv) the fact that ‘some goods looted from Mongbwalu were actually brought to Mr Ntaganda’s residence in Bunia’.²¹⁷⁸

(c) Determination by the Appeals Chamber²¹⁷⁹

1003. The Appeals Chamber notes that in support of his argument that the Trial Chamber erred in its consideration of the murders committed at the *Appartements* camp in Mongbwalu, Mr Ntaganda relies on his submissions made under the eighth

²¹⁷² [Prosecutor’s Response to Appeal – Part II](#), para. 262.

²¹⁷³ [Prosecutor’s Response to Appeal – Part II](#), para. 263.

²¹⁷⁴ [Conviction Decision](#), para. 1184 (footnotes omitted).

²¹⁷⁵ [Conviction Decision](#), para. 1184 (footnotes omitted).

²¹⁷⁶ [Conviction Decision](#), para. 1182 (footnote omitted).

²¹⁷⁷ [Conviction Decision](#), para. 1182 (footnote omitted).

²¹⁷⁸ [Conviction Decision](#), para. 1183 (footnote omitted).

²¹⁷⁹ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

ground of appeal in relation to the Trial Chamber's assessment of the testimony of P-0768 and P-0017.²¹⁸⁰ As Mr Ntaganda's challenges in this regard have been addressed and rejected in the determination of the eighth ground of appeal,²¹⁸¹ the Appeals Chamber will not consider them any further.

1004. Mr Ntaganda submits that paragraph 535 of the Conviction Decision does not support the Trial Chamber's conclusion that women were raped at the *Appartements* camp and that he was present and aware of this.²¹⁸² The Trial Chamber found that 'murders and rapes committed in Mongbwalu occurred at the *Appartements* camp, Mr Ntaganda's base'.²¹⁸³ In support of this finding, the Trial Chamber referred to its findings on rape as a crime against humanity and as a war crime.²¹⁸⁴ The Trial Chamber also found that 'Mr Ntaganda was present and aware that civilian women were brought to the *Appartements* camp by UPC/FPLC soldiers and commanders in Mongbwalu; these women were raped in the camp, and then thrown out, to be replaced by other women'.²¹⁸⁵ In this regard, the Trial Chamber referenced paragraph 535 of the Conviction Decision,²¹⁸⁶ wherein it found that:

UPC/FPLC soldiers and commanders, including Mr Ntaganda, who were openly carrying their weapons, brought women that witnesses referred to as 'civilians' back to the *Appartements* camp. The soldiers and commanders had sexual intercourse with most of them on these occasions. After a few hours or a few days, these women were thrown out by the soldiers, who would later go get other women. Some of these women appeared 'intimidated': they were in the presence of many soldiers, remained completely silent during their entire stay, or were seen crying when they left.²¹⁸⁷

At footnote 1600 of the Conviction Decision, the Trial Chamber refers to evidence supporting the finding that Mr Ntaganda was among the UPC/FPLC commanders who brought civilian women to the *Appartements* camp.²¹⁸⁸

²¹⁸⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 349; fn. 921.

²¹⁸¹ See paras 678-681, 746-757 above.

²¹⁸² [Mr Ntaganda's Appeal Brief – Part II](#), para. 350.

²¹⁸³ [Conviction Decision](#), para. 1184.

²¹⁸⁴ [Conviction Decision](#), fns 3214-3215.

²¹⁸⁵ [Conviction Decision](#), para. 1184.

²¹⁸⁶ [Conviction Decision](#), fn. 3218.

²¹⁸⁷ [Conviction Decision](#), para. 535 (footnotes omitted).

²¹⁸⁸ [Conviction Decision](#), fn. 166, referring, *inter alia*, to P-0907: [T-90](#), pp. 40, 42, P-0017: [T-59](#), pp. 21-22, 27-28.

1005. When read in context, it is clear that, contrary to Mr Ntaganda's submissions, paragraph 535 of the Conviction Decision does support the Trial Chamber's finding that rapes were committed at the *Appartements* camp and that Mr Ntaganda was present and aware that civilian women were brought to the *Appartements* camp by UPC/FPLC soldiers and commanders in Mongbwalu. Mr Ntaganda's arguments fail to identify an error in this regard.

1006. In its conclusion on the intent and knowledge for the crime of rape, the Trial Chamber found that 'Mr Ntaganda [...] meant for UPC/FPLC soldiers to rape local inhabitants; and was aware that the relevant coercive circumstances for the crimes of rape [...] were being taken advantage of'.²¹⁸⁹ The Trial Chamber concluded beyond reasonable doubt that 'Mr Ntaganda meant for the troops deployed during the First and Second Operation to engage in the conducts and cause the consequences required for the commission of crimes of [...] rape as a crime against humanity and as a war crime'.²¹⁹⁰

1007. It is worth recalling that in the determination of the thirteenth ground of appeal the Appeals Chamber rejected Mr Ntaganda's argument that it was unreasonable for the Trial Chamber to infer on the basis of its findings that the co-perpetrators meant for the crime of rape to be committed by virtue of the common plan.²¹⁹¹ These findings included: (i) that rapes went unpunished;²¹⁹² (ii) that acts of sexual violence were a tool to achieve the UPC/FPLC's objectives;²¹⁹³ (iii) that in the context of side discussions in June 2002 in Kampala, 'reference was also made to using the rape of enemy women as a means of waging war';²¹⁹⁴ (iv) that a particularly violent method was used for rapes, and UPC/FPLC soldiers forced detained victims to sexually assault each other.²¹⁹⁵

1008. In these circumstances, and in the absence of any more specific submissions by Mr Ntaganda, the Appeals Chamber finds that it was reasonable for the Trial

²¹⁸⁹ [Conviction Decision](#), para. 1188 (4th bullet point).

²¹⁹⁰ [Conviction Decision](#), para. 1189.

²¹⁹¹ See paragraphs 936-939 above.

²¹⁹² [Conviction Decision](#), para. 800, referring to para. 332.

²¹⁹³ [Conviction Decision](#), para. 805.

²¹⁹⁴ [Conviction Decision](#), para. 799, referring to para. 293. See also para. 805.

²¹⁹⁵ [Conviction Decision](#), para. 806, referring to paras 545, 623, 943, 944.

Chamber to conclude that ‘Mr Ntaganda [...] meant for UPC/FPLC soldiers to rape local inhabitants; and was aware that the relevant coercive circumstances for the crimes of rape [...] were being taken advantage of’.²¹⁹⁶

1009. Mr Ntaganda further submits that ‘the fact that [he] gave orders “to fire the heavy weapons, and decided which objects to be shot at” is not indicative of criminal intent for any of the charged crimes’.²¹⁹⁷ He submits that ‘the only example cited of an illegal order is [REDACTED] [that he ordered the] shooting at a column [of people] in Sayo’.²¹⁹⁸ Mr Ntaganda’s arguments in relation to this factual finding are addressed and rejected in the determination of the eighth ground of appeal and will not be considered any further.²¹⁹⁹

1010. Mr Ntaganda also argues that ‘even if this manifestly unreasonable finding stands, the number of findings of lawful orders by UPC/FPLC commanders reveals this attack on the column as an anomaly’.²²⁰⁰ The Appeals Chamber recalls that the evidence and related findings of the Trial Chamber do not support Mr Ntaganda’s contention. In particular, the Appeals Chamber notes the Trial Chamber’s findings concerning the use of the phrase *kupiga na kuchaji* and the issuance of specific orders to attack civilians, as confirmed in the fifth ground of appeal.²²⁰¹ His argument is therefore rejected.

1011. In addition, Mr Ntaganda takes issue with the Trial Chamber’s reliance on its finding that “some of the goods looted from Mongbwalu were actually brought to [his] residence in Bunia”.²²⁰² He submits that the finding is based on an erroneous assessment of the evidence because the Trial Chamber found the Prosecution witnesses who made this allegation to be credible, without considering his evidence and submissions.²²⁰³

²¹⁹⁶ [Conviction Decision](#), para. 1188 (4th bullet point).

²¹⁹⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 351.

²¹⁹⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 351.

²¹⁹⁹ See paragraph 745 above.

²²⁰⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 351.

²²⁰¹ See paragraph 453 *et seq.* above.

²²⁰² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 352, referring to [Conviction Decision](#), para. 1183.

²²⁰³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 352.

1012. In support of its finding that ‘some goods looted from Mongbwalu were actually brought to Mr Ntaganda’s residence in Bunia’,²²⁰⁴ the Trial Chamber cited paragraph 516 of the Conviction Decision.²²⁰⁵ In said paragraph, which appears in the section containing the factual findings related to the *ratissage* operation carried out in the aftermath of the attack in Mongbwalu, the Trial Chamber found that ‘some looted goods were brought to Mr Ntaganda’s residence in Bunia’.²²⁰⁶ For this finding, the Trial Chamber relied on the evidence of P-0888,²²⁰⁷ P-0768,²²⁰⁸ P-0901²²⁰⁹ and P-0963.²²¹⁰ In light of their evidence and its finding that P-0901 and P-0963 were credible witnesses whose testimony could be relied upon, and that P-0888’s evidence on his participation in certain operations could generally be relied upon,²²¹¹ the Trial Chamber considered ‘that this finding [was] not affected by the Defence challenge’.²²¹²

1013. The Appeals Chamber notes that the Trial Chamber referred to the paragraph in Mr Ntaganda’s Closing Brief where he challenged this specific allegation advanced by the Prosecutor.²²¹³ In that paragraph, Mr Ntaganda argued, with reference to his own testimony, that he ‘did not have others commit pillage on his behalf; and did not organise the transport of looted goods from Mongbwalu to Bunia’.²²¹⁴ The Appeals Chamber notes that ‘in instances where the evidence provided by Mr Ntaganda [was] contradicted by other evidence, the [Trial Chamber] considered [...] the possibility that Mr Ntaganda had an incentive to provide exculpatory evidence’.²²¹⁵ The Trial Chamber referred in this regard to findings concerning, *inter alia*, ‘[t]he operations involving the UPC/FPLC, notably in relation to the conduct of the various operations and the commission of crimes by UPC/FPLC soldiers in that context’.²²¹⁶ The Appeals Chamber recalls that Mr Ntaganda’s general challenge to the Trial

²²⁰⁴ [Conviction Decision](#), para. 1183.

²²⁰⁵ [Conviction Decision](#), fn. 3213.

²²⁰⁶ [Conviction Decision](#), para. 516, fn. 1530

²²⁰⁷ P-0888: [T-105](#), p. 84, lines 12-19.

²²⁰⁸ P-0768: [T-33](#), p. 61, lines 16-19.

²²⁰⁹ P-0901: [T-28](#), p. 58, lines 8-23.

²²¹⁰ P-0963: [T-79](#), p. 20, line 10 to p. 21, line 10.

²²¹¹ [Conviction Decision](#), fn. 1530.

²²¹² [Conviction Decision](#), fn. 1530.

²²¹³ [Conviction Decision](#), fn. 1530, referring to [Mr Ntaganda’s Closing Brief](#), para. 765.

²²¹⁴ [Mr Ntaganda’s Closing Brief](#), para. 765, fns 2184-2185.

²²¹⁵ [Conviction Decision](#), para. 262.

²²¹⁶ [Conviction Decision](#), fn. 656.

Chamber's credibility assessment of his evidence has been addressed and rejected in the determination of the seventh ground of appeal.²²¹⁷ The Appeals Chamber notes that in paragraph 765 of Mr Ntaganda's Closing Brief, referred to by the Trial Chamber in its determination of the factual issue, Mr Ntaganda asserted that no probative value could be attributed to the evidence of P-0768, P-0963, P-0907, P-0901 and P-0888. In this regard, Mr Ntaganda fails to elaborate why that should be the case in relation to the specific finding now challenged on appeal.

1014. Accordingly, the Appeals Chamber finds no merit in Mr Ntaganda's argument. The Trial Chamber considered the relevant evidence and reached a reasonable conclusion on the basis of it. Mr Ntaganda has failed to show an error in this regard. The Appeals Chamber therefore finds that the Trial Chamber did not err in considering the fact that some of the looted goods were brought to Mr Ntaganda's residence in Bunia when determining his intent and knowledge of the crimes charged.

(d) Conclusion

1015. In light of the foregoing, the Appeals Chamber finds no error in the Trial Chamber's reliance on its findings concerning: (i) the murders committed during the First Operation in Mongbwalu that occurred at the *Appartements* camps, (ii) Mr Ntaganda's presence and awareness that civilian women were brought to the *Appartements* camp by UPC/FPLC soldiers and commanders in Mongbwalu and were raped in the camp, (iii) the order issued by Mr Ntaganda to fire heavy weapons, and (iv) the fact that some goods looted from Mongbwalu were actually brought to Mr Ntaganda's residence in Bunia, to infer his intent and knowledge for each of the crimes charged.

4. Alleged failure to consider the reasonable possibility of other available conclusions, and associated relevant evidence

(a) Summary of submissions

(i) Mr Ntaganda's submissions

1016. Mr Ntaganda submits that '[i]n order for a Chamber to infer the existence of a fact upon which a conviction relies, the inference drawn must be the only reasonable

²²¹⁷ See paragraphs 588-605 above.

one available'.²²¹⁸ In his view, a chamber is thus required to 'eliminate any other reasonable possibility, having considered all the relevant evidence'.²²¹⁹ Mr Ntaganda argues that the evidence the Trial Chamber failed to consider is the 'testimony and contemporaneous records' that show that the UPC/FPLC and Mr Ntaganda strived 'to direct a disciplined force that protected all civilians without distinction, in furtherance of the ultimate goal of peace in Ituri'.²²²⁰ In his view, this was a reasonable possibility which is supported by available and reliable evidence.²²²¹

(ii) *The Prosecutor's submissions*

1017. The Prosecutor submits that the Trial Chamber did not ignore the evidence which Mr Ntaganda claims was overlooked.²²²² She maintains that Mr Ntaganda's contention that the Trial Chamber ignored evidence of his attempt to promote the goal of an inclusive peace in Ituri is unsupported by the reasoning of the Trial Chamber.²²²³

(iii) *The victims' observations*

1018. Victims Group 2 submit that Mr Ntaganda fails to show an error or unreasonableness on the part of the Trial Chamber and merely disagrees with its appreciation of the evidence.²²²⁴

(b) Relevant part of the Conviction Decision

1019. The Trial Chamber found that Mr Ntaganda meant for the troops deployed during the First Operation to engage in the conduct and cause the consequences required for the commission of the crimes charged, based on several factors.²²²⁵

²²¹⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 353.

²²¹⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 353.

²²²⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 354.

²²²¹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 353-354.

²²²² [Prosecutor's Response to Appeal – Part II](#), para. 264.

²²²³ [Prosecutor's Response to Appeal – Part II](#), para. 264.

²²²⁴ [Observations of Victims Group 2 on Appeal – Part II](#), para. 97.

²²²⁵ (i) [Conviction Decision](#), para. 1177 ('Mr Ntaganda agreed and worked with others to achieve their plan to drive out all the Lendu from the localities targeted during the course of the First [...] Operation' and the execution of the agreement 'inherently involved the conduct that constitutes the crimes under consideration'); (ii) [Conviction Decision](#), para. 1178 (the repetition over time of crimes that followed a certain *modus operandi*); (iii) [Conviction Decision](#), para. 1179 (Mr Ntaganda's high ranking position and his position as the overall commander for the Mongbwalu assault which enabled him to be 'fully informed of the training and composition of the troops to be deployed'); (iv) [Conviction Decision](#), para. 1180 (Mr Ntaganda's presence in Mongbwalu 'once the assault had already commenced, but before the

(c) Determination by the Appeals Chamber²²²⁶

1020. Mr Ntaganda argues that the Trial Chamber failed to consider evidence of the UPC/FPLC, and Mr Ntaganda in particular, ‘striving to direct a disciplined force that protected all civilians without distinction, in furtherance of the ultimate goal of peace in Ituri’.²²²⁷ In this regard, the Appeals Chamber recalls that under the fourth and thirteenth grounds of appeal, Mr Ntaganda raises a similar argument in which he claims that the Trial Chamber failed to properly consider evidence of pacification efforts, speeches and other acts, which in his view showed that the UPC’s goal was to establish peace and protect civilians, and that it failed to explain why, in light of this contrary evidence, the existence of an organizational policy of the UPC/FPLC and a common plan amongst its military leaders for the destruction of the Lendu was the only reasonable inference available.²²²⁸

1021. Under the present ground of appeal, Mr Ntaganda refers to evidence of particular messages recorded in the logbooks in which he ‘refers explicitly to sanctions being meted out in cases of any indiscipline within the UPC/FPLC, and exhibits concern that any troops engaging in misconduct be reprimanded’.²²²⁹ He submits that ‘[t]hese messages raise doubt as to his apparent intent that the troops “attack and kill Lendu civilians, to engage in sexual violence against this population,

UPC/FPLC assault on Sayo began, and that he remained in the area, when the *ratissage* operation was ongoing, until at least one week after the UPC/FPLC had taken over Mongbwalu’); (v) [Conviction Decision](#), para. 1181 (the issuance of two orders by Mr Ntaganda to UPC/FPLC troops to attack the Lendu, including Lendu civilians); (vi) [Conviction Decision](#), para. 1182 (the issuance of orders by Mr Ntaganda, ‘either in person or over the radio, to fire the heavy weapons’ deciding ‘which objects were to be targeted’, including Mr Ntaganda’s order during the Sayo assault ‘to fire with a grenade launcher at the slope of the mountain’ to individuals that ‘were clearly not taking any part in hostilities’); (v) [Conviction Decision](#), para. 1183 (‘some goods looted from Mongbwalu were actually brought to Mr Ntaganda’s residence in Bunia’); (vi) [Conviction Decision](#), para. 1184 (‘murders and rapes committed in Mongbwalu occurred at the *Appartements* camp, Mr Ntaganda’s base’ (footnotes omitted), including one specific instance when ‘two persons who had been detained at this location were beaten and killed upon specific order of Mr Ntaganda’, the shooting and killing of *Abbé* Bwanalunga, a civilian of advanced age, by Mr Ntaganda); and (vii) [Conviction Decision](#), para. 1184 (Mr Ntaganda’s presence and awareness ‘that civilian women were brought to the *Appartements* camp by UPC/FPLC soldiers and commanders in Mongbwalu; these women were raped in the camp, and then thrown out, to be replaced by other women’).

²²²⁶ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

²²²⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 354.

²²²⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 109, 119, 123-126, 296-300.

²²²⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 354, *referring to* [Conviction Decision](#), para. 1187.

and to loot and destroy their belongings”²²³⁰ The Appeals Chamber notes that, as correctly pointed out by the Prosecutor,²²³¹ the Trial Chamber found that ‘there are limitations to conclusions that can be drawn from the logbooks’.²²³² Moreover, the messages cited by Mr Ntaganda as referring to sanctions mostly do not mention the reasons for the sanctions – other than instances of theft²²³³ and insubordination²²³⁴ – nor do they refer to sanctions for rape, murder, pillage or destruction of property against Lendu civilians.

1022. Furthermore, the Appeals Chamber recalls that under the fourth ground of appeal, after considering the Trial Chamber’s overall assessment of the relevant evidence, including that presented by Mr Ntaganda, it found that the Trial Chamber reasonably concluded that the killing, the looting, the rape or sexual violence committed against the Lendu were not considered punishable within the UPC/FPLC.²²³⁵ In these circumstances, the Appeals Chamber finds no error in the Trial Chamber’s non-consideration of the messages referred to by Mr Ntaganda in its determination of his intent and knowledge of the crimes charged.

1023. Mr Ntaganda also cites to the video recording of Chief Kahwa’s speech at Mandro and argues that, during that speech, it was impressed upon the troops that ‘the aim of the organization is to protect all civilians without discrimination, and the prohibition on looting and rape was forcibly underscored’.²²³⁶ He contends that the Trial Chamber’s dismissal of such exculpatory evidence was an error.²²³⁷ Consistent with its findings under the fourth ground of appeal in relation to this evidence, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that Chief Kahwa’s speech did not reflect the reality of the disciplinary system within the UPC/FPLC as regards looting and rape of civilians associated with the enemy, during UPC/FPLC operations.²²³⁸ The Appeals Chamber noted that the events subsequent to these speeches and the testimony of various witnesses show that the UPC/FPLC

²²³⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 355.

²²³¹ [Prosecutor’s Response to Appeal – Part II](#), para. 265.

²²³² [Conviction Decision](#), paras 59-66.

²²³³ DRC-OTP-2102-3854, at 4000.

²²³⁴ DRC-OTP-2102-3854, at 4027.

²²³⁵ See paragraphs 371-372 above.

²²³⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 355.

²²³⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 355.

²²³⁸ See paragraph 390 above.

soldiers understood that the policy *vis-à-vis* the civilian population was not that ostensibly conveyed in these speeches.²²³⁹ The evidence considered by the Trial Chamber shows that the policy to attack the civilian population was communicated directly, through orders to attack the Lendu, combatants and civilians, and that, contrary to Mr Ntaganda's argument, crimes committed against civilians in the course of the military operations were not punished.²²⁴⁰ In these circumstances, the Appeals Chamber finds no error in the Trial Chamber's non-consideration of Chief Kahwa's speech in its determination of Mr Ntaganda's intent and knowledge of the crimes charged.

1024. Mr Ntaganda further submits that the Trial Chamber ignored evidence of him giving 'shelter, assistance, and protection to Lendu civilians who had fled Mandro Camp after attacks on their homes' and delivering 'weapons to the Lendu combatants in Libi, in order to form a military alliance with them to force the UPDF out of Ituri'.²²⁴¹ The Appeals Chamber notes that Mr Ntaganda relies primarily on his own testimony in support of this argument.²²⁴² The Appeals Chamber recalls that the Trial Chamber did not find Mr Ntaganda to be 'credible when he affirms that he always fought and acted, including in 2002 and 2003, for the liberation and freedom of the civilian population in general in Ituri', observing that 'this statement is clearly contradicted by the other available evidence on the record which shows that at least a part of the civilian population in Ituri, in particular the Lendu, was actually the target of violent acts by the UPC/FPLC in 2002 and 2003'.²²⁴³ The Appeals Chamber has addressed and rejected Mr Ntaganda's general challenge to the Trial Chamber's credibility assessment of his evidence in the determination of the seventh ground of appeal.²²⁴⁴ Accordingly, the Appeals Chamber finds that it was reasonable for the Trial Chamber not to accord weight to Mr Ntaganda's testimony on this point.

1025. Furthermore, the Appeals Chamber notes Mr Ntaganda's reference to the testimony of D-0054 and to a video taken in Mongbwalu after the First Operation

²²³⁹ See paragraph 392 above.

²²⁴⁰ See paragraph 392 above.

²²⁴¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 356.

²²⁴² [Mr Ntaganda's Appeal Brief – Part II](#), fns 942-943.

²²⁴³ [Conviction Decision](#), para. 261.

²²⁴⁴ See paragraphs 588-605 above.

depicting Mr Ntaganda with a ‘Maman Lendu’ affirming that his intention was not to kill inhabitants but rather protect them and their goods.²²⁴⁵ In Mr Ntaganda’s view, this evidence supports his submission that the UPC’s goal was to establish peace and protect civilians without distinction.²²⁴⁶ The Appeals Chamber recalls its finding under the fourth ground of appeal, that it was reasonable for the Trial Chamber to conclude based on its numerous factual findings that within the UPC/FPLC a policy to attack civilians existed.²²⁴⁷ Moreover, the Appeals Chamber notes the Trial Chamber’s finding that the ‘stated aim [of the UPC/FPLC to defend the population as a whole] was directly contradicted by the planning and unfolding of the group’s military operations’.²²⁴⁸ In light of the foregoing, the Appeals Chamber considers that when viewed in the context of the entire evidentiary record and other relevant findings of the Trial Chamber that have been confirmed on appeal, it was not unreasonable for the Trial Chamber to have disregarded D-0054’s testimony or the video evidence in its evaluation of Mr Ntaganda’s intent and knowledge of the crimes charged.

(d) Conclusion

1026. In sum, the Appeals Chamber determines that, consistent with its findings under the fourth ground of appeal in relation to evidence which is the same or similar to that being relied upon under the present ground of appeal, the Trial Chamber did not fail to properly consider the evidence in question. Moreover, the Appeals Chamber considers that it was reasonable for the Trial Chamber to discount alternate conclusions, based on the evidence that Mr Ntaganda suggests, points to ‘the UPC/FPLC generally, and Mr Ntaganda in particular, striving to direct a disciplined force that protected all civilians without distinction, in furtherance of the ultimate goal of peace in Ituri’.²²⁴⁹ Accordingly, the Appeals Chamber rejects Mr Ntaganda’s arguments.

²²⁴⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 357, 358.

²²⁴⁶ D-0054: [T-244](#), p. 18, lines 14-25 [REDACTED].

²²⁴⁷ See paragraph 394 above.

²²⁴⁸ [Conviction Decision](#), para. 687.

²²⁴⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 354.

5. Overall conclusion

1027. Having rejected the entirety of Mr Ntaganda's arguments challenging the Trial Chamber's finding that Mr Ntaganda meant for the troops deployed during the First Operation to engage in the conduct and cause the consequences required for the commission of crimes of murder as a crime against humanity and as a war crime (counts 1 and 2), intentionally attacking civilians as a war crime (count 3), rape as a crime against humanity and as a war crime (counts 4 and 5), sexual slavery as a crime against humanity and as a war crime (counts 7 and 8), persecution as a crime against humanity (count 10), pillage as a war crime (count 11), forcible transfer of population as a crime against humanity (count 12), ordering the displacement of the civilian population as a war crime (count 13), attacking protected objects as a war crime (count 17), and destroying the adversary's property as a war crime (count 18), and that Mr Ntaganda was aware of the relevant circumstances, the Appeals Chamber, by majority, Judge Eboe-Osuji dissenting, rejects this ground of appeal.

O. Fifteenth ground of appeal: Whether Mr Ntaganda possessed the *mens rea* for the crimes committed during the Second Operation

1028. Under the fifteenth ground of appeal, Mr Ntaganda contends that the Trial Chamber erred in finding that he had control over the crimes committed during the Second Operation and that he was aware of the factual circumstances that allowed him to exert control over those crimes.²²⁵⁰ Consequently, the Appeals Chamber observes that, despite the title of this ground of appeal, Mr Ntaganda not only challenges the Trial Chamber's findings on his *mens rea* but also his contribution to the implementation of the common plan, being an objective element of his criminal liability as an indirect co-perpetrator.

1029. In support of his argument, Mr Ntaganda alleges: (i) legal errors in the Trial Chamber's application of the law on indirect co-perpetration;²²⁵¹ (ii) errors in the assessment of his contribution to, and *mens rea* for, the crimes committed during the Second Operation;²²⁵² (iii) errors in the Trial Chamber's factual findings on his 'direct

²²⁵⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 361, 373-388, 396-398.

²²⁵¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 369; [Mr Ntaganda's Reply to Prosecutor's Response to Appeal – Part II](#), paras 47-55.

²²⁵² [Mr Ntaganda's Appeal Brief – Part II](#), paras 362-363.

contributions to the Second Operation’, arguing that ‘[t]hese *de minimis* contributions to the Second Operation reveal no awareness that he was exercising control over, or making an essential contribution to, the crimes of the Second Operation’;²²⁵³ and (iv) errors in the Trial Chamber’s reliance on the testimony of P-0055 that Mr Ntaganda was ‘contemporaneously informed of the Kobu massacre and expressed approval of that event’.²²⁵⁴ The Appeals Chamber will address these arguments in turn.

I. Alleged errors in the Trial Chamber’s application of the law on indirect co-perpetration

(a) Summary of submissions

(i) Mr Ntaganda’s submissions

1030. With reference to the relevant jurisprudence of the Court, Mr Ntaganda submits that at a minimum co-perpetration requires that the accused make “an essential contribution with the resulting power to frustrate the commission of the crime”.²²⁵⁵ He argues that ‘[t]here is ambiguity as to whether this “essential contribution” must be to the common plan pursuant to which the crime is committed, or to the crime itself’.²²⁵⁶ Notwithstanding, he argues that ‘[t]he contribution must demonstrate that the “person nevertheless had **control over** the crime”’²²⁵⁷ and that the *mens rea* for co-perpetration requires, *inter alia*, that ‘the accused at least be aware, if not intend, that his or her contributions amount to exercising control over the crime to such an extent that he or she would frustrate its commission by not making the contribution’.²²⁵⁸

(ii) The Prosecutor’s submissions

1031. The Prosecutor argues that there is no ambiguity regarding the ‘essential contribution’ requirement. She asserts that according to the Appeals Chamber, an

²²⁵³ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 373-388 (emphasis in original).

²²⁵⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 399-411.

²²⁵⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 369, referring to [Lubanga Appeal Judgment](#), para. 469.

²²⁵⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 369.

²²⁵⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 369 (emphasis in original), referring to [Lubanga Appeal Judgment](#), para. 469.

²²⁵⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 366.

‘accused must make an essential contribution to the implementation of the common plan or “within the framework of the common plan”’.²²⁵⁹

1032. The Prosecutor submits that in accordance with the Court’s jurisprudence on indirect co-perpetration, she is required to establish, *inter alia*, ‘that the accused was aware of the factual circumstances that enabled him or her, together with other co-perpetrators, to *jointly* exercise functional control over the crimes’.²²⁶⁰ She submits that in cases, such as the present one, where it is alleged that the co-perpetrators for the most part committed the crimes *via* a hierarchy of power, the accused’s awareness is established ‘by showing that the accused was aware of his or her critical role in the implementation of the common plan and his or her ability to control, jointly with others, the organised structure of power’.²²⁶¹

1033. The Prosecutor submits that even though the Trial Chamber ‘did not expressly articulate its conclusion that Ntaganda was aware of the factual circumstances that enabled him, together with the other co-perpetrators, to exercise functional control over the crime’ it nevertheless held that Mr Ntaganda had ‘met all the *mens rea* requirements for indirect co-perpetration and was thus responsible for the crimes pursuant to article 25(3)(a), based on its prior factual findings’.²²⁶²

(iii) Mr Ntaganda’s reply to the Prosecutor

1034. Mr Ntaganda submits that, as acknowledged by the Prosecutor, the Trial Chamber failed to make a finding that he was aware of the factual circumstances which allowed him to exert control over the crime.²²⁶³ In order to have made such a determination, he argues that the Trial Chamber was required to first determine whether he actually exerted control over the crime by assessing whether he had made an essential contribution, within the framework of a common plan, with the resulting power to frustrate the commission of the crime.²²⁶⁴ This assessment, in turn, required an analysis of his actions as a co-perpetrator in relation to the crimes committed by

²²⁵⁹ [Prosecutor’s Response to Appeal – Part II](#), para. 276, referring to [Bemba et al. Appeal Judgment](#), paras 818-820; [Lubanga Appeal Judgment](#), paras 445, 469.

²²⁶⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 270 (emphasis in original).

²²⁶¹ [Prosecutor’s Response to Appeal – Part II](#), para. 270.

²²⁶² [Prosecutor’s Response to Appeal – Part II](#), para. 273.

²²⁶³ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 49.

²²⁶⁴ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 50.

the members of the ‘organisation’.²²⁶⁵ Mr Ntaganda submits that the ‘actions of the co-perpetrator’, in this regard, ‘depend on the nature of the common plan and the element of criminality found therein’.²²⁶⁶

1035. Mr Ntaganda submits that it was not possible for the Trial Chamber to find that he was aware of the factual circumstances that allowed him to exert control over the crimes ‘without assessing the evidence of his actions, within the framework of the common plan, related to the specific crimes charged’.²²⁶⁷ Thus in his view, the Trial Chamber erred when it relied on his acts and conduct ‘almost exclusively in relation to the First Operation and the crimes committed therein’.²²⁶⁸

(b) Relevant part of the Conviction Decision

1036. In interpreting the relevant applicable law concerning indirect co-perpetration, the Trial Chamber, with reference to the previous jurisprudence of the Appeals Chamber and other jurisprudence of the Court, considered that

individual criminal responsibility for commission of a crime jointly with another person and through another person requires the following objective legal elements: (i) the existence of an agreement or common plan, between the accused and one of [*sic*] more other persons, to commit the crimes or to engage in a conduct which, in the ordinary course of events, would result in the commission of the crimes; and (ii) the control of the members of the common plan over a person or persons who execute the material elements of the crimes by subjugating the will of the direct perpetrators. The accused, though not required to carry out the criminal conduct directly and personally, must have a [*sic*] control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission.²²⁶⁹

1037. The Trial Chamber stated that in order to establish that an accused committed a crime jointly with another person it must be established that an agreement existed, either express or implied, between these perpetrators ‘which led to the commission of one or more crimes under the jurisdiction of the Court’.²²⁷⁰ Concerning the requirement of control over the crime, the Trial Chamber found that it facilitates

²²⁶⁵ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 50.

²²⁶⁶ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 51.

²²⁶⁷ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 53.

²²⁶⁸ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 54.

²²⁶⁹ [Conviction Decision](#), para. 774.

²²⁷⁰ [Conviction Decision](#), para. 775.

a normative assessment of the role of the accused in the specific circumstances of the case. Indeed, the most appropriate tool for conducting such an assessment is an evaluation of whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if his essential contribution was not made at the execution stage of the crime.²²⁷¹

1038. In relation to the subjective element, the Trial Chamber noted that ‘individual criminal responsibility requires that the subjective elements are fulfilled as required by Article 30 and any *lex specialis*’.²²⁷²

(c) Determination by the Appeals Chamber²²⁷³

1039. The Appeals Chamber notes that Mr Ntaganda’s argument concerns alleged errors by the Trial Chamber in the application of the law on co-perpetration. In particular, he notes an ambiguity in the law concerning the notion of ‘essential contribution’ and alleges an error in the Trial Chamber’s *mens rea* findings, namely, his awareness of the factual circumstances, which allowed him to exert control over the crime.

1040. In the *Lubanga* Appeal Judgment, the Appeals Chamber stated with respect to individual criminal responsibility as a co-perpetrator that

in circumstances where a plurality of persons was involved in the commission of crimes under the Statute, the question of whether an accused ‘committed’ a crime – and therefore not only contributed to the crime committed by someone else – cannot only be answered by reference to how close the accused was to the actual crime and whether he or she directly carried out the incriminated conduct. Rather, what is required is a normative assessment of the role of the accused person in the specific circumstances of the case. The Appeals Chamber considers that the most appropriate tool for conducting such an assessment is an evaluation of whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its

²²⁷¹ [Conviction Decision](#), para. 779 (footnotes omitted).

²²⁷² [Conviction Decision](#), para. 774 (footnote omitted).

²²⁷³ As set out in paragraph 879 above, Judge Morrison and Judge Eboe-Osuji entertain considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber. Judge Morrison is unable to agree with the legal reasoning of the majority of the Appeals Chamber pertaining to indirect co-perpetration set out in this section (*see* [Annex 2](#), Separate opinion of Judge Howard Morrison on Mr Ntaganda’s appeal). Judge Eboe-Osuji is unable to concur with the determinations in this section of the judgment (*see* [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

commission, even if that essential contribution was not made at the execution stage of the crime.²²⁷⁴

1041. It follows that, at a minimum, for a person to be held liable as a co-perpetrator ‘it has to be established, *inter alia*, that he or she exercised control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission’.²²⁷⁵ In this regard, the Appeals Chamber notes Mr Ntaganda’s argument as to whether the ‘essential contribution’ must be to the common plan pursuant to which the crime is committed or to the crime itself.²²⁷⁶ As rehearsed above, the Appeals Chamber considers that, consistent with the principle of causation, which requires a causal link between the conduct of an accused and the crime, an accused’s essential contribution must be to the crime for which he or she is responsible. However, the contribution of a co-perpetrator which, on its face, is not directly to a specific crime, but to the implementation of the common plan more generally may still suffice. As previously found by the Appeals Chamber, ultimately, ‘[t]he decisive consideration [...] is whether the individual contribution of the accused within the framework of the agreement was such that without it, the crime could not have been committed or would have been committed in a significantly different way’.²²⁷⁷ In the case at hand, the Trial Chamber correctly articulated the law in finding that Mr Ntaganda’s contribution to the crimes was essential.²²⁷⁸

1042. Furthermore, the Appeals Chamber notes Mr Ntaganda’s argument that, in assessing his *mens rea* for the crimes committed during the Second Operation, the Trial Chamber failed to find that he was aware of the factual circumstances that allowed him to exert control over the crime.²²⁷⁹ The Appeals Chamber observes, in this regard, that there appears to be varying jurisprudence as to whether the accused’s awareness of the factual circumstances that allow him or her to exert control over the crime is an additional subjective element or whether such is encompassed in the mental elements prescribed in article 30 of the Statute.²²⁸⁰ The pre-trial chamber in the

²²⁷⁴ [Lubanga Appeal Judgment](#), para. 473.

²²⁷⁵ [Bemba et al. Appeal Judgment](#), para. 810.

²²⁷⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 369.

²²⁷⁷ [Bemba et al. Appeal Judgment](#), paras 820, 825.

²²⁷⁸ [Conviction Decision](#), para. 856.

²²⁷⁹ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 49.

²²⁸⁰ [Katanga Conviction Decision](#), para. 1414 (‘In addition to satisfying the mental elements set forth in article 30 and the intent specific to certain crimes – ingredients whose contours are delineated above –

Lubanga Confirmation Decision observed that the person’s awareness of the factual circumstances enabling him or her to control the crime ‘requires the suspect to be aware (i) that his or her role is essential to the implementation of the common plan, and hence in the commission of the crime; and (ii) that he or she can - by reason of the essential nature of his or her task - frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to perform the task assigned to him or her’.²²⁸¹

1043. In the case at hand, the Appeals Chamber notes that, while the Pre-Trial Chamber, in the Confirmation Decision, specifically entered a finding on Mr Ntaganda’s awareness of the circumstances allowing him to exert control over the crime,²²⁸² the Trial Chamber did not expressly refer to this element. For the reasons that follow, the Appeals Chamber considers that the Trial Chamber did not err in this respect.

1044. Article 30 of the Statute provides that ‘a person shall be criminally responsible and liable for punishment for a crime [...] if the material elements are committed with intent and knowledge’. ‘Knowledge’, is defined by the Statute as ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events’.²²⁸³

the Chamber further considered that indirect commission requires the perpetrator’s awareness of the factual circumstances which allow him or her to exert control over the crime’); [Lubanga Confirmation Decision](#), paras 349-367 (apart from the subjective elements mentioned in article 30 of the Statute, the pre-trial chamber stated that ‘[t]he theory of co-perpetration based on joint control over the crime requires two additional subjective elements. The suspect and the other co-perpetrators (a) must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime, and (b) must all mutually accept such a result by reconciling themselves with it or consenting to it’. In addition, the pre-trial chamber stated that ‘the third and last subjective element of co-perpetration based on joint control of the crime is the awareness by the suspect of the factual circumstances enabling him or her to jointly control the crime’); [Lubanga Conviction Decision](#), para. 1013 (‘The Chamber is of the view that the prosecution must establish, as regards the mental element, that: (i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence “will occur in the ordinary course of events”; and (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan’. In this decision, the Trial Chamber does not appear to have viewed the latter element as additional to the mental elements prescribed in article 30 of the Statute).

²²⁸¹ [Lubanga Confirmation Decision](#), para. 367.

²²⁸² [Confirmation Decision](#), para. 135 (‘Moreover, based on Mr Ntaganda’s high-ranking position in the UPC/FPLC and his dominant role as set out previously [referring to Mr Ntaganda’s specific actions in relation to each of the operations], he was also aware of the factual circumstances enabling him to exercise joint control over the commission of the crimes through other persons’ (footnotes omitted)).

²²⁸³ Article 30(3) of the Statute.

1045. The Appeals Chamber considers that, for indirect co-perpetration, the ‘knowledge’ component of *mens rea* includes an awareness on the part of the co-perpetrator of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise control over the crime.

1046. In the case at hand, the Appeals Chamber notes that, in addressing the subjective elements, the Trial Chamber found, with respect to Mr Ntaganda’s personal conduct, that it was uncontested ‘that Mr Ntaganda deliberately participated in UPC/FPLC activities throughout and beyond the period of the charges, or that he had high-level status within its military branch at the time’, and that he testified at length about his ‘responsibilities and related actions, notably in relation to the UPC/FPLC training efforts, the setting up of a company of bodyguards for himself, and the First Operation’.²²⁸⁴ The Trial Chamber found ‘that the only reasonable conclusion, based on the nature of these activities, is that his related conduct was deliberate’.²²⁸⁵ Furthermore, on the basis of several considerations, the Trial Chamber concluded beyond reasonable doubt, in relation to the crimes committed in the First and Second Operations, ‘that Mr Ntaganda meant for the troops deployed during the First and Second Operation to engage in the conducts and cause the consequences required for the commission of crimes’, and was aware of the relevant circumstances.²²⁸⁶

²²⁸⁴ [Conviction Decision](#), para. 1175.

²²⁸⁵ [Conviction Decision](#), para. 1175.

²²⁸⁶ [Conviction Decision](#), para. 1189 (the Trial Chamber based this conclusion on the following considerations: (i) ‘Mr Ntaganda agreed and worked with others to achieve their plan to drive out all the Lendu from the localities targeted during the course of the First and Second Operation’ and the execution of the agreement ‘inherently involved the conduct that constitutes the crimes under consideration’ ([Conviction Decision](#), para. 1177); (ii) the repetition over time of crimes that followed a certain *modus operandi* ([Conviction Decision](#), para. 1178); (iii) Mr Ntaganda’s position as ‘the highest ranked leader of the FPLC’ ([Conviction Decision](#), para. 1179); (iv) Mr Ntaganda’s non-hesitation ‘to remind [UPC/FPLC troops] that they were expected to execute orders, as he did on 18 February 2003 in the context of the Second Operation’ ([Conviction Decision](#), para. 1179); (v) Mr Ntaganda being ‘informed of the training and composition of the troops to be deployed’ ([Conviction Decision](#), para. 1179); (vi) Mr Ntaganda’s announcement prior to the launching of the Second Operation of an important reorganisation concerning the assignment of commanders ([Conviction Decision](#), para. 1179); (vii) Mr Ntaganda’s presence, actions, and directives in the context of the First Operation ([Conviction Decision](#), paras 1180-1184); and (viii) the fact that at the conclusion of the Second Operation ‘Mr Ntaganda had a conversation with the G2 about the fact that UPC/FPLC soldiers killed civilians in Kobu under the command of Salumu Mulenda’ during which Mr Ntaganda ‘said that he was glad how things had turned out and also said that Salumu Mulenda was a “gentleman”, “a brave, a fine person”, or a “real man”’, thereby approving the behaviour of Salumu Mulenda’s troops during the Kobu massacre ([Conviction Decision](#), para. 1185)).

1047. The Appeals Chamber finds that, in determining Mr Ntaganda's *mens rea* in relation to his personal conduct and the crimes committed during the First and Second Operations, the Trial Chamber also established Mr Ntaganda's awareness of the factual circumstances that enabled him to exercise control over the crimes. Moreover, in the specific circumstances of this case, the Appeals Chamber notes that, although the Pre-Trial Chamber assessed Mr Ntaganda's awareness of the circumstances enabling him to exercise control over the crimes as a separate element, the circumstances it considered to enter its finding thereon are almost identical to those relied upon by the Trial Chamber to determine Mr Ntaganda's intent and knowledge – Mr Ntaganda's high-ranking position²²⁸⁷ and his specific role in the execution of crimes – during the First and Second Operations.²²⁸⁸

1048. In sum, the Appeals Chamber finds that Mr Ntaganda shows no error in the Trial Chamber's application of the law on indirect co-perpetration and his arguments are rejected.

2. *Alleged errors in the Trial Chamber's assessment of Mr Ntaganda's contributions and mens rea*

(a) **Summary of submissions**

(i) *Mr Ntaganda's submissions*

1049. Mr Ntaganda contends that the Trial Chamber's characterisation of the relationship between the two operations as being 'a logical succession of events' and as part of the 'same course of conduct' inevitably 'short-circuited the appropriate analysis of *mens rea*; over-stated [his] degree of contribution and control; and was an error of law'.²²⁸⁹ He argues that in finding that the 'two operations were one and the same' the Trial Chamber failed to 'analyse first the extent to which the contributions to the First Operation were contributions to the crimes of the Second Operation, and whether those contributions were made with the requisite *mens rea*'.²²⁹⁰ Mr Ntaganda

²²⁸⁷ [Confirmation Decision](#), para. 135; [Conviction Decision](#), paras 1175, 1179.

²²⁸⁸ [Confirmation Decision](#), paras 110-117, 135; [Conviction Decision](#), paras 1179-1185.

²²⁸⁹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 362-363.

²²⁹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 391 (emphasis in original).

submits that the Trial Chamber's approach 'does little more than transfer its findings of *mens rea* from the First Operation to the Second Operation'.²²⁹¹

1050. Moreover, he argues that, in the Confirmation Decision, the Pre-Trial Chamber analysed his conduct in relation to the two operations separately and in so doing recognised that 'it would be improper to indiscriminately treat contributions to the First Operation as contributions to the Second for the purpose of evaluating whether there was the requisite degree of control for co-perpetration of the crimes of the Second Operation'.²²⁹² He submits that the crimes of the Second Operation were 'clearly distinct from those of the First in terms of timing, circumstances, scale, geographic location, identity of perpetrators and degree of involvement of the accused'.²²⁹³ Consequently, Mr Ntaganda avers that his actions in relation to the First Operation 'cannot be said to have been committed with the required knowledge of control over the crimes of the Second Operation'.²²⁹⁴

(ii) *The Prosecutor's submissions*

1051. The Prosecutor submits that the Trial Chamber 'did not err in finding that the two operations were part of the same' course of conduct and it was therefore unnecessary 'to conduct a separate analysis of Ntaganda's contribution to the First and Second Operations to determine whether his individual criminal responsibility was established in respect of each'.²²⁹⁵ She argues that the 'operations were separate only in terms of place and time'²²⁹⁶ and that the Trial Chamber's finding that Mr Ntaganda's 'own presence, actions and directives [were] more prominent in the First Operation than the Second, does not automatically diminish his contributions to the crimes as a whole'.²²⁹⁷ The Prosecutor argues that Mr Ntaganda 'fails to identify an error in the Chamber's approach to assessing his contributions to, and *mens rea* for, the crimes of the First and Second Operations'.²²⁹⁸

²²⁹¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 392.

²²⁹² [Mr Ntaganda's Appeal Brief – Part II](#), para. 393.

²²⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 395.

²²⁹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 395.

²²⁹⁵ [Prosecutor's Response to Appeal – Part II](#), para. 286.

²²⁹⁶ [Prosecutor's Response to Appeal – Part II](#), para. 279.

²²⁹⁷ [Prosecutor's Response to Appeal – Part II](#), para. 286 (footnotes omitted).

²²⁹⁸ [Prosecutor's Response to Appeal – Part II](#), para. 279.

1052. Lastly, the Prosecutor avers that Mr Ntaganda’s reference to the assessment of an accused’s essential contribution with the requisite *mens rea* in other cases before the Court is ‘inapposite’ given the ‘fact-specific’ nature of such an assessment based on the evidence in each case.²²⁹⁹ In her view, the Pre-Trial Chamber’s approach of separating its analysis of Mr Ntaganda’s contributions to the First and Second Operations in the Confirmation Decision, ‘did not prevent the Trial Chamber from finding that the evidence supported a unitary approach’.²³⁰⁰

(iii) *The victims’ observations*

1053. Victims Group 2 submit that ‘Mr Ntaganda was convicted on the basis of a common plan and his prominent position and contribution to the plan’.²³⁰¹ In their view, ‘the Trial Chamber did not have to find *mens rea* for each specific crime committed as a result of the intended implementation of the common plan’.²³⁰² They argue that since the Trial Chamber ‘found that the First and Second Operations were part of the same plan, it was entitled to assess Mr Ntaganda’s role therein comprehensively’.²³⁰³

(iv) *Mr Ntaganda’s reply to the Prosecutor*

1054. Mr Ntaganda argues that the evidence concerning the First and Second Operations reveals that his role within the framework of the common plan; his interactions with the co-perpetrators; the planning of the operations and his actions in relation to the ‘organisation’ through which the crimes were committed, were different.²³⁰⁴ Consequently, he argues that ‘the Trial Chamber was bound to analyse [his] responsibility in respect of both operations separately’.²³⁰⁵

(b) Relevant part of the Conviction Decision

1055. In addressing the contextual elements of crimes against humanity, the Trial Chamber noted that ‘[a]rticle 7(2)(a) of the Statute defines an “attack directed against any civilian population” as’, *inter alia*, ‘a “course of conduct involving the multiple

²²⁹⁹ [Prosecutor’s Response to Appeal – Part II](#), para. 287.

²³⁰⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 287.

²³⁰¹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 101.

²³⁰² [Observations of Victims Group 2 on Appeal – Part II](#), para. 101.

²³⁰³ [Observations of Victims Group 2 on Appeal – Part II](#), para. 103.

²³⁰⁴ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 54.

²³⁰⁵ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 54.

commission of acts” mentioned in article 7(1)’ of the Statute.²³⁰⁶ The Trial Chamber considered that the ‘requirement that the acts form part of a “course of conduct” indicates that Article 7 is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts’.²³⁰⁷ In this regard, the Trial Chamber found that the ‘UPC/FPLC committed several acts constituting murder, rape, sexual slavery, persecution, and forcible transfer of civilians, during the First and Second Operation’.²³⁰⁸ The Trial Chamber considered that ‘[t]hese two operations were part of the same military campaign and constituted a logical succession of events. As such, although separate in place and time, the acts performed by the UPC/FPLC troops during the First and Second Operation are part of one and the same course of conduct’.²³⁰⁹

1056. In considering whether Mr Ntaganda entered into a common plan with the other alleged co-perpetrators the Trial Chamber found that the UPC/FPLC military leaders had planned a military campaign that included a series of assaults against the Lendu community.²³¹⁰ In particular, the Trial Chamber found that

After the successful taking of Bunia in August 2002, they undertook the planning of a large scale military campaign to prevent the APC from reorganising and launching counter-attacks. As set out above, the UPC/FPLC had the intention to occupy key positions in Ituri, notably Mongbwalu, and secure important roads leading to and from Bunia. It is in this context that the UPC/FPLC undertook to open the Main Road between Mongbwalu and Bunia (Second Operation) after having successfully taken control over Mongbwalu, its airstrip and its surroundings (First Operation). As such, the First and Second Operation are part of the same military campaign and constitute a logical succession of events. Although separate in place and time, the acts performed by the UPC/FPLC troops during these two successive operations are part of one and the same course of conduct.²³¹¹

1057. Further still, in assessing Mr Ntaganda’s role in the implementation of the common plan, the Trial Chamber found that Mr Ntaganda had ‘devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu and

²³⁰⁶ [Conviction Decision](#), para. 661.

²³⁰⁷ [Conviction Decision](#), para. 662.

²³⁰⁸ [Conviction Decision](#), para. 664.

²³⁰⁹ [Conviction Decision](#), paras 664, 793.

²³¹⁰ [Conviction Decision](#), paras 793-807.

²³¹¹ [Conviction Decision](#), para. 793 (footnotes omitted).

the related First and Second Operation'.²³¹² In particular, the Trial Chamber found that

once the UPC/FPLC was in control of Mongbwalu, most notably of its airstrip, it could most effectively launch various assaults on villages located in the Walendu-Djatsi *collectivité*, seize the Main Road, and drive out the targeted group from this area. As such, the success of the UPC/FPLC assault on Mongbwalu allowed the organisation to continue, pursuant to the common plan, the commission of crimes against the targeted groups during both the First and Second Operation. Consequently, since the First and Second Operation are part of one and the same plan, the Chamber has assessed Mr Ntaganda's role in a comprehensive way, taking into account the totality of his actions in the context of the First and Second Operation.²³¹³

1058. Finally, in assessing Mr Ntaganda's intent and knowledge for each of the crimes charged the Trial Chamber conducted its assessment in relation to both operations together and found that

the criminal acts performed by the UPC/FPLC troops during the First Operation were reproduced during the course of the Second Operation, which culminated in particularly violent events, *i.e.* the "Kobu massacre", and having found that Mr Ntaganda approved of the behaviour of the troops in this context, the Chamber considers that he intended the troops to continue with the same criminal conduct during the course of the Second Operation.²³¹⁴

(c) Determination by the Appeals Chamber²³¹⁵

1059. Mr Ntaganda argues that the Trial Chamber erred in finding that the First and Second Operations 'were part of the same military campaign' and constituted a 'logical succession of events'.²³¹⁶ He contends that the two operations were distinct and as a result, his degree of control over the crimes and related *mens rea*, with respect to both operations was different. Consequently, Mr Ntaganda submits that the

²³¹² [Conviction Decision](#), paras 834-846.

²³¹³ [Conviction Decision](#), para. 838.

²³¹⁴ [Conviction Decision](#), para. 1187.

²³¹⁵ As set out in paragraph 879 above, Judge Morrison and Judge Eboe-Osuji entertain considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber. Judge Morrison is unable to agree with the legal reasoning of the majority of the Appeals Chamber pertaining to indirect co-perpetration set out in this section (*see* [Annex 2](#), Separate opinion of Judge Howard Morrison on Mr Ntaganda's appeal). Judge Eboe-Osuji is unable to concur with the determinations in this section of the judgment (*see* [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

²³¹⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 362-363, 390-391 referring to [Conviction Decision](#), paras 664, 793.

Trial Chamber was ‘bound to analyse [his] responsibility in respect of both operations separately’.²³¹⁷

1060. At the outset, the Appeals Chamber notes that Mr Ntaganda’s arguments ignore the Trial Chamber’s findings on what constituted the common plan agreed to by Mr Ntaganda and the other alleged co-perpetrators. In addition, his arguments fail to appreciate that for co-perpetration, the decisive consideration is whether his contributions as a whole amounted to an essential contribution to the crimes within the framework of the common plan, such that without it, ‘the crime could not have been committed or would have been committed in a significantly different way’.²³¹⁸ As noted above,²³¹⁹ the Appeals Chamber has previously held, with regard to co-perpetration, that ‘a normative assessment of the role of the accused person in the specific circumstances of the case’ is required to determine ‘whether the accused had control over the crime, by virtue of his or her essential contribution to it and the resulting power to frustrate its commission, even if that essential contribution was not made at the execution stage’.²³²⁰

1061. In the specific circumstances of this case, the Appeals Chamber notes that the common plan agreed to by Mr Ntaganda and the other co-perpetrators was ‘to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML’.²³²¹ The UPC/FPLC intended through its military campaign ‘to occupy key positions in Ituri, [such as] Mongbwalu, and secure important roads leading to and from Bunia’.²³²² The Trial Chamber found that it was ‘in this context that the UPC/FPLC undertook to open the Main Road between Mongbwalu and Bunia (Second Operation) after having successfully taken control over Mongbwalu, its airstrip and its surroundings (First Operation)’.²³²³ Notably, the Trial Chamber found that it was only once the UPC/FPLC had successfully secured Mongbwalu and its airstrip, could it ‘most effectively launch’ its assault under the

²³¹⁷ [Mr Ntaganda’s Reply to Prosecutor’s Response to Appeal – Part II](#), para. 54; [Mr Ntaganda’s Appeal Brief – Part II](#), paras 362-363, 390-393.

²³¹⁸ [Bemba et al. Appeal Judgment](#), paras 820, 825.

²³¹⁹ See paragraph 1040 above.

²³²⁰ [Lubanga Appeal Judgment](#), para. 473; [Bemba et al. Appeal Judgment](#), para. 820.

²³²¹ [Conviction Decision](#), para. 808 (footnote omitted).

²³²² [Conviction Decision](#), paras 438-439, 793.

²³²³ [Conviction Decision](#), para. 793.

Second Operation and continue to implement the common plan to drive out the Lendu from the area.²³²⁴

1062. In addition, the Trial Chamber's findings demonstrated that the two operations were inter-related. It found: (i) that the timing between the end of the First Operation and the start of preparations for the Second Operation was approximately two months;²³²⁵ (ii) that during both operations the UPC/FPLC troops followed a certain *modus operandi*;²³²⁶ (iii) that '*kupiga na kuchaji*' orders were given before each operation;²³²⁷ and (iv) that with the exception of some of the crimes which were found to have taken place in only one of the two operations, the nature of the crimes committed during the First and Second Operations was the same.²³²⁸

1063. The Appeals Chamber notes Mr Ntaganda's argument that the Trial Chamber's approach to its assessment of his contribution to, and *mens rea* for, the crimes committed during both operations amounted to an improper 'transfer [of] its findings' from the First Operation to the Second Operation and that it 'indiscriminately treat[ed] contributions to the First Operation as contributions to the Second for the purpose of evaluating whether there was the requisite degree of control for co-perpetration of the crimes of the Second Operation'.²³²⁹ The Appeals Chamber is unpersuaded by this argument.

1064. The Appeals Chamber recalls that the decisive consideration for co-perpetration is whether Mr Ntaganda's contributions as a whole amounted to an essential contribution to the crimes within the framework of the common plan. In the circumstances of this case, given that the two operations formed part of the UPC/FPLC's military campaign and were therefore, in the Appeals Chamber's view, an integral component of the common plan, the Trial Chamber was entitled to assess Mr Ntaganda's role therein comprehensively with a view to determining whether, as a *whole*, his contributions to the implementation of the common plan amounted to an essential contribution with the resulting power to frustrate the commission of the

²³²⁴ [Conviction Decision](#), para. 838.

²³²⁵ [Conviction Decision](#), paras 550, 539, 543, 566.

²³²⁶ [Conviction Decision](#), para. 688. *See also* paras 695, 1178.

²³²⁷ [Conviction Decision](#), para. 688.

²³²⁸ [Conviction Decision](#), section VII, Disposition.

²³²⁹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 392-393.

crimes.²³³⁰ Therefore, the Appeals Chamber considers that a separate analysis of Mr Ntaganda's essential contribution with respect to the specific crimes charged in each operation was not required.

1065. It follows that the Trial Chamber was not required to assess Mr Ntaganda's *mens rea* in respect of the specific criminal acts committed in each operation. Indeed, in order to find him criminally responsible as a co-perpetrator for specific criminal acts of murder or rape that took place on particular dates and in particular locations, it need not be established that Mr Ntaganda was aware of the details of these events, including whether and which specific acts had been committed. Rather, what must be established is that he possessed the requisite *mens rea* with respect to the crimes as such in the sense of murder, rape, persecution, pillage *et cetera*, committed in implementation of the common plan.

1066. Contrary to Mr Ntaganda's arguments, it was appropriate for the Trial Chamber to assess Mr Ntaganda's contribution to the implementation of the common plan and *mens rea* in relation to the First and Second Operations comprehensively. The Appeals Chamber finds that this approach did not amount to a mere transfer of its findings on his contribution to, and *mens rea* for, the crimes from the First Operation to the Second Operation.²³³¹ In the same vein, even though Mr Ntaganda's 'presence, actions, and directives' were found to be more pronounced during the First Operation than the Second Operation,²³³² the Trial Chamber was not prevented from 'taking into account the totality of his actions in the context of the First and the Second Operation[s]' and finding that he had made an essential contribution to both operations.²³³³ As to Mr Ntaganda's contention that his contributions to the First Operation were 'so remote in time [to the Second Operation] that, notwithstanding his

²³³⁰ [Bemba et al. Appeal Judgment](#), para. 1248.

²³³¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 392.

²³³² [Conviction Decision](#), para. 1180.

²³³³ [Conviction Decision](#), paras 838, 856. The Appeals Chamber also notes that in assessing Mr Ntaganda's essential contribution, the Trial Chamber considered: (i) the leadership position he occupied during the relevant period ([Conviction Decision](#), paras 827-829); (ii) that his 'role was determinative in setting up a strong military group capable of driving out from certain areas all Lendu civilians' ([Conviction Decision](#), paras 830-833); (iii) that he 'devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu and the related First and Second Operation' ([Conviction Decision](#), paras 834-846); and (iv) that he 'gave orders to commit crimes and personally engaged in violent conduct towards the enemies' ([Conviction Decision](#), paras 847-851).

participation in the common plan’,²³³⁴ he could not have frustrated the crimes of the Second Operation, the Appeals Chamber recalls that a co-perpetrator can make an essential contribution to the common plan at any stage, including the execution stage, the planning and preparation stage, and the stage when the common plan is conceived.²³³⁵

1067. In sum, the Appeals Chamber finds that the Trial Chamber did not err in finding that the First and Second Operations ‘were part of the same military campaign and constituted a logical succession of events’.²³³⁶ Given that both operations were an integral part of the common plan and were inter-related, the Trial Chamber was correct to assess Mr Ntaganda’s role in a holistic way rather than conduct a separate analysis of his contributions and *mens rea* for the First and Second Operations respectively. The Appeals Chamber considers that, in so doing, the Trial Chamber did not ‘short-[circuit] the appropriate analysis of *mens rea*’ nor ‘[overstate] Mr Ntaganda’s degree of contribution and control’.²³³⁷ Rather the Trial Chamber assessed his contribution to the implementation of the common plan as a whole, to determine whether it amounted to an essential contribution with the resulting power to frustrate the commission of the crimes.²³³⁸ Mr Ntaganda’s arguments under this sub-ground of appeal are rejected.

3. *Alleged error in the Trial Chamber’s reliance on direct contributions to the Second Operation*

(a) **Summary of submissions**

(i) *Mr Ntaganda’s submissions*

1068. Mr Ntaganda argues that the ‘purported direct contributions fall far short of showing the requisite degree of control over the crimes of the Second Operation, and that he made those contributions with the necessary awareness of the crimes and his ability to frustrate them’.²³³⁹ In particular, he challenges the Trial Chamber’s reliance on: (i) Mr Ntaganda’s participation in preparatory meetings in advance of the Second

²³³⁴ [Conviction Decision](#), para. 398.

²³³⁵ [Bemba et al. Appeal Judgment](#), paras 810, 819; [Lubanga Appeal Judgment](#), paras 469, 473.

²³³⁶ [Conviction Decision](#), para. 664.

²³³⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 363.

²³³⁸ [Bemba et al. Appeal Judgment](#), para. 1248.

²³³⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 373.

Operation;²³⁴⁰ (ii) Mr Ntaganda's distribution of a new operational structure, reminders to commanders concerning disciplinary matters and 'asking for designations of personnel within units to be updated';²³⁴¹ (iii) four purported communications that occurred in the context of the Second Operation, of which some were recorded in the logbooks;²³⁴² and (iv) the evidence of P-0055 and P-0901, to conclude that Mr Ntaganda was monitoring the unfolding of the Second Operation.²³⁴³ Finally, he argues that the Trial Chamber failed to establish his whereabouts between 18 February 2003 and 4 March 2003, which, in his view, was necessary in order to conclude that he was monitoring and communicating through radio devices.²³⁴⁴

(ii) *The Prosecutor's submissions*

1069. The Prosecutor responds that the Trial Chamber 'provided sufficient reasons to support its finding that Ntaganda made an essential contribution to the crimes of both operations and that he had the requisite *mens rea*'.²³⁴⁵ She submits, *inter alia*, that Mr Ntaganda's 'artificial delineation of the Chamber's findings into the two operations, and his inability to identify any error in the challenged underlying findings themselves warrant rejection of this ground of appeal'.²³⁴⁶

(iii) *The victims' observations*

1070. Victims Group 2 submit that Mr Ntaganda's 'different contribution' to the crimes committed during the Second Operation, namely, his 'prior instruction, oversight, and post-factum approval', does not call into question 'his overall contribution to the common plan and the crimes, for which the Trial Chamber had correctly assessed his *mens rea*'.²³⁴⁷ In their view, since the Trial Chamber found the First and Second Operations to be part of the same plan, 'it was entitled to assess Mr Ntaganda's role therein comprehensively'.²³⁴⁸ In relation to P-0055's testimony about the words of endorsement spoken by Mr Ntaganda after the Second Operation had taken place, Victims Group 2 submit that the Trial Chamber was entitled to rely

²³⁴⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 374.

²³⁴¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 375.

²³⁴² [Mr Ntaganda's Appeal Brief – Part II](#), paras 376-380.

²³⁴³ [Mr Ntaganda's Appeal Brief – Part II](#), paras 381-383.

²³⁴⁴ [Mr Ntaganda's Appeal Brief – Part II](#), paras 384-386.

²³⁴⁵ [Prosecutor's Response to Appeal – Part II](#), para. 295.

²³⁴⁶ [Prosecutor's Response to Appeal – Part II](#), para. 295.

²³⁴⁷ [Observations of Victims Group 2 on Appeal – Part II](#), para. 103.

²³⁴⁸ [Observations of Victims Group 2 on Appeal – Part II](#), para. 103.

on Mr Ntaganda's words and that his challenges to P-0055's credibility reflect mere disagreement with the Trial Chamber's credibility assessment of P-0055.²³⁴⁹

(iv) *Mr Ntaganda's response to the victims*

1071. Mr Ntaganda submits that Victims Group 2's observations 'fail to rebut' his arguments and should therefore be rejected.²³⁵⁰ In his view, Victims Group 2's submissions on co-perpetration 'rely on and refer to principles relevant to the JCE mode of responsibility' which are inapplicable to the joint control theory of indirect co-perpetration.²³⁵¹ He further argues that, contrary to Victims Group 2's submissions, the Trial Chamber's findings regarding his involvement in the Second Operation, including '(i) the role assigned to him within the framework of the common plan; (ii) his interactions with the alleged co-perpetrators and his contribution to the planning of military operations; and (iii) his actions related to UPC/FPLC members involved in the Second Operation', show that he did not make an essential contribution, did not have control over the crimes and lacked the power to frustrate their commission.²³⁵² He argues that the Trial Chamber's failure to establish his whereabouts at the time of the commission of the crimes or 'what he was doing at the time' indicate that he did not exert control over the crimes and did not possess the required *mens rea*.²³⁵³

(b) Relevant part of the Conviction Decision

1072. The Trial Chamber's conclusion that Mr Ntaganda exercised control over the crimes committed by UPC/FPLC troops pursuant to the common plan was based upon its consideration of: (i) the position occupied by Mr Ntaganda during the relevant period;²³⁵⁴ (ii) Mr Ntaganda's determinative role 'in setting up a strong military group capable of driving out from certain areas all Lendu civilians';²³⁵⁵ (iii) the fact that Mr Ntaganda 'devised the military tactic which allowed for the success of the UPC/FPLC taking over of Mongbwalu and the related First and Second

²³⁴⁹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 105.

²³⁵⁰ [Mr Ntaganda's Response to Observations of Victims on Appeal– Part II](#), para. 105.

²³⁵¹ [Mr Ntaganda's Response to Observations of Victims on Appeal– Part II](#), para. 94.

²³⁵² [Mr Ntaganda's Response to Observations of Victims on Appeal– Part II](#), para. 100.

²³⁵³ [Mr Ntaganda's Response to Observations of Victims on Appeal– Part II](#), paras 101-102.

²³⁵⁴ [Conviction Decision](#), paras 827-829.

²³⁵⁵ [Conviction Decision](#), paras 830-833.

Operation’;²³⁵⁶ and (iv) the fact that Mr Ntaganda ‘gave orders to commit crimes and personally engaged in violent conduct towards the enemies’.²³⁵⁷ These findings were, in turn, based on other findings and evidence.

(c) Determination by the Appeals Chamber²³⁵⁸

1073. Preliminarily, the Appeals Chamber notes that, although Mr Ntaganda purports to challenge the Trial Chamber’s findings on both his control over the crimes and his intent and knowledge,²³⁵⁹ his arguments primarily challenge the Trial Chamber’s findings supporting its conclusion that Mr Ntaganda exercised control over the crimes committed by UPC/FPLC troops pursuant to the common plan.

1074. In addition, the Appeals Chamber observes that Mr Ntaganda’s arguments under this sub-ground of his appeal presuppose that each factual finding relied upon by the Trial Chamber, should on their own suffice to establish his control over the crimes and related *mens rea*.²³⁶⁰ As discussed in the preceding section under this ground of appeal, the Appeals Chamber has found that a determination of whether an alleged co-perpetrator exercised control over the crimes with the requisite *mens rea* necessarily depends on a holistic assessment of all the relevant facts and evidence.²³⁶¹

²³⁵⁶ [Conviction Decision](#), paras 834-846.

²³⁵⁷ [Conviction Decision](#), paras 847-851.

²³⁵⁸ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

²³⁵⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 373.

²³⁶⁰ *See e.g.* [Mr Ntaganda’s Appeal Brief – Part II](#), para. 374 (‘Mr. Ntaganda’s contributions during this first meeting in Bunia had no meaningful impact on any of the subsequent crimes; reveals no control over those crimes (or even the Second Operation as a whole); and reveals no knowledge of, or intent for, those crimes’); para. 375 (‘[t]hese extremely generic actions, however, are not indicative of control over the Second Operation; of control over the crimes that occurred in the context of that Operation; or of the requisite *mens rea*’); para. 377 (‘[t]hese four communications [...] are manifestly insufficient to demonstrate the knowledge of crimes – or even of the operational details of the Second Operation – necessary to satisfy the *mens rea* for co-perpetration of the crimes of the Second Operation’); para. 379 (‘[t]hese communications, taken at their highest, do not evince any awareness of crimes, let alone awareness that any action of Mr. Ntaganda constitutes a contribution tantamount to control over any of the crimes of the Second Operation’).

²³⁶¹ *See* paragraphs 1064-1067 above. *See also* [Lubanga Appeal Judgment](#), para. 488 (‘[t]he Appeals Chamber finds that Mr Lubanga’s first set of submissions does not accurately reflect the conclusions of the Trial Chamber, which addressed the question of whether Mr Lubanga’s role and activities amounted cumulatively to an essential contribution, as required for co-perpetration. The Trial Chamber did not rely on any one of these activities in isolation to establish that Mr Lubanga made such an essential contribution’ (footnote omitted)); [Bemba et al. Appeal Judgment](#), para. 812 (‘[t]he Appeals Chamber observes that the Trial Chamber not only carefully analysed each contribution or activity personally undertaken by Mr Bemba, in conjunction with the other co-perpetrators, but also explained

Thus, to the extent that Mr Ntaganda suggests otherwise, the Appeals Chamber rejects this contention.

1075. In essence, Mr Ntaganda challenges the Trial Chamber's findings on his 'direct contributions' to the Second Operation arguing that they were insufficient to prove his degree of control over the crimes and his intent and knowledge.²³⁶² These arguments will be considered in turn.

(i) *Reliance on Mr Ntaganda's participation in preparatory meetings*

1076. Mr Ntaganda disputes the Trial Chamber's reliance on 'one "planning" meeting' during which Mr Ntaganda was found, *inter alia*, to have: (i) given instructions, jointly with Floribert Kisembo 'to handle the Lipri road', which the Trial Chamber determined was 'indeed attacked by the UPC/FPLC as part of the Second Operation';²³⁶³ and (ii) 'specifically gave instructions to go by Centrale to pick up ammunition and bring it to the troops in Bambu', one of the localities targeted during the Second Operation.²³⁶⁴ Mr Ntaganda argues that his 'contributions during this first meeting in Bunia had no meaningful impact on any of the subsequent crimes; reveals no control over those crimes' let alone the Second Operation as a whole.²³⁶⁵

1077. The Appeals Chamber notes that, in concluding that Mr Ntaganda had exercised control over the crimes, the Trial Chamber found, *inter alia*, that Mr Ntaganda had devised the 'military tactic' related to both the First and Second Operations.²³⁶⁶ In particular, with regard to the Second Operation, the Trial Chamber found that Mr Ntaganda had participated in two preparatory meetings and that during one of these meetings, he had issued instructions as mentioned above.²³⁶⁷ The Appeals Chamber considers that it was reasonable for the Trial Chamber to consider this preparatory meeting in its holistic assessment of Mr Ntaganda's contributions to the crimes committed within the framework of the common plan. Contrary to

why the activities, *taken as a whole*, amounted to an essential contribution to the offences covered by the common plan' (emphasis in original and footnotes omitted)).

²³⁶² [Mr Ntaganda's Appeal Brief – Part II](#), para. 373.

²³⁶³ [Conviction Decision](#), para. 837 (footnotes omitted); [Mr Ntaganda's Appeal Brief – Part II](#), para. 374.

²³⁶⁴ [Conviction Decision](#), para. 837; [Mr Ntaganda's Appeal Brief – Part II](#), para. 374.

²³⁶⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 374.

²³⁶⁶ [Conviction Decision](#), paras 834-846.

²³⁶⁷ [Conviction Decision](#), para. 837.

Mr Ntaganda's arguments, the absence of a finding by the Trial Chamber that 'other instructions were given by Mr Ntaganda'²³⁶⁸ or that the issue of the 'treatment of civilians' was not discussed,²³⁶⁹ does not detract from the Trial Chamber's finding that Mr Ntaganda participated in the planning of the Second Operation and gave specific instructions. Consequently, Mr Ntaganda's arguments are rejected.

(ii) *Reliance on Mr Ntaganda 'generic actions' as indications of his control over the crimes*

1078. Mr Ntaganda further challenges the Trial Chamber's reliance on certain 'other actions' as being contributions to the crimes of the Second Operation, namely: (i) his involvement in the distribution of 'a "new operational structure" of brigades and battalions'; (ii) 'reminders to commanders regarding disciplinary matters'; and (iii) his 'asking for designations of personnel within units to be updated'.²³⁷⁰ He argues that '[t]hese extremely generic actions [...] are not indicative of control over the Second Operation', over crimes committed in the context of this operation 'or of the requisite *mens rea*'.²³⁷¹ The Appeals Chamber finds no merit in Mr Ntaganda's argument.

1079. First, the Appeals Chamber notes that the Trial Chamber did not rely on these so-called 'other actions' to establish Mr Ntaganda's contribution to or his *mens rea* for, the crimes committed during the Second Operation.²³⁷² Instead, the Appeals Chamber notes that the Trial Chamber's assessment indicates reliance, in part, on findings that: (i) Mr Ntaganda's message in reaction to information that a commander had refused to depart for a specific assault forming part of the Second Operation, 'was to reassert discipline within the UPC/FPLC and ensure the proper execution of orders in the unfolding of the Second Operation';²³⁷³ (ii) he 'ensured that UPC/FPLC troops would be obedient, and did not hesitate to remind them that they were expected to execute orders'; and (iii) '[p]rior to the launching of the Second Operation,

²³⁶⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 374, referring to P-0055: [T-72](#), p. 6, lines 12-15.

²³⁶⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 374, referring to P-0055: [T-71](#), p. 40, lines 3-7.

²³⁷⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 375, referring to [Conviction Decision](#), para. 554.

²³⁷¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 375.

²³⁷² [Conviction Decision](#), paras 826-857, 1176-1189.

²³⁷³ [Conviction Decision](#), para. 846.

Mr Ntaganda announced an important reorganisation concerning the assignment of commanders, some of which would participate in this operation'.²³⁷⁴

1080. Second, the Appeals Chamber considers that these findings are indeed relevant to ascertain whether Mr Ntaganda exercised control over the crimes committed during the Second Operation and had the requisite intent and knowledge. Therefore, it was reasonable for the Trial Chamber to consider these factual findings in its holistic assessment of whether Mr Ntaganda exercised control over the crimes, and/or 'meant for the troops deployed during the First and Second Operation to engage in the conduct and cause the consequences required for the commission of the crimes' charged, 'and was aware of the relevant circumstances'.²³⁷⁵

(iii) Reliance on four purported communications that occurred in the context of the Second Operation

1081. Mr Ntaganda questions the Trial Chamber's reliance on four 'purported communications that occurred before or at the very beginning of the Second Operation'.²³⁷⁶ The Appeals Chamber notes that the first communication referred to by Mr Ntaganda concerns 'a *radiophonie* message about a skirmish at Kilo preceding the Second Operation'.²³⁷⁷ This message was not relied upon by the Trial Chamber either in its determination of Mr Ntaganda's control over the crimes or in its conclusions on his intent and knowledge.²³⁷⁸ Accordingly, the Appeals Chamber will not consider Mr Ntaganda's argument in relation to this message any further.

1082. The three remaining communications concern: (i) Mr Ntaganda being 'informed by the commanders on the ground about the failed assault in Lipri';²³⁷⁹ (ii) Mr Ntaganda being copied in a message addressed to Salongo Ndekezi informing him that a battalion commander 'had refused to depart for the Kobu operation' to which Mr Ntaganda responded 'that no commander could refuse an order from his

²³⁷⁴ [Conviction Decision](#), para. 1179.

²³⁷⁵ [Conviction Decision](#), paras 856, 1189.

²³⁷⁶ [Mr Ntaganda's Appeal Brief – Part II](#), paras 376-379.

²³⁷⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 376, referring to [Conviction Decision](#), para. 555 (where the Trial Chamber found that '[o]n 13 February 2003, Mr Ntaganda was copied on a message sent by Salumu Mulenda to Salongo Ndekezi reporting confrontations in Kilo, which included a request for ammunition, including for RPGs, for the upcoming Second Operation'). See also, DRC-OTP-2102-3854, at 3982.

²³⁷⁸ [Conviction Decision](#), paras 826-857, 1176-1189.

²³⁷⁹ [Conviction Decision](#), para. 565 (1st bullet point), referring to P-0055: [T-71](#), p. 42.

superiors and that this had never occurred before’;²³⁸⁰ and (iii) messages indicating that Mr Ntaganda ‘was aware that the troops arrived in Lipri, Kobu, and Bambu and that further reports would follow’.²³⁸¹

1083. The Appeals Chamber notes that these messages were relied upon to support the Trial Chamber’s finding that Mr Ntaganda ‘exercised oversight over the unfolding of the Second Operation and, by reinforcing the chain of command within the group, he made sure that the forces deployed were carrying out the project as planned’.²³⁸² This finding was, in turn, relied upon to conclude that Mr Ntaganda devised the military tactic which ultimately was but one consideration by which the Trial Chamber established Mr Ntaganda’s overall control over the crimes.²³⁸³

1084. First, Mr Ntaganda argues that, in accordance with his communications logbook, of all the *radiophonie* messages sent and received during the relevant period, only 2% concerned the Second Operation.²³⁸⁴ In his view, this was highly indicative of his ‘lack of involvement in the Second Operation’.²³⁸⁵ The Appeals Chamber observes that, as noted by the Prosecutor,²³⁸⁶ in assessing the reliability of the logbooks, the Trial Chamber considered ‘that it must be kept in mind that in addition to formalised, coded, and recorded communications, which is recorded in the logbooks, the *radiophonie* could also be used for uncoded, informal, and direct voice communication, and was not the only technical means of communication available to the UPC/FPLC’.²³⁸⁷ The Trial Chamber referred, in this regard, to Motorola radio communication,²³⁸⁸ Thuraya satellite phones and mobile phones.²³⁸⁹ As further noted by the Prosecutor,²³⁹⁰ Mr Ntaganda testified that, if he was able to contact Kisembo by Thuraya, he would do so and that he did not always use *radiophonie* to

²³⁸⁰ [Conviction Decision](#), para. 565 (2nd bullet point), referring to DRC-OTP-2102-3854, at 3998.

²³⁸¹ [Conviction Decision](#), para. 565 (3rd bullet point), referring to DRC-OTP-2102-3854, at 3993 (first) and 3998 (fourth).

²³⁸² [Conviction Decision](#), para. 846.

²³⁸³ [Conviction Decision](#), paras 826-857.

²³⁸⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 377.

²³⁸⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 377.

²³⁸⁶ [Prosecutor’s Response to Appeal – Part II](#), para. 292.

²³⁸⁷ [Conviction Decision](#), para. 66.

²³⁸⁸ [Conviction Decision](#), para. 343.

²³⁸⁹ [Conviction Decision](#), para. 345.

²³⁹⁰ [Prosecutor’s Response to Appeal – Part II](#), para. 292.

communicate with him.²³⁹¹ Finally, the Appeals Chamber notes that Mr Ntaganda's communications logbook reflected entries until 22 February 2003, shortly after the commencement of the Second Operation which lasted until 'on or about 27 February 2003'.²³⁹²

1085. In these circumstances, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to consider these messages, even if they represented just a fraction of Mr Ntaganda's *radiophonie* messages. In the Appeals Chamber's view, these messages were relevant to the assessment of whether Mr Ntaganda exercised control over the crimes committed during the course of the First and Second Operations. Mr Ntaganda's argument that these communications 'do not evince any awareness of crimes, let alone awareness that' his actions could amount 'to control over any of the crimes of the Second Operation',²³⁹³ ignores the fact that they were but one of the considerations taken into account by the Trial Chamber to reach its conclusion on Mr Ntaganda's control over the crimes and his intent and knowledge.

1086. Mr Ntaganda questions the Trial Chamber's particular reliance on one of the communications addressed to Salongo Ndekezi and in relation to which he was copied,²³⁹⁴ concerning a battalion commander who had refused to depart for the Kobu operation.²³⁹⁵ The Trial Chamber found that Mr Ntaganda responded 'emphasising that no commander could refuse an order from his superiors and that this had never occurred before'.²³⁹⁶ The Appeals Chamber notes that Mr Ntaganda does not challenge the fact that he indeed responded to this message as found by the Trial Chamber. Rather, he challenges the Trial Chamber's interpretation of this message arguing that his response was 'merely a generic and self-evident comment addressing discipline in general'.²³⁹⁷

1087. In this regard, the Trial Chamber noted Mr Ntaganda's testimony 'that it was a disciplinary matter, and that when he was made aware of a case of indiscipline, he did

²³⁹¹ D-0300: [T-226](#), p. 88, line 17 to p. 89, line 12.

²³⁹² [Conviction Decision](#), para. 33.

²³⁹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 379.

²³⁹⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 380.

²³⁹⁵ [Conviction Decision](#), para. 565 (2nd bullet point), referring to DRC-OTP-2102-3854, at 3990.

²³⁹⁶ [Conviction Decision](#), para. 565 (2nd bullet point), referring to DRC-OTP-2102-3854, at 3998.

²³⁹⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 380.

not hesitate’.²³⁹⁸ It found ‘that the message shows that the highest levels of authority within the UPC/FPLC, including Mr Ntaganda, were involved in disciplinary matters related to the behaviour of the commanders deployed for the Second Operation’.²³⁹⁹ The Trial Chamber concluded that ‘the message’s purpose was to reassert discipline within the UPC/FPLC and ensure the proper execution of orders in the unfolding of the Second Operation’ and that Mr Ntaganda ‘exercised oversight over the unfolding of the Second Operation and, by reinforcing the chain of command within the group, he made sure that the forces deployed were carrying out the project as planned’.²⁴⁰⁰

1088. Given the evidence relied upon and the Trial Chamber’s reasoning when considered in light of other relevant findings, particularly those addressing Mr Ntaganda’s disciplinary powers,²⁴⁰¹ the Appeals Chamber finds that it was reasonable for the Trial Chamber to rely on this message in its determination that Mr Ntaganda exercised oversight over the Second Operation.

1089. Mr Ntaganda further questions the Trial Chamber’s reliance on one of the communications in which he was ‘informed by the commanders on the ground about the failed assault in Lipri’.²⁴⁰² On the basis of this communication and others, the Trial Chamber determined that ‘Mr Ntaganda remained in contact with the commanders in the field and monitored the unfolding [of the Second Operation] via the UPC/FPLC radio communications systems’.²⁴⁰³

1090. Mr Ntaganda argues that the finding that he was informed about the failed operation on Lipri is unreasonable because ‘it was based on the uncorroborated hearsay testimony of P-0055 alone’ and it ‘was too important [...] to be based on a proposition that could not be cross-examined’.²⁴⁰⁴ In its reasoning supporting its finding, the Trial Chamber stated as follows

²³⁹⁸ [Conviction Decision](#), fn. 1723.

²³⁹⁹ [Conviction Decision](#), fn. 1723.

²⁴⁰⁰ [Conviction Decision](#), para. 846.

²⁴⁰¹ See e.g. [Conviction Decision](#), para. 323 (‘[w]ithin the FPLC, Mr Ntaganda was responsible for military training, and had, as part of his role, the power to order disciplinary measures’ (footnotes omitted)).

²⁴⁰² [Mr Ntaganda’s Appeal Brief – Part II](#), para. 387, referring to [Conviction Decision](#), para. 565 (1st bullet point).

²⁴⁰³ [Conviction Decision](#), para. 846.

²⁴⁰⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 387.

P-0055 testified that Mr Ntaganda followed the developments relating to the failed attack on Lipri, from Fataki before he returned to Bunia, and that Salongo Ndekezi and Tchaligonza said that they had transmitted this information to Ntaganda through the Thuraya. Considering P-0055's position within the UPC/FPLC, and noting that he explained the circumstances in which he obtained the information, the Chamber considers the testimony in this respect reliable.²⁴⁰⁵

1091. The Appeals Chamber notes that, while it is correct that the testimony of P-0055 is the only evidence cited by the Trial Chamber in support of its finding that Mr Ntaganda was informed of the failed assault on Lipri, and that it consists of hearsay evidence,²⁴⁰⁶ this in itself does not render the Trial Chamber's finding unreasonable. This is particularly so given the Trial Chamber's reasoning, including its reference to the position occupied by P-0055 who, at the relevant time, was 'a high level UPC/FPLC insider'.²⁴⁰⁷

1092. Mr Ntaganda further argues that the only specific information provided to him by P-0055 'was the death of a commander during the attack, which [he contends] falls short of being information about "the failed assault" in general or being indicative of operational level control'.²⁴⁰⁸ The Appeals Chamber notes that P-0055 testified, in relevant part, as follows:

[REDACTED].²⁴⁰⁹

1093. It is clear that P-0055 testified that Mr Ntaganda [REDACTED].²⁴¹⁰ It is clear from the context of P-0055's testimony, that the battle to which the witness referred concerns the failed assault on Lipri. The fact that P-0055 only mentioned one specific aspect of the information received does not render the Trial Chamber's conclusion that Mr Ntaganda was informed of the failed assault unreasonable. In the Appeals Chamber's view, the death of the commander was provided as an example of the information that Mr Ntaganda received in relation to the assault. Mr Ntaganda fails to show an error in this regard.

²⁴⁰⁵ [Conviction Decision](#), fn. 1720, referring to P-0055: [T-71](#), p. 42.

²⁴⁰⁶ [Conviction Decision](#), fn. 1720.

²⁴⁰⁷ [Conviction Decision](#), para. 118.

²⁴⁰⁸ [Mr Ntaganda's Appeal Brief – Part II](#), para. 387.

²⁴⁰⁹ P-0055: [T-71](#), p. 42, lines 9-24.

²⁴¹⁰ P-0055: [T-71](#), p. 42.

1094. Mr Ntaganda also submits that P-0055 lacked reliability ‘in respect of this information’ because the person who supposedly informed Mr Ntaganda about the events in Lipri (Salongo Ndekezi) ‘was actually, according to the Chamber’s own findings, not in Lipri’ but in Mongbwalu.²⁴¹¹ The Appeals Chamber notes that, in footnote 1673 of the Conviction Decision referred to by Mr Ntaganda, the Trial Chamber did not find that Salongo Ndekezi was in Mongbwalu at the time of the failed assault on Lipri, which was found to have taken place on or about 17 February 2003,²⁴¹² but rather it noted P-0907’s testimony in this regard.²⁴¹³ Finally, the Appeals Chamber notes that the logbook entries referred to by Mr Ntaganda at footnote 1014 of his appeal brief seem to refer to messages dated ‘février 2003’ without any further specification as to the exact date they were sent or received. In these circumstances, the Appeals Chamber finds no merit in Mr Ntaganda’s argument.

1095. Mr Ntaganda argues that yet another finding of the Trial Chamber that, in his view was manifestly unreasonable, was that his ‘account of the Second Operation was damaged because of his purported “categorical denial of knowledge of the Second Operation”’.²⁴¹⁴ Mr Ntaganda argues that this finding was unreasonable given that elsewhere in the Conviction Decision the Trial Chamber acknowledged that ‘he was aware of a general intention to open that key road’.²⁴¹⁵ The Appeals Chamber finds that Mr Ntaganda fails to explain the impact, if any, that this purported unreasonable finding would have had on the Trial Chamber’s finding that he exercised control over the crimes with the requisite *mens rea*. In any event, the Appeals Chamber notes that the Trial Chamber did not rely on this finding for its conclusion on Mr Ntaganda’s control over the crimes committed in the Second Operation.²⁴¹⁶ His argument is therefore rejected.

²⁴¹¹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 387 (1st bullet point).

²⁴¹² [Conviction Decision](#), para. 566.

²⁴¹³ [Conviction Decision](#), fn. 1673 (‘[a]s regards the Defence submission that P-0907 confirms Salongo Ndekezi’s presence in Mongbwalu [...], the Chamber notes that P-0907 referred to Salongo Ndekezi’s actions in Mongbwalu immediately before and during the execution of the Second Operation (P-0907: [T-90](#), pp. 58-59), which is not in contradiction with P-0055’s evidence of the preparation meetings’).

²⁴¹⁴ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 387 (2nd bullet point).

²⁴¹⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 387 (2nd bullet point) referring to [Conviction Decision](#), fn. 1672.

²⁴¹⁶ [Conviction Decision](#), paras 826-857.

1096. In light of the above considerations, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that Mr Ntaganda was informed by the commanders on the ground about the failed assault on Lipri and to rely on this finding to conclude that he ‘exercised oversight over the unfolding of the Second Operation’.²⁴¹⁷

(iv) *Reliance on the general testimony of P-0055 and P-0901 to conclude that Mr Ntaganda was monitoring the unfolding of the Second Operation*

1097. Mr Ntaganda also questions the Trial Chamber’s reliance on the testimony of P-0055 and P-0901 to conclude that ‘[he] “was monitoring the unfolding of the Second Operation”’.²⁴¹⁸ In relevant part, the Trial Chamber found:

Two informed insiders, P-0901 and P-0055, affirmed that Mr Ntaganda was able to follow and supervise the Second Operation. The Chamber notes that while P-0901 and P-0055 did not discuss specific examples of the interaction between Mr Ntaganda and the commanders and mainly talked about how Mr Ntaganda was generally involved in the unfolding of the Second Operation based on the position that he occupied within the UPC/FPLC at that time, they both confirmed that Mr Ntaganda used radio devices to communicate during the Second Operation. Based on their informed knowledge of the functioning of the UPC/FPLC at the time, and having had regard to the positions they held at the time, the Chamber concludes that Mr Ntaganda was monitoring the unfolding of the Second Operation.²⁴¹⁹

1098. The Trial Chamber relied upon this finding to conclude that ‘Mr Ntaganda remained in contact with the commanders in the field and monitored the unfolding via the UPC/FPLC radio communications systems’.²⁴²⁰ This finding was, in turn, relied upon to establish that Mr Ntaganda devised the military tactic related to the First and Second Operations which was but one of the considerations in the Trial Chamber’s holistic assessment of Mr Ntaganda’s exercise of control over the crimes.²⁴²¹

1099. In this regard, P-0901, [REDACTED], testified as follows:

²⁴¹⁷ [Conviction Decision](#), para. 846.

²⁴¹⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 381 referring to [Conviction Decision](#), para. 565 (4th bullet point).

²⁴¹⁹ [Conviction Decision](#), para. 565 (4th bullet point and footnotes omitted).

²⁴²⁰ [Conviction Decision](#), para. 846.

²⁴²¹ [Conviction Decision](#), para. 846.

[REDACTED].²⁴²²

1100. The Appeals Chamber notes Mr Ntaganda's argument that the Trial Chamber's reliance on the testimony of P-0901 was misplaced because he did not refer to any examples of monitoring by Mr Ntaganda and did not identify Mr Ntaganda as being one of the interlocutors whom he heard on the Motorola radio traffic.²⁴²³ The Trial Chamber acknowledged that P-0901 did not discuss any specific example of the interaction between Mr Ntaganda and the commanders but nonetheless relied upon his testimony to find that Mr Ntaganda was monitoring the unfolding of the Second Operation '[b]ased on [his] informed knowledge of the functioning of the UPC/FPLC at the time, and having had regard to the position [he] held at the time'.²⁴²⁴ In the Appeals Chamber's view, this was a reasonable conclusion to draw in light of the reasoning provided in support thereof.

1101. The Appeals Chamber notes that the Trial Chamber's finding was also supported by the evidence of P-0055.²⁴²⁵ In addition to his testimony, referred to above in relation to the failed assault on Lipri, of which Mr Ntaganda was informed, the relevant part of his testimony on which the Trial Chamber relied reads as follows:

A. There was no operation that could be planned without Ntaganda. And even when Kisembo planned an operation, Ntaganda had to be aware. And I'm talking of major operations such as Kobu, Lipri and Bambu. Wherever he was positioned, Ntaganda had to have information through Motorola or Manpack. In Fataki, he had a Manpack. He had a communication equipment, and he was able to follow operations on a regular basis.

Q. And my question is more than just whether Mr Ntaganda was aware of the operations, but what is it that makes you conclude that he was commanding the operations?

A. I really do not know how to explain this to you. [REDACTED]. During the battle of Kobu, I would say that Lipri and Bambu were taken on the same day. Lipri was occupied in one hour. But I would say that the battle that took a long time was the Kobu battle. Most of the time Ntaganda was following developments through Manpack, and he was in communication with the people who were in Kobu and in Mongbwalu.

²⁴²² P-0901: [T-29](#), p. 13, lines 6-22.

²⁴²³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 382.

²⁴²⁴ [Conviction Decision](#), para. 565 (4th bullet point).

²⁴²⁵ [Conviction Decision](#), para. 565 (4th bullet point).

Q. And did you ever hear him transmit commands or instructions to the troops during this operation?

A. I cannot tell you what type of orders he gave [REDACTED].²⁴²⁶

1102. Mr Ntaganda questions the Trial Chamber's reliance on P-0055's testimony because he testified that 'he had to [REDACTED] - a distance of just 25 kilometres, which is far less than the distance between anywhere in the area of the Second Operation and Fataki (where Ntaganda was located for most of the Second Operation)'.²⁴²⁷ The Appeals Chamber notes that, in his testimony, P-0055 referred to Mr Ntaganda having a Manpack in Fataki and that '[m]ost of the time Ntaganda was following developments through Manpack'.²⁴²⁸ While it is correct that the Trial Chamber found that the normal range of the Motorola radio network was 15 to 20 kilometres,²⁴²⁹ the Trial Chamber also determined that this range 'was sometimes extended through modification of the antenna'.²⁴³⁰ Furthermore, in relation to the range of the manpacks, the Trial Chamber noted that '[t]he range of the network extended to Aru and Mahagi'.²⁴³¹ Moreover, Mr Ntaganda's argument is premised on his submission that he was in Fataki for most of the Second Operation which, as explained below, was not conclusively established by the Trial Chamber.

1103. Mr Ntaganda further questions P-0055's evidence in relation to the manpack communication system because of the limited number of messages in the *radiophonie* logbooks.²⁴³² The Appeals Chamber recalls, however, the Trial Chamber's finding 'that it must be kept in mind that in addition to formalised, coded, and recorded communications, which is recorded in the logbooks, the *radiophonie* could also be used for uncoded, informal and direct voice communication'²⁴³³ and that Mr Ntaganda's communications logbook reflected entries until 22 February 2003,

²⁴²⁶ P-0055: [T-71](#), p. 43, line 14 to p. 44, line 8.

²⁴²⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 382 (footnotes omitted), referring to P-0055: [T-71](#), p. 41, line 16 to p. 42, line 8, [T-74](#), p. 22, lines 14-17.

²⁴²⁸ P-0055: [T-71](#), p. 44, lines 1-2.

²⁴²⁹ [Conviction Decision](#), para. 343.

²⁴³⁰ [Conviction Decision](#), para. 343, referring to P-0016: DRC-OTP-0126-0422-R03, at 0467, para. 260; P-0901: [T-28](#), pp. 15, 38; D-0243: [T-257](#), pp. 35-36, 39, [T-259](#), p. 23.

²⁴³¹ [Conviction Decision](#), para. 341.

²⁴³² [Mr Ntaganda's Appeal Brief – Part II](#), para. 383.

²⁴³³ [Conviction Decision](#), para. 66.

shortly after the commencement of the Second Operation which lasted until ‘on or about 27 February 2003’.²⁴³⁴

1104. In light of the above, the Appeals Chamber rejects Mr Ntaganda’s argument that the Trial Chamber erred by relying on the evidence P-0055 and P-0901 to conclude that Mr Ntaganda was monitoring the unfolding of the Second Operation.

(v) *Alleged failure to establish Mr Ntaganda’s whereabouts*

1105. Mr Ntaganda argues that the Trial Chamber erred by failing to ‘give any account’ of his whereabouts.²⁴³⁵ He contends that had the Trial Chamber considered his whereabouts, it would have concluded that he was not ‘within range of the “radio devices” in question’²⁴³⁶ and therefore could not have found that he “used radio devices to communicate during the Second Operation” and “was monitoring the unfolding of the Second Operation””.²⁴³⁷

1106. At the outset, the Appeals Chamber notes that Mr Ntaganda is correct in arguing that the Trial Chamber does not appear to have made specific findings on his whereabouts between 18 February 2003 and 4 March 2003.²⁴³⁸ In this regard, the Appeals Chamber recalls that the Second Operation commenced on or about 12 February 2003 and lasted till on or about 27 February 2003.²⁴³⁹ Regarding this timeframe, the Trial Chamber did make some findings concerning his whereabouts. According to the Trial Chamber, Mr Ntaganda attended the preparatory meetings that took place in Bunia on or before 13 February 2003.²⁴⁴⁰ The Trial Chamber further found that in said meetings, it was agreed that ‘Mr Ntaganda was to go to Fataki for a graduation ceremony’.²⁴⁴¹ The Trial Chamber also appears to have accepted the testimony of P-0055 that Mr Ntaganda was following ‘the developments relating to the failed attack on Lipri, from Fataki before he returned to Bunia’.²⁴⁴² The failed

²⁴³⁴ [Conviction Decision](#), para. 33.

²⁴³⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 384.

²⁴³⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 385.

²⁴³⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 384, referring to [Conviction Decision](#), para. 565 (4th bullet point).

²⁴³⁸ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 384.

²⁴³⁹ [Conviction Decision](#), para. 33.

²⁴⁴⁰ [Conviction Decision](#), paras 550-551, fn. 1668.

²⁴⁴¹ [Conviction Decision](#), para. 552.

²⁴⁴² [Conviction Decision](#), fn. 1720.

attack on Lipri was found to have taken place on 17 February 2003.²⁴⁴³ Although the Trial Chamber seems to have made no finding regarding how long Mr Ntaganda was in Fataki, it did find that Mr Ntaganda was in Bunia at least as of 5 March 2003.²⁴⁴⁴

1107. The Appeals Chamber further notes that in Mr Ntaganda's Closing Brief and by reference to his own testimony, he indicated that he was in Bunia at least from 17 February 2003 to 19 February 2003, at night, when he went to Libi.²⁴⁴⁵ He noted that he stayed in Fataki on 20 February 2003²⁴⁴⁶ but further to a request from Mr Lubanga he returned to Bunia and stayed there on the night of the 20th of February and the 21st of February.²⁴⁴⁷ Mr Ntaganda testified that on the night of the 21st of February 2003, he left Bunia for Libi and did not return to Bunia until the 3rd of March 2003.²⁴⁴⁸

1108. The Appeals Chamber considers that establishing the whereabouts of an accused at the time that the alleged crimes – that he or she is said to have co-perpetrated through another person – took place may be relevant in establishing his or her control over the crimes in question. This, however, does not mean that for an accused to be held responsible he or she must be present when the crimes are taking place. Nevertheless, when, in cases such as the present one, it is alleged that the accused is controlling the crimes indirectly through, *inter alia*, the monitoring of the operations in the course of which crimes are being committed, the whereabouts of the person may be an important consideration.

1109. Accordingly, the Appeals Chamber notes that Mr Ntaganda does not seem to be disputing the Trial Chamber's limited findings on his whereabouts during the Second Operation. Rather, his argument seems to be that, given his whereabouts during this operation, he was not within the range of the radio devices through which he was allegedly monitoring the unfolding of the operation.²⁴⁴⁹

²⁴⁴³ [Conviction Decision](#), fn. 1720.

²⁴⁴⁴ [Conviction Decision](#), para. 648.

²⁴⁴⁵ [Mr Ntaganda's Closing Brief](#), paras 1057, 1060, 1064, 1066, 1073.

²⁴⁴⁶ [Mr Ntaganda's Closing Brief](#), para. 1074.

²⁴⁴⁷ [Mr Ntaganda's Closing Brief](#), para. 1074.

²⁴⁴⁸ [Mr Ntaganda's Closing Brief](#), para. 1078.

²⁴⁴⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 385.

1110. As explained above, from the Conviction Decision and the submissions of Mr Ntaganda, it does not appear to be disputed that during the Second Operation Mr Ntaganda was either in Bunia, Libi or Fataki. The question then is whether from these locations it was possible for Mr Ntaganda to have monitored the operation through the devices to which the Trial Chamber referred in its findings.

1111. The Trial Chamber's finding that 'Mr Ntaganda remained in contact with the commanders in the field and monitored the unfolding via the UPC/FPLC radio communications systems'²⁴⁵⁰ is based on: (i) a Thuraya communication informing him of the failed assault on Lipri, which took place on 17 February 2003;²⁴⁵¹ (ii) two *radiophonie* messages dated 18 February 2003,²⁴⁵² one of which Mr Ntaganda acknowledged having sent;²⁴⁵³ (iii) one *radiophonie* message dated 19 February 2003 stating that troops arrived in Lipri, Kobu and Bambu and that further reports would follow,²⁴⁵⁴ which Mr Ntaganda acknowledged having received;²⁴⁵⁵ (iv) the evidence of P-0901²⁴⁵⁶ who testified that he did not know where Mr Ntaganda was but that he would call the commanders using the Motorola;²⁴⁵⁷ and (v) the evidence of P-0055²⁴⁵⁸ who testified that wherever he was positioned, Mr Ntaganda had to have information through Motorola or Manpack.²⁴⁵⁹

1112. In order to address Mr Ntaganda's argument, it is important to recall the normal range of the three main communication systems used during the Second Operation (*radiophonie* or manpacks, Motorola network and Thuraya).²⁴⁶⁰ The Trial Chamber found that the normal range of the Motorola network was 15 to 20 kilometres²⁴⁶¹ but it noted that this range was sometimes extended through modification of the antenna.²⁴⁶² Furthermore, in relation to the range of the manpacks, the Trial Chamber

²⁴⁵⁰ [Conviction Decision](#), para. 846, referring to [Conviction Decision](#), para. 565.

²⁴⁵¹ [Conviction Decision](#), para. 565 (1st bullet point), fn. 1720.

²⁴⁵² [Conviction Decision](#), para. 565 (2nd bullet point).

²⁴⁵³ [Conviction Decision](#), fn. 1723, referring to D-0300: [T-228](#), p. 3, lines 12-23.

²⁴⁵⁴ [Conviction Decision](#), para. 565 (3rd bullet point).

²⁴⁵⁵ [Conviction Decision](#), para. 565 (3rd bullet point); D-0300: [T-220](#), p. 78, lines 9-13.

²⁴⁵⁶ [Conviction Decision](#), para. 565 (4th bullet point).

²⁴⁵⁷ [Conviction Decision](#), fn. 1726, referring to P-0901: [T-29](#), p. 13, lines 9-16.

²⁴⁵⁸ [Conviction Decision](#), para. 565 (5th bullet point).

²⁴⁵⁹ [Conviction Decision](#), fn. 1727, referring to P-0055: [T-71](#), p. 43, lines 14-19.

²⁴⁶⁰ See [Conviction Decision](#), section IV.A.2.g (Communication System).

²⁴⁶¹ [Conviction Decision](#), para. 343.

²⁴⁶² [Conviction Decision](#), para. 343, referring to P-0016: DRC-OTP-0126-0422-R03, at 0467, para. 260; P-0901: [T-28](#), pp. 15, 38; D-0243: [T-257](#), pp. 35-36, 39, pp.41-43; D-0243: [T-259](#), p. 23.

noted that it extended to Aru and Mahagi.²⁴⁶³ As to the Thuraya, the Trial Chamber did not specify the normal range but Mr Ntaganda testified that with a Thuraya it would be possible to communicate between The Hague and Africa.²⁴⁶⁴

1113. Given the Trial Chamber's findings as to the normal range of the *radiophonie* or manpack communication system²⁴⁶⁵ and the fact that Mr Ntaganda acknowledged receiving and sending messages through this system in the course of the Second Operation,²⁴⁶⁶ the whereabouts of Mr Ntaganda have no impact on the Trial Chamber's finding that he received and responded to messages through the *radiophonie* communication system. As to the relevance of Mr Ntaganda's whereabouts to establish that he could communicate *via* the Thuraya, the Appeals Chamber recalls that Mr Ntaganda testified that this system permitted inter-continental communications,²⁴⁶⁷ that P-0055 testified that [REDACTED] while the latter was in Fataki,²⁴⁶⁸ and that Mr Ntaganda testified that Thurayas worked in Bunia.²⁴⁶⁹ In light of the foregoing, the Appeals Chamber considers that, regardless of where Mr Ntaganda was located during the Second Operation (Bunia, Libi or Fataki), it was reasonable for the Trial Chamber to conclude that he was monitoring the unfolding of the operation *via* 'the UPC/FPLC radio communications systems'.

1114. In terms of whether it was possible to monitor the operations through the Motorola network, the Appeals Chamber notes that, according to the Trial Chamber's findings, this was possible while Mr Ntaganda was in Bunia.²⁴⁷⁰ From the Trial Chamber's findings, it is not possible for the Appeals Chamber to discern whether it was technically possible to establish communication *via* Motorola between Fataki or Libi and the area of the Second Operation. However, given that at least four of the incidents in the course of which crimes were committed in the context of the Second

²⁴⁶³ [Conviction Decision](#), para. 341.

²⁴⁶⁴ D-0300: [T-235](#), p. 59, lines 15-17.

²⁴⁶⁵ [Conviction Decision](#), para. 341.

²⁴⁶⁶ [Conviction Decision](#), fns 1723, 1725, referring to D-0300: [T-228](#), p. 3, lines 12-23; D-0300: [T-220](#), p. 74.

²⁴⁶⁷ D-0300: [T-235](#), p. 59, lines 15-17.

²⁴⁶⁸ [Mr Ntaganda's Appeal Brief – Part II](#), fn. 1002.

²⁴⁶⁹ D-0300: [T-238](#), p. 29, lines 13-16.

²⁴⁷⁰ [Conviction Decision](#), fn. 1726.

Operation occurred while Mr Ntaganda was in Bunia,²⁴⁷¹ the Appeals Chamber considers that Mr Ntaganda's whereabouts do not have an impact upon the Trial Chamber's reliance on the evidence of P-0901 and P-0055, who testified, *inter alia*, that Mr Ntaganda was monitoring the unfolding of the Second Operation *via* this means of communication. Accordingly, it was reasonable for the Trial Chamber to find that Mr Ntaganda was monitoring the unfolding of the Second Operation through the UPC/FPLC radio communications systems, namely, a manpack, *radiophonie*, Thuraya, Motorola, or a combination thereof. While this may not have been possible for the entirety of the Second Operation in relation to the Motorola network, it was technically possible for a substantial part of it.

1115. Given that during the entirety of the Second Operation it was possible for Mr Ntaganda to communicate through either some or all of the communications systems, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that 'Mr Ntaganda remained in contact with the commanders in the field and monitored the unfolding *via* the UPC/FPLC radio communications systems'.²⁴⁷²

(vi) *Conclusion on the Trial Chamber's findings on Mr Ntaganda's direct contributions to the Second Operation*

1116. Having found that the Trial Chamber did not err in assessing Mr Ntaganda's exercise of control over the crimes by reference to his essential contribution to the common plan to drive out all the Lendu from the localities targeted during the course of the UPC/FPLC's military campaign against the RCD-K/ML, and having rejected Mr Ntaganda's challenges to the Trial Chamber's findings related to the Second Operation, the Appeals Chamber rejects Mr Ntaganda's over-arching argument that his role in the Second Operation was *de minimis* and that '[t]hese *de minimis* contributions to the Second Operation reveal no awareness that he was exercising control over, or making an essential contribution to, the crimes of the Second Operation'.²⁴⁷³

²⁴⁷¹ [Conviction Decision](#), para. 567 (assault on Lipri and surrounding villages on 18 February 2003), para. 572 (assault on Kobu on 18 February 2003), paras 583-584 (assault on Bambu on 18 and 19 February 2003), para. 640 (assault on Nyangaray at the start of the Second Operation).

²⁴⁷² [Conviction Decision](#), para. 846.

²⁴⁷³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 388 (emphasis in original).

4. *Alleged error in the Trial Chamber's finding on Mr Ntaganda's awareness of the Kibu massacre*

(a) **Summary of submissions**

(i) *Mr Ntaganda's submissions*

1117. Mr Ntaganda submits that the Trial Chamber's finding that he was informed of the Kibu massacre soon after it occurred is only supported by the evidence of P-0055.²⁴⁷⁴ In his view, the Trial Chamber erred by relying on this witness's evidence and by failing to consider the contradictory testimony of P-0317.²⁴⁷⁵ Mr Ntaganda also argues that the Trial Chamber erred in relying on his alleged 'expression of *post facto* approval' to establish his *mens rea*.²⁴⁷⁶

(ii) *The Prosecutor's submissions*

1118. The Prosecutor responds that Mr Ntaganda 'merely disagrees' with the Trial Chamber's assessment of the evidence and fails to identify an error.²⁴⁷⁷ She refers to the Trial Chamber's 'in-depth credibility assessment of [P-0055]' that found the witness to be credible and reliable.²⁴⁷⁸ The Prosecutor further contends that the evidence of P-0317 does not contradict P-0055's evidence.²⁴⁷⁹

(iii) *The victims' observations*

1119. Victims Group 2 submit that the Trial Chamber did not err in relying 'on Mr Ntaganda's words of endorsement for the conduct employed during the Second Operation'.²⁴⁸⁰ They submit that Mr Ntaganda's challenges to the credibility of P-0055 'are nothing more than a disagreement with the Trial Chamber's assessment of that witness's credibility without demonstrating an error'.²⁴⁸¹

(iv) *Mr Ntaganda's response to the victims*

1120. Mr Ntaganda submits that the evidence of P-0055 was: '(i) uncorroborated; (ii) directly contradicted by P-0317; (iii) contradicted by Mr. Ntaganda; and

²⁴⁷⁴ [Mr Ntaganda's Appeal Brief – Part II](#), para. 399.

²⁴⁷⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 399.

²⁴⁷⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 399.

²⁴⁷⁷ [Prosecutor's Response to Appeal – Part II](#), para. 296.

²⁴⁷⁸ [Prosecutor's Response to Appeal – Part II](#), para. 297.

²⁴⁷⁹ [Prosecutor's Response to Appeal – Part II](#), paras 298-299.

²⁴⁸⁰ [Observations of Victims Group 2 on Appeal – Part II](#), para. 105.

²⁴⁸¹ [Observations of Victims Group 2 on Appeal – Part II](#), para. 105.

(iv) undermined during cross-examination'.²⁴⁸² In his view, the Trial Chamber 'was required to provide a reasoned opinion as to why [the evidence of P-0055] was nonetheless considered capable of reliance'.²⁴⁸³

(b) Relevant part of the Conviction Decision

1121. The Trial Chamber found:

637. After the events, in Bunia, sometime before 6 March 2003, Thomas Lubanga received a visit from MONUC staff who asked him about the alleged killings in Kobu. He asked the G2 to investigate. An intelligence officer from Salumu Mulenda's brigade was summoned for an oral report and was told that UPC/FPLC soldiers from Salumu Mulenda's brigade had shot Lendu 'civilians' in Kobu under the pretence of negotiations. Thomas Lubanga was given this information.

638. Straight afterwards, the G2 went to see Mr Ntaganda and asked him if he heard 'what happened in Kobu', discussing the fact that Lendu 'civilians' were killed in Kobu by UPC/FPLC soldiers led by Salumu Mulenda. Mr Ntaganda confirmed that he was already aware of 'the incident' and said that he was glad with how things had turned out. He also said, in Kinyarwanda, that Salumu Mulenda was a 'gentleman', 'a brave, a fine person', or a 'real man,' which was interpreted to mean that Mr Ntaganda agreed with 'what had happened'.²⁴⁸⁴

1122. In assessing Mr Ntaganda's intent and knowledge for the crimes committed during the Second Operation, the Trial Chamber observed in relation to this finding, that 'on this occasion, Mr Ntaganda approved the behaviour of Salumu Mulenda's troops during the "Kobu massacre" in the context of the Second Operation'.²⁴⁸⁵

(c) Determination by the Appeals Chamber²⁴⁸⁶

1123. Mr Ntaganda challenges the Trial Chamber's finding that he was informed of the Kobu massacre soon after it had occurred and that he reacted in a manner that showed he "approved of the behaviour of the troops in this context".²⁴⁸⁷ In essence, Mr Ntaganda seeks to impugn the Trial Chamber's reliance upon the evidence of P-0055 for this finding which, in his view, was unsafe and resulted in an erroneous

²⁴⁸² [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 104.

²⁴⁸³ [Mr Ntaganda's Response to Observations of Victims on Appeal – Part II](#), para. 104.

²⁴⁸⁴ [Conviction Decision](#), paras 637-638 (footnotes omitted).

²⁴⁸⁵ [Conviction Decision](#), para. 1185.

²⁴⁸⁶ As set out in paragraph 879 above, Judge Eboe-Osuji entertains considerable reservations regarding the theory of indirect co-perpetration applied by the Trial Chamber and is unable to concur with this section of the judgment (*see Annex 5*, Partly concurring opinion of Judge Chile Eboe-Osuji). Accordingly, the determinations in this section are made by the majority of the Appeals Chamber.

²⁴⁸⁷ [Mr Ntaganda's Appeal Brief – Part II](#), para. 399, referring to [Conviction Decision](#), para. 1187.

finding that he possessed the *mens rea* for the crimes of the Second Operation.²⁴⁸⁸ In this regard, Mr Ntaganda raises several arguments concerning the veracity of P-0055's testimony when examined against the testimony of P-0317, who was a MONUC human rights officer at the time of the events.²⁴⁸⁹ In addition, Mr Ntaganda takes issue with other aspects of P-0055's testimony, such as the alleged 'inconsistency of this testimony as to the timing of [REDACTED]'.²⁴⁹⁰ The Appeals Chamber will consider these arguments in turn.

1124. At the outset, the Appeals Chamber observes that, in raising his arguments, Mr Ntaganda appears to suggest that the Trial Chamber's finding concerning Mr Ntaganda's knowledge of the crimes committed in the context of the Second Operation is based only on the finding impugned in this section. However, the Appeals Chamber notes that Mr Ntaganda's intent and knowledge for the crimes committed during both operations was based on a holistic evaluation of several considerations, of which the finding challenged by Mr Ntaganda in this section, is but one.²⁴⁹¹

1125. The Appeals Chamber notes that, for its finding on Mr Ntaganda's knowledge of, and reaction to, the Kobu massacre, the Trial Chamber relied on the evidence of P-0055.²⁴⁹² The Trial Chamber found that 'in Bunia, sometime before 6 March 2003, Thomas Lubanga received a visit from MONUC staff who asked him about the alleged killings in Kobu'.²⁴⁹³ Following this encounter, Mr Lubanga had 'asked the G2 to investigate'.²⁴⁹⁴ In doing so, the G2 spoke to Mr Ntaganda who 'confirmed that he was already aware of "the incident"' and said that he was glad with how things had turned out'.²⁴⁹⁵ Moreover, the Trial Chamber found that, in response to being told that soldiers led by Salumu Mulenda had killed civilians in Kobu, Mr Ntaganda stated in Kinyarwanda 'that Salumu Mulenda was a "gentleman", "a brave, a fine person", or a

²⁴⁸⁸ [Mr Ntaganda's Appeal Brief – Part II](#), paras 399, 409-410.

²⁴⁸⁹ [Mr Ntaganda's Appeal Brief – Part II](#), paras 402-406.

²⁴⁹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), paras 407-410.

²⁴⁹¹ [Conviction Decision](#), paras 1177-1189.

²⁴⁹² [Conviction Decision](#), paras 319, 637-638. See also P-0055: [T-74](#), pp. 60, 69, 70; [T-71](#), p. 52.

²⁴⁹³ [Conviction Decision](#), para. 637.

²⁴⁹⁴ [Conviction Decision](#), para. 637 referring to P-0055: [T-74](#), pp. 60, 69, 70; [T-71](#), p. 52.

²⁴⁹⁵ [Conviction Decision](#), para. 638, fns 2030-2031, referring to P-0055: [T-71](#), p. 52, lines 21-23; [T-71](#), p. 56, lines 18-22; [T-74](#), p. 70, lines 6-10; P-0768: [T-34](#) pp. 60-64.

“real man”, which was interpreted to mean that Mr Ntaganda agreed with “what had happened””.²⁴⁹⁶

1126. Mr Ntaganda argues that, in the Trial Chamber’s view, his *mens rea* for co-perpetrating the ‘Kobu massacre’ was substantiated by its finding that he was informed of the massacre soon after it occurred and expressed approval of it.²⁴⁹⁷ In the first place, the Appeals Chamber understands Mr Ntaganda to be arguing that in order to find him criminally responsible as a co-perpetrator for the crimes that took place during the Kobu massacre, it must be established that he was aware of the details of this event, including whether and which specific acts had been committed. The Appeals Chamber considers this argument to misconstrue the applicable law on co-perpetration. As stated elsewhere in this judgment, Mr Ntaganda’s *mens rea* with respect to the specific crimes committed during the Kobu massacre need not have been established.²⁴⁹⁸ Rather, what must be established is that he possessed the requisite *mens rea* with respect to the crimes as such in the sense of murder, rape, persecution, pillage *et cetera* committed in implementation of the common plan.

1127. In addition, Mr Ntaganda argues that the Trial Chamber improperly imputed his *mens rea* based on his apparent ‘expression of *post facto* approval, without any evidence that [he] performed the *actus reus* of the crime with the requisite *mens rea*’.²⁴⁹⁹ The issue arising from this argument is whether it was proper for the Trial Chamber to rely on Mr Ntaganda’s conduct after the commission of the crime for its assessment of his intent at the time of the offence. The Appeals Chamber considers that, depending on the circumstances, the conduct of an accused after the commission of a crime may provide information or evidence that may be of relevance to the assessment of his or her intent at the time of the offence. In the present case, the Trial Chamber assessed Mr Ntaganda’s *mens rea* by conducting a holistic assessment based on several considerations, including the fact that he had expressed approval of the crimes that had been committed in Kobu when he was informed of what had

²⁴⁹⁶ [Conviction Decision](#), para. 638 (footnote omitted), referring to P-0055: [T-71](#), p. 52, 56; [T-74](#), p. 70.

²⁴⁹⁷ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 399.

²⁴⁹⁸ See paragraph 1065 above.

²⁴⁹⁹ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 399.

happened.²⁵⁰⁰ Notably, the Trial Chamber found that ‘the criminal acts performed by the UPC/FPLC troops during the First Operation were reproduced during the course of the Second Operation, which culminated in particularly violent events, *i.e.* “the Kobu massacre”’.²⁵⁰¹ This, coupled with Mr Ntaganda’s expression of approval of the crimes committed in Kobu, led the Trial Chamber to find ‘that [Mr Ntaganda] intended the troops to continue with the same criminal conduct during the course of the Second Operation’.²⁵⁰²

1128. In these circumstances, the Appeals Chamber finds that it was reasonable for the Trial Chamber to consider Mr Ntaganda’s reaction to the crimes committed in Kobu as a relevant consideration, together with other considerations in its assessment of his *mens rea*. Consequently, Mr Ntaganda shows no error in this finding and his argument in this regard is rejected.

1129. Furthermore, Mr Ntaganda challenges the evidence of P-0055 that MONUC was the source of the information regarding the Kobu incident on the basis that it is not supported by any MONUC document or witness.²⁵⁰³ While Mr Ntaganda is correct that P-0055’s account as to how the information was first made known to Thomas Lubanga and himself is not corroborated by evidence from MONUC, the Appeals Chamber finds that this, in and of itself, does not render the witness’s evidence unreliable. Indeed, the Appeals Chamber notes that P-0055’s evidence on this point is partly corroborated by evidence of P-0768, who testified that the

²⁵⁰⁰ [Conviction Decision](#), paras 1177-1189 (the Trial Chamber considered the following factors: (i) Mr Ntaganda agreed and worked with others to achieve their plan to drive out all the Lendu from the localities targeted during the course of the First and Second Operation’ and the execution of the agreement ‘inherently involved the conduct that constitutes the crimes under consideration’; (ii) the repetition over time of crimes that followed a certain *modus operandi*; (iii) Mr Ntaganda’s position as the highest ranked leader of the FPLC; (iv) Mr Ntaganda’s non-hesitation ‘to remind [UPC/FPLC troops] that they were expected to execute orders, as he did on 18 February 2003 in the context of the Second Operation’; (v) Mr Ntaganda being informed of the training and composition of the troops to be deployed; (vi) Mr Ntaganda’s announcement prior to the launching of the Second Operation of an important reorganisation concerning the assignment of commanders; (vii) Mr Ntaganda’s presence, actions and directives in the context of the First Operation; and (viii) the fact that at the conclusion of the Second Operation ‘Mr Ntaganda had a conversation with the G2 about the fact that UPC/FPLC soldiers killed civilians in Kobu under the command of Salumu Mulenda’ during which Mr Ntaganda ‘said that he was glad with how things had turned out and also said that Salumu Mulenda was a “gentleman”, “a brave, a fine person”, or a “real man”’ thereby approving the behaviour of Salumu Mulenda’s troops during the Kobu massacre).

²⁵⁰¹ [Conviction Decision](#), para. 1187.

²⁵⁰² [Conviction Decision](#), para. 1187.

²⁵⁰³ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 402.

hierarchy of the UPC/FPLC knew about the Kobu massacre.²⁵⁰⁴ In the Appeals Chamber's view, how and when the witness came to know of the Kobu massacre was not decisive for the Trial Chamber's finding that Mr Ntaganda was aware of the Kobu incident and that he had reacted to this information in a manner that showed that he 'approved of the behaviour of the troops in this context'.²⁵⁰⁵ In these circumstances, the Appeals Chamber finds that the absence of corroborating evidence from MONUC with respect to this discrete aspect of P-0055's testimony does not render the evidence of this witness on Mr Ntaganda's knowledge any less reliable.

1130. Mr Ntaganda further argues that the evidence of P-0317 contradicts that of P-0055 given that P-0317, a MONUC officer who arrived in Bunia on 24 March 2003, 'could not recall that MONUC had any contemporaneous information about a massacre at Kobu'.²⁵⁰⁶ Thus, in his view, Mr Lubanga could not have obtained information before 6 March 2003 about an alleged massacre in Kobu from MONUC officials nor could he have had a meeting with them as described by P-0055. In addressing this argument, the Trial Chamber noted that Mr Ntaganda's arguments were based on the testimony of P-0317 who had only arrived in Bunia on 24 March 2003.²⁵⁰⁷ In this regard, the Trial Chamber noted that it did 'not believe that she reliably knew what information was or was not available to MONUC before 6 March 2003', therefore the Trial Chamber found that there was no 'contradiction between her testimony and that of P-0055'.²⁵⁰⁸ In relevant part, P-0317 testified

Q. [...] in the case of Bogoro, in respect of which you received information from MILOBS and from Congolese NGOs, you didn't receive any such information while you were in Kinshasa from those sources about a massacre in Kobu; is that right?

A. We did not receive information when we were in Kinshasa, we received information only when we arrived in Bunia.

Q. *And once you did arrive in Bunia, did the military observers or anyone else in MONUC tell you that they had information about an attack in Kobu or a massacre in Kobu?

²⁵⁰⁴ [Conviction Decision](#), fn. 2031, referring to P-0768: [T-34](#), p. 60, line 12 to p. 61, line 9.

²⁵⁰⁵ [Conviction Decision](#), para. 1187.

²⁵⁰⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 403.

²⁵⁰⁷ [Conviction Decision](#), fn. 2029, referring to P-0317: [T-192](#), p. 43, lines 21-25. See also P-0317: [T-192](#), p. 45, line 12 to p. 46, line 1.

²⁵⁰⁸ [Conviction Decision](#), fn. 2029.

A. Well, I should point out that there were six military observers at the time in Bunia and they were afraid to leave town. They had some vague information regarding attacks on the villages but no direct information.

Q. *So they did not tell you that any information about a massacre in Kobu had been reported to them; is that right?

A. I don't believe so.²⁵⁰⁹

1131. Mr Ntaganda maintains that '[i]f MONUC officials had had sufficiently substantiated information to raise it during a meeting with Lubanga, then this information would undoubtedly have been recorded, reported and communicated as a matter of the highest importance to the human rights officer with direct responsibility for such matters'.²⁵¹⁰ The Appeals Chamber notes that the reference provided by Mr Ntaganda to support this claim is unrelated to the Kobu incident and refers generally to the witness's preliminary preparations before going into the field to investigate:

Q. Now, before you would go into the field to conduct an investigation, what type of preliminary preparations did you undertake?

A. If we had received information from the field, I would share that with everyone. As regards preparations, we would look at the map where the villages were situated, et cetera, and of course we would read the reports that had already been drafted on Ituri. And we would also see the NGOs in Kinshasa. Some of them had information on Ituri. We spoke to soldiers as well, because we also had information that came from MILOBS.²⁵¹¹

1132. Mr Ntaganda makes reference to P-0317's position as head of the special investigations unit of the human rights section of MONUC at the time to argue that '[i]t is inconceivable that MONUC officials would have informed Thomas Lubanga, but not P-0317 about a massacre at Kobu'.²⁵¹² He further refers to P-0317 being informed of smaller attacks on civilians and specifically indicating that the first information she received about the Kobu incident came from a Lendu civilian.²⁵¹³

1133. The Appeals Chamber considers that it is reasonable to conclude, as the Trial Chamber has, that the fact that P-0317 was not told by the six military observers about

²⁵⁰⁹ P-0317: [T-192](#), p. 45, lines 12-25.

²⁵¹⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 403.

²⁵¹¹ [Mr Ntaganda's Appeal Brief – Part II](#), fn. 1045, referring to P-0317: [T-191](#), p. 24, lines 6-13.

²⁵¹² [Mr Ntaganda's Appeal Brief – Part II](#), para. 405, referring to P-0317: [T-191](#), p. 8, lines 16-22.

²⁵¹³ [Mr Ntaganda's Appeal Brief – Part II](#), para. 405, referring to P-0317: [T-191](#), p. 38, lines 17-18.

a massacre in Kobu does not exclude the possibility that the information was available to the observers. Furthermore, even assuming Mr Ntaganda's assertion, that P-0317 should have known about the incident if MONUC officials truly were the source of the information, was correct, the Appeals Chamber considers that such a contradiction in the testimony of P-0055 and P-0317 would not render the Trial Chamber's finding on Mr Ntaganda's awareness and reaction to the Kobu massacre *per se* unreasonable. As explained above, that aspect is the core part of P-0055's evidence and is partially supported by other corroborating evidence, particularly that provided by P-0768.²⁵¹⁴

1134. According to Mr Ntaganda, the credibility of P-0055 'is further undermined by the inconsistency of this testimony as to the timing [REDACTED]'.²⁵¹⁵ He notes that P-0055 first testified that [REDACTED] occurred after Mr Ntaganda returned from Fataki but prior to the UPC/FPLC's defeat on 6 March 2003 and subsequently stated [REDACTED] the Kobu incident was not discussed.²⁵¹⁶ The Appeals Chamber notes that the Trial Chamber addressed Mr Ntaganda's argument that 'it is impossible that, in Bunia, Mr Ntaganda could have received information about the alleged crimes while Floribert Kisembo was still in Mongbwalu'.²⁵¹⁷ The Trial Chamber 'view[ed] the timing of Kisembo's return to Bunia as peripheral to the core of P-0055's evidence on this subject, and therefore [did] not consider any purported inconsistency on this matter to affect the credibility of P-0055's account'.²⁵¹⁸

1135. The Appeals Chamber notes that Mr Ntaganda's argument on appeal does not concern the timing of Floribert Kisembo's return to Bunia but specifically the timing [REDACTED] in Bunia. In this regard, relying on the evidence of P-0055, the Trial Chamber found that [REDACTED] straight after Mr Lubanga had asked the G2 to investigate and a report on what had happened in Kobu was provided to him.²⁵¹⁹ In relevant part, P-0055 testified as follows:

[REDACTED].²⁵²⁰

²⁵¹⁴ See paragraph 1129 above.

²⁵¹⁵ [Mr Ntaganda's Appeal Brief – Part II](#), para. 407.

²⁵¹⁶ [Mr Ntaganda's Appeal Brief – Part II](#), para. 407.

²⁵¹⁷ [Conviction Decision](#), fn. 2029.

²⁵¹⁸ [Conviction Decision](#), fn. 2029.

²⁵¹⁹ [Conviction Decision](#), paras 637-638.

²⁵²⁰ P-0055: [T-71](#), p. 52, lines 19-23.

[REDACTED].²⁵²¹

[REDACTED].²⁵²²

1136. The Trial Chamber found that, ‘[...] in light of the context provided by [P-0055]’ the meeting between Thomas Lubanga and MONUC staff ‘occurred between the “Kobu massacre” [on or about 25-26 February 2003] and 6 March 2003’.²⁵²³ The Trial Chamber did not specify when exactly Thomas Lubanga was provided with a report about the massacre in Kobu, or when [REDACTED] had met with Mr Ntaganda.²⁵²⁴ However, it found that the meeting in which Mr Ntaganda alleges that [REDACTED], took place on 5 March 2003.²⁵²⁵

1137. The Appeals Chamber notes that, despite the Trial Chamber’s lack of clarity as to the dates in which these events took place, the parts of P-0055’s testimony relied on by the Trial Chamber and cited in paragraph 1135 above, do not support Mr Ntaganda’s argument that the witness provided contradictory evidence on the timing [REDACTED]. In his testimony, he did not provide a [REDACTED] and did not indicate, as Mr Ntaganda seems to suggest that this was the first occasion [REDACTED] after Mr Ntaganda’s return to Bunia. The Appeals Chamber further recalls the Trial Chamber’s finding that generally ‘P-0055 had obvious difficulties remembering dates or timeframes, which he openly emphasised at the beginning, and throughout the course, of his testimony, preferring to frame periods by indicating major events’.²⁵²⁶ The Trial Chamber considered that ‘the aforementioned difficulties do not render his evidence unreliable’.²⁵²⁷

1138. The Appeals Chamber notes that the Trial Chamber provided the following assessment of the timing as to when Mr Ntaganda found out about the Kobu massacre:

Mr Ntaganda denied having ever discussed or obtained information from the G2 relating to civilians allegedly killed in Kobu by members of the UPC/FPLC in

²⁵²¹ P-0055: [T-74](#), p. 81, line 23 to p. 82, line 8.

²⁵²² P-0055: [T-74](#), p. 83, lines 20-25.

²⁵²³ [Conviction Decision](#), fn. 2026.

²⁵²⁴ [Conviction Decision](#), paras 637-638. *See also* fn. 2035.

²⁵²⁵ [Conviction Decision](#), para. 648.

²⁵²⁶ [Conviction Decision](#), para. 123 (footnotes omitted).

²⁵²⁷ [Conviction Decision](#), para. 123.

February or March 2003 [...]. He testified to the effect that from 17 February 2003 to 6 March 2003, he only had two contacts with the G2, one Thuraya call while he was in Fataki, and again at a meeting on 5 March 2003, at which the Second Operation was not discussed [...]. Mr Ntaganda also denied having obtained any information about civilians allegedly killed in Kobu by members of the UPC/FPLC in February or March 2003 [...]. According to Mr Ntaganda, he first heard allegations about civilians being killed in Kobu in February or March 2003 by the UPC/FPLC in 2004 from media reports [...]. The Chamber, in line with its general assessment of P-0055 as a credible witness, accepts as truthful P-0055's detailed description, including his testimony to the effect that Mr Ntaganda already knew about the 'Kobu massacre', and consequently does not accept Mr Ntaganda's denial. Considering P-0055's evidence, and in light of the Chamber's findings on the involvement of Mr Ntaganda specifically in the Second Operation, and generally in UPC/FPLC operations, it is not necessary to discuss further how and when exactly Mr Ntaganda found out about the 'Kobu massacre'.²⁵²⁸

1139. Consequently, the Appeals Chamber finds that Mr Ntaganda's argument regarding the timing of [REDACTED], during which, in the testimony of the witness, Mr Ntaganda [REDACTED], does not render the Trial Chamber's finding on this point unreasonable.

1140. In addition, Mr Ntaganda contends that P-0055 failed to assert [REDACTED].²⁵²⁹ Mr Ntaganda argues that the 'testimony adduced by the Prosecution was only that Mr. Ntaganda was "already aware of the incident," without confirming exactly what the incident was'.²⁵³⁰ In his view, no reasonable Trial Chamber could have inferred without more that this was a reference to the Kobu massacre.²⁵³¹ The Appeals Chamber finds no merit in this argument. On a plain reading of the relevant part of P-0055's testimony it is evident that he was indeed referring to the Kobu massacre [REDACTED]:

[REDACTED].²⁵³²

[REDACTED].²⁵³³

1141. With reference to, *inter alia*, the above extracts of P-0055's testimony, the Trial Chamber found that 'the G2 went to see Mr Ntaganda and asked him if he heard

²⁵²⁸ [Conviction Decision](#), fn. 2035.

²⁵²⁹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 408.

²⁵³⁰ [Mr Ntaganda's Appeal Brief – Part II](#), para. 408, referring to [Conviction Decision](#), para. 638.

²⁵³¹ [Mr Ntaganda's Appeal Brief – Part II](#), para. 408.

²⁵³² P-0055: [T-71](#), p. 52, line 7 to p. 53, line 2 (emphasis added).

²⁵³³ P-0055: [T-71](#), p. 57, lines 11-21.

“what happened in Kobu”, discussing the fact that Lendu “civilians” were killed in Kobu by UPC/FPLC soldiers led by Salumu Mulenda’.²⁵³⁴ In light of this testimony and the Trial Chamber’s assessment thereof, the Appeals Chamber finds that there was no ambiguity as to whether P-0055 was in fact referring to the Kobu massacre when Mr Ntaganda confirmed that he was ‘already aware of “the incident”’.²⁵³⁵ Mr Ntaganda’s argument is therefore rejected.

1142. With respect to Mr Ntaganda’s final argument that ‘the Trial Chamber’s reliance on P-0055’s testimony was determinative in reaching its conclusions about [his] purported knowledge of, and reaction to, the Kobu massacre’ and in turn was ‘essential for the Chamber’s findings concerning his *mens rea* in relation to the crimes of the Second Operation’,²⁵³⁶ the Appeals Chamber finds that it ignores the other considerations that the Trial Chamber relied upon to enter its finding on his intent and knowledge for each of the crimes charged. These included ‘evidence indicating that: (i) on 24 February 2003, Thomas Lubanga met with persons including personnel from MONUC and discussed fighting in the area of Kobu, Lipri, and Nyangaray, including allegations that UPC/FPLC troops were chasing fleeing people in forests around Nyangaray and Kobu’;²⁵³⁷ (ii) ‘UPC/FPLC soldiers who killed people in “Kobu massacre” discussed rapes and killings with other UPC/FPLC soldiers shortly after the event’;²⁵³⁸ and that (iii) ‘a vice-governor heard about the death of Mr Burombi, who was one of the victims in the “Kobu massacre”, through Mr Burombi’s family, although he heard about it in the context of allegations that a UPC/FPLC group had gone to Lipri on the pretext of pacification and killed Lendu “civilians” there’.²⁵³⁹ Contrary to Mr Ntaganda’s argument, the Appeals Chamber finds that these

²⁵³⁴ [Conviction Decision](#), para. 638.

²⁵³⁵ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 408, referring to [Conviction Decision](#), para. 638.

²⁵³⁶ [Mr Ntaganda’s Appeal Brief – Part II](#), paras 409-410.

²⁵³⁷ [Conviction Decision](#), fn. 2035, referring to DRC-OTP-0127-0061 (a video recording of Mr Lubanga together with personnel from MONUC where they discuss fighting in the area around Kobu, Lipri and Nyangaray, including allegations that UPC/FPLC troops were chasing fleeing people in forests around Nyangaray and Kobu); D-0300: [T-230](#), p. 51, lines 19-25.

²⁵³⁸ [Conviction Decision](#), fn. 2035, referring to P-0017: [T-60](#), pp. 17-18; P-0963: [T-79](#), p. 74.

²⁵³⁹ [Conviction Decision](#), fn. 2035, referring to the prior recorded testimony of P-0041 (DRC-OTP-0147-0002 at 0016-0017, paras 82 to 86).

considerations were indeed probative of the fact that ‘Mr Ntaganda was informed of the massacre’ and that ‘news of this massacre was widely known at the time’.²⁵⁴⁰

1143. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in relying, *inter alia*, on P-0055’s evidence to establish Mr Ntaganda’s knowledge of, and reaction to, the Kobu massacre.

5. Overall conclusion

1144. Having rejected the entirety of Mr Ntaganda’s arguments challenging the Trial Chamber’s finding that Mr Ntaganda exercised control over the crimes, meant for the troops deployed during the Second Operation to engage in the conduct and cause the consequences required for the commission of crimes of murder as a crime against humanity and as a war crime (counts 1 and 2), intentionally attacking civilians as a war crime (count 3), rape as a crime against humanity and as a war crime (counts 4 and 5), sexual slavery as a crime against humanity and as a war crime (counts 7 and 8), persecution as a crime against humanity (count 10), pillage as a war crime (count 11), forcible transfer of population as a crime against humanity (count 12), ordering the displacement of the civilian population as a war crime (count 13), attacking protected objects as a war crime (count 17), and destroying the adversary’s property as a war crime (count 18), and that Mr Ntaganda was aware of the relevant circumstances, the Appeals Chamber, by majority, Judge Eboe-Osuji dissenting, rejects this ground of appeal.

V. PROSECUTOR’S APPEAL

1145. The Prosecutor raises two grounds of appeal, under which she argues that the Trial Chamber erred in not considering that the term ‘attack’ in article 8(2)(e)(iv) of the Statute has a ‘special meaning’ and that an ‘attack’ for the purpose of this provision ‘is not limited to the conduct of hostilities’.²⁵⁴¹ She argues that ‘the special meaning of the term “attack” [...] also applies to hospitals and other places where the sick and wounded are collected’.²⁵⁴² The Appeals Chamber will examine both grounds of appeal together.

²⁵⁴⁰ [Mr Ntaganda’s Appeal Brief – Part II](#), para. 409.

²⁵⁴¹ [Prosecutor’s Appeal Brief](#), para. 9 (emphasis in original omitted); [T-270](#), p. 7, lines 15-21.

²⁵⁴² [Prosecutor’s Appeal Brief](#), para. 11.

A. Relevant part of the Conviction Decision

1146. Under count 17, Mr Ntaganda was charged with attacking protected objects as a war crime,²⁵⁴³ including in relation to the hospital in Mongbwalu, as well as the church and the health centre in Sayo.²⁵⁴⁴ The Trial Chamber convicted Mr Ntaganda as an indirect co-perpetrator only for the attack on the health centre in Sayo.²⁵⁴⁵

1. Hospital in Mongbwalu

1147. The Trial Chamber found that in the context of the First Operation ‘UPC/FPLC soldiers looted the Mongbwalu hospital’²⁵⁴⁶ and also noted that ‘[t]he UPC/FPLC soldiers [...] looted medical equipment from the Mongbwalu hospital’.²⁵⁴⁷ This finding is made in the section regarding a *ratissage* operation, conducted in the aftermath of the takeover of Mongbwalu by members of the UPC/FPLC and Hema ‘civilians’.²⁵⁴⁸

2. Church in Sayo

1148. The Trial Chamber found that ‘[o]n or about 24 November 2002, the UPC/FPLC attacked Sayo, coming from the direction of the factory in Mongbwalu’.²⁵⁴⁹ The Trial Chamber held that, immediately after ‘the assault on Mongbwalu and the surrounding areas, members of the UPC/FPLC and Hema “civilians” continued the *ratissage* operation in Sayo’.²⁵⁵⁰ It further found that ‘some time after the assault on the village, the UPC/FPLC set up a base inside the church in Sayo; they broke the doors of the church, removed the furniture, dug trenches around the church, and started a fire inside to prepare their food’.²⁵⁵¹

3. Trial Chamber’s interpretation of the term ‘attack’ under article 8(2)(e)(iv) of the Statute

1149. Regarding the term ‘attack’, in its determination of the applicable law, the Trial Chamber held that:

²⁵⁴³ [Confirmation Decision](#), para. 36; [UDCC](#), p. 65.

²⁵⁴⁴ [Confirmation Decision](#), para. 69.

²⁵⁴⁵ [Conviction Decision](#), paras 1145-1147, p. 538.

²⁵⁴⁶ [Conviction Decision](#), para. 1138.

²⁵⁴⁷ [Conviction Decision](#), para. 514.

²⁵⁴⁸ [Conviction Decision](#), para. 512.

²⁵⁴⁹ [Conviction Decision](#), para. 500.

²⁵⁵⁰ [Conviction Decision](#), para. 526.

²⁵⁵¹ [Conviction Decision](#), para. 526. *See also* para. 1138.

the term ‘attack’ is to be understood as an ‘act of violence against the adversary, whether in offence or defence’. As with the war crime of attacking civilians, the crime of attacking protected objects belongs to the category of offences committed during the actual conduct of hostilities. Article 8(2)(e)(iv) only requires the perpetrator to have launched an attack against a protected object and it need not be established that the attack caused any damage or destruction to the object in question.²⁵⁵²

1150. In making this finding, the Trial Chamber relied on the definition of ‘attack’ adopted in relation to the crime of intentionally attacking civilians:

The Chamber notes that neither the Statute nor the Elements of Crimes include a definition of the term ‘attack’. Having regard to the established framework of international law, the Chamber notes that the crime as described in Article 8(2)(e)(i) of the Statute is based on Article 13(2) of Additional Protocol II. This protocol does not define attacks, but Additional Protocol I does, and the term is considered to have the same meaning in Additional Protocol II. ‘Attack’ must therefore be understood within the meaning of Article 49 of Additional Protocol I as ‘acts of violence against the adversary, whether in offence or defence’.²⁵⁵³

1151. The Trial Chamber thus rejected the Prosecutor’s proposed definition of ‘attack’, in terms of article 8(2)(e)(iv) of the Statute, which covered pillaging of protected objects.²⁵⁵⁴

1152. The Trial Chamber concluded that it would not further consider the looting of medical equipment from the hospital in Mongbwalu, noting that ‘pillaging of protected objects [...] is [not] an “act of violence against the adversary” and, consequently, it does not constitute an attack’.²⁵⁵⁵

1153. With respect to the church in Sayo, the Trial Chamber found that, since the attack on the church ‘took place sometime after the assault, and therefore not during the actual conduct of hostilities’, the first element of article 8(2)(e)(iv) was not met.²⁵⁵⁶ As a result, this incident was not further considered.²⁵⁵⁷

²⁵⁵² [Conviction Decision](#), para. 1136 (footnotes and emphasis in original omitted).

²⁵⁵³ [Conviction Decision](#), para. 916 (footnote omitted).

²⁵⁵⁴ See [Conviction Decision](#), para. 1141, referring to [Prosecutor’s Closing Brief](#), para. 408.

²⁵⁵⁵ [Conviction Decision](#), para. 1141.

²⁵⁵⁶ [Conviction Decision](#), para. 1142.

²⁵⁵⁷ [Conviction Decision](#), para. 1142.

B. Summary of submissions

1. *The Prosecutor's submissions*

1154. The Prosecutor argues that the term ‘attack’ in article 8(2)(e)(iv) of the Statute has a ‘special meaning’, which ‘give[s] effect to the broader prohibition in international humanitarian law which this crime was intended to implement’.²⁵⁵⁸ While the Prosecutor accepts that the formulation of article 8(2)(e)(iv) is based on article 27 of the 1907 Hague Regulations,²⁵⁵⁹ she submits that article 8(2)(e)(iv) ‘derive[s] from’ articles 27 and 56 of the 1907 Hague Regulations.²⁵⁶⁰ The Prosecutor argues that ‘cultural’ objects listed in article 8(2)(e)(iv) differ from other objects, persons or property which receive special protection from an attack in articles 8(2)(b)(iii), 8(2)(b)(vii), 8(2)(e)(ii) and 8(2)(e)(iii).²⁵⁶¹

1155. Regarding the protection of hospitals, the Prosecutor argues that adopting a special meaning of attacks against hospitals, consistent with the interpretation she proposes to ‘cultural’ objects, would ensure that the nature of the protection offered by article 8(2)(e)(iv) is the same for all objects listed therein.²⁵⁶² She submits that such interpretation would also avoid duplication between the crime under this article and the crime of attacking buildings using the distinctive emblems of the Geneva Conventions under article 8(2)(e)(ii) of the Statute.²⁵⁶³ The Prosecutor submits that the term ‘attack’ in article 8(2)(e)(iv) of the Statute refers to an act of violence which may lead to the destruction or damage of the hospital, including its ‘ability [...] to carry out the function which it serves’.²⁵⁶⁴ The Prosecutor also contends that the UPC/FPLC soldiers in this case could not be said to have lawfully requisitioned medical equipment from the hospital in Mongbwalu, as there was no assurance that that equipment was not required for the civilian population.²⁵⁶⁵

²⁵⁵⁸ [Prosecutor's Appeal Brief](#), para. 30; [T-270](#), p. 9, lines 22-24.

²⁵⁵⁹ [1907 Hague Regulations](#).

²⁵⁶⁰ [Prosecutor's Appeal Brief](#), para. 36.

²⁵⁶¹ [Prosecutor's Appeal Brief](#), para. 61.

²⁵⁶² [Prosecutor's Appeal Brief](#), paras 115-117.

²⁵⁶³ [Prosecutor's Appeal Brief](#), paras 118-121.

²⁵⁶⁴ [Prosecutor's Appeal Brief](#), para. 128.

²⁵⁶⁵ [Prosecutor's Appeal Brief](#), paras 143-144.

2. *Mr Ntaganda's submissions*

1156. Mr Ntaganda submits that the Trial Chamber's interpretation of the term attack in article 8(2)(e)(iv) of the Statute is correct.²⁵⁶⁶ He avers that the term 'attack' in that provision does not have a special meaning for 'cultural objects' and is limited to acts committed during the actual conduct of hostilities.²⁵⁶⁷ Mr Ntaganda argues that consistent with the established framework of international law, the term 'attack' 'should be interpreted in accordance with article 49(1) of [Additional Protocol I]'.²⁵⁶⁸ In Mr Ntaganda's view, such 'approach is [...] consistent with the drafting history of article 8(2)(e)(iv), with a consideration of the Statute as a whole, with the Court's case law and with the principle of legality'.²⁵⁶⁹

1157. Mr Ntaganda finds the Prosecutor's argument that in order to ensure that parties to an armed conflict always respect hospitals requires that article 8(2)(e)(iv) of the Statute to be interpreted beyond its original scope intended by the drafters to be misguided.²⁵⁷⁰ Mr Ntaganda adds that the proper interpretation of article 8(2)(e)(iv) does not 'extend to the appropriation of property' given the limited scope of the term 'attack' used in that provision.²⁵⁷¹

3. *The victims' observations*

1158. Victims Group 2 submit that the term attack under article 8(2)(e)(iv) of the Statute should be 'equally interpreted with regard to all protected objects covered by the provision, including churches and hospitals'.²⁵⁷² In their view, 'the term "attack" does not need to be given a "special meaning";²⁵⁷³ rather, it should be 'interpreted in a way that accounts both for combat action and its aftermath'.²⁵⁷⁴ Victims Group 2 allege that the Trial Chamber 'erred in not extending its analysis to [...] the objective of the protection of the listed categories of property and the rationale of including

²⁵⁶⁶ [Mr Ntaganda's Response to Prosecutor's Appeal](#), paras 2-28.

²⁵⁶⁷ [Mr Ntaganda's Response to Prosecutor's Appeal](#), para. 47.

²⁵⁶⁸ [Mr Ntaganda's Response to Prosecutor's Appeal](#), para. 47; [T-270](#), p. 24, lines 19-22.

²⁵⁶⁹ [Mr Ntaganda's Response to Prosecutor's Appeal](#), para. 47.

²⁵⁷⁰ [Mr Ntaganda's Response to Prosecutor's Appeal](#), paras 55, 58.

²⁵⁷¹ [Mr Ntaganda's Response to Prosecutor's Appeal](#), paras 65-71.

²⁵⁷² [Observations of Victims Group 2 on Prosecutor's Appeal](#), para. 1.

²⁵⁷³ [Observations of Victims Group 2 on Prosecutor's Appeal](#), para 10.

²⁵⁷⁴ [Observations of Victims Group 2 on Prosecutor's Appeal](#), para. 13 (emphasis in original omitted).

See also para. 33.

religious sites, hospitals, and buildings dedicated to art and religion within the same provision'.²⁵⁷⁵

4. *Mr Ntaganda's response to the victims*

1159. Mr Ntaganda submits that the observations of Victims Group 2, which focus on the 'temporal parameters of the term "attack"' pursuant to article 8(2)(e)(iv) of the Statute should be dismissed as they are 'misplaced' and 'misconceived'.²⁵⁷⁶ He argues that by 'acknowledging the limited origins of article 8(2)(e)(iv) of the Statute, [Victims Group 2] reveal[] that, at core, the approach taken to the interpretation of this provision by both the Trial Chamber and the Defence is correct'.²⁵⁷⁷

5. *The Prosecutor's response to the victims*

1160. The Prosecutor concurs with Victims Group 2 that 'objects entitled to special protection under article 8(2)(e)(iv) not only benefit from protection from attacks in the conduct of hostilities but also "other adverse conduct, such as destroying, vandalising, ransacking, or otherwise rendering [the object] unusable"'.²⁵⁷⁸ However, she disagrees with Victims Group 2's contention that 'the material question merely concerns "the temporal parameters of the term "attack"'.²⁵⁷⁹

6. *The amici curiae's observations*

1161. In their written and oral observations, made pursuant to rule 103 of the Rules, *amici curiae* presented various views on the meaning of 'attacks' in article 8(2)(e)(iv) of the Statute. Mr Newton,²⁵⁸⁰ Mr O'Keefe,²⁵⁸¹ the Association for the Promotion of International Humanitarian Law 'ALMA',²⁵⁸² Mr Corn *et al.*,²⁵⁸³ Ms Levina and Ms Vaid,²⁵⁸⁴ Ms Jachec-Neale²⁵⁸⁵ and Ms Bagott²⁵⁸⁶ argue that in international

²⁵⁷⁵ [Observations of Victims Group 2 on Prosecutor's Appeal](#), para. 34 (emphasis in original omitted); [T-270](#), p. 34, lines 15-18.

²⁵⁷⁶ [Mr Ntaganda's Response to Observations of Victims Group 2 on Prosecutor's Appeal](#), paras 2, 7, 22.

²⁵⁷⁷ [Mr Ntaganda's Response to Observations of Victims Group 2 on Prosecutor's Appeal](#), para. 5.

²⁵⁷⁸ [Prosecutor's Response to Observations of Victims Group 2 on Prosecutor's Appeal](#), para. 19; [T-270](#), p. 12, lines 14-18.

²⁵⁷⁹ [Prosecutor's Response to Observations of Victims Group 2 on Prosecutor's Appeal](#), para. 2.

²⁵⁸⁰ [Mr Newton's Observations](#), para. 7; [T-270](#), p. 41, lines 2-7; p. 42, lines 15-21.

²⁵⁸¹ [Mr O'Keefe's Observations](#), paras 2, 6.

²⁵⁸² [ALMA's Observations](#), paras 3, 12.

²⁵⁸³ [Mr Corn et al.'s Observations](#), paras 10, 19; [T-270](#), p. 48, lines 19-25.

²⁵⁸⁴ [Ms Levina's and Ms Vaid's Observations](#), para. 4.

²⁵⁸⁵ [Ms Jachec-Neale's Observations](#), paras 2, 10.

²⁵⁸⁶ [Ms Bagott's Observations](#), paras 4, 8.

humanitarian law the term ‘attacks’ means ‘combat action’ and that this term has the same meaning under article 8(2)(e)(iv) of the Statute.

1162. The Public International Law and Policy Group submits that the meaning of ‘attacks’ is ‘broader in the context of hospitals and cultural property and [...] must account for the conduct of hostilities *and its aftermath*’.²⁵⁸⁷ The Antiquities Coalition, Blue Shield International and Genocide Watch argue that the term ‘attacks’ ‘should not be narrowly interpreted’, as otherwise the Court ‘would not recognize the harm to the victims’.²⁵⁸⁸ Mr Heyns *et al.* submit that outside the conduct of hostilities the term ‘attacks’, as applicable to hospitals and cultural property, is ‘to be defined broadly as encompassing all military operations in any armed conflict’.²⁵⁸⁹ Ms Gamarra submits that the term ‘attacks’ is under discussion and that some key terms of article 8(2)(e)(iv) of the Statute are vague.²⁵⁹⁰ Mr Clancy and Mr Kearney, of Al-Haq, aver that it is not a legal element that the relevant acts took place in the context of ‘conduct of hostilities’.²⁵⁹¹

C. Determination by the Appeals Chamber

1163. The Appeals Chamber finds, by majority, Judge Ibáñez Carranza dissenting, that the Prosecutor’s appeal should be rejected. The views of the Judges are presented below.

1. *The views of the Judges*

1164. Judge Morrison and Judge Hofmański find²⁵⁹² that the term ‘attack’ used in article 8(2)(e)(iv) of the Statute means ‘combat action’ and that the Trial Chamber did not err by not applying a different definition of ‘attack’. Judge Balungi Bossa considers²⁵⁹³ that it was unacceptable for the Trial Chamber to find that the conduct of hostilities ceased after the assault in Mongbwalu; for reasons set out in her separate opinion, she declines to overturn Mr Ntaganda’s acquittal for the charge of attacking

²⁵⁸⁷ [Public International Law and Policy Group’s Observations](#), para. 2 (emphasis in original).

²⁵⁸⁸ [Antiquities Coalition, Blue Shield International and Genocide Watch’s Observations](#), paras 2, 13.

²⁵⁸⁹ [Mr Heyns *et al.*’s Observations](#), paras 1, 15; [T-270](#), p. 40, lines 4-14.

²⁵⁹⁰ [Ms Gamarra’s Observations](#), paras 4, 20.

²⁵⁹¹ [Mr Clancy’s and Mr Kearney’s Observations](#), p. 4.

²⁵⁹² The views of Judge Morrison and Judge Hofmański are presented in full in their separate opinion appended to this judgment. See [Annex 1](#), Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor’s appeal.

²⁵⁹³ The views of Judge Balungi Bossa are presented in full in her separate opinion appended to this judgment. See [Annex 4](#), Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor’s appeal.

protected objects as a war crime against the hospital in Mongbwalu and the church in Sayo. Judge Eboe-Osuji is of the view²⁵⁹⁴ that the kind of attack that the Rome Statute forbids can occur outside the course of active hostilities and he does not accept the Trial Chamber’s findings in this respect; for reasons set out in his partly concurring opinion, he declines to overturn the Trial Chamber’s dispositif on this particular matter. Judge Ibáñez Carranza partly concurs²⁵⁹⁵ with Judge Balungi Bossa and Judge Eboe-Osuji that the Trial Chamber erred in the interpretation of the term ‘attack’ in article 8(2)(e)(iv) of the Statute, and finds that the term ‘attack’ includes the preparation, the carrying out of combat action and the immediate aftermath thereof; she would grant the Prosecutor’s appeal and would reverse the Trial Chamber’s findings in this respect.

2. *The dissenting opinion of Judge Ibáñez Carranza*

1165. Judge Ibáñez Carranza finds that the Prosecutor’s appeal should be granted and the Conviction Decision overturned insofar as it adopted a narrow interpretation of the term ‘attacks’ in article 8(2)(e)(iv) of the Statute, as a result of which it declined to consider the attacks on the hospital in Mongbwalu and the church in Sayo under the crime of attacking protected objects.²⁵⁹⁶ Her opinion is informed by an interpretation that accords with the ordinary meaning of the term ‘attack’ and in the light of the object and purpose of the provision, and the Rome Statute more broadly.

1166. The term attack is ordinarily defined as ‘an act of using violence to try to hurt or kill somebody’²⁵⁹⁷ and as ‘a violent act intended to hurt or damage someone or something’.²⁵⁹⁸ These definitions properly reflect the common understanding of this term. Judge Ibáñez Carranza further notes article 49(1) of Additional Protocol I which stipulates that ‘attack’ means any ‘acts of violence against the adversary, whether in offence or in defence’.²⁵⁹⁹ Judge Ibáñez Carranza considers, in line with the findings of the Pre-Trial Chamber in this case, that ‘[i]n characterizing a certain conduct as an “attack”, what matters is the consequences of the act, and particularly whether injury,

²⁵⁹⁴ The views of Judge Eboe-Osuji are presented in full in his partly concurring opinion appended to this judgment. See [Annex 5](#), Partly concurring opinion of Judge Chile Eboe-Osuji.

²⁵⁹⁵ The views of Judge Ibáñez Carranza are presented in full below.

²⁵⁹⁶ [Conviction Decision](#), paras 1136, 1141-1142.

²⁵⁹⁷ https://www.oxfordlearnersdictionaries.com/definition/english/attack_1?q=attack.

²⁵⁹⁸ <https://dictionary.cambridge.org/dictionary/english/attack>.

²⁵⁹⁹ [Additional Protocol I](#).

death, damage or destruction are *intended* or *foreseeable consequences* thereof’ and therefore

in principle, any conduct, including shelling, sniping, murder, rape, pillage, attacks on protected objects and destruction of property, may constitute an act of violence for the purpose of the war crime of attacking civilians, provided that the perpetrator resorts to this conduct as a method of warfare and, thus, that there exists a sufficiently close link to the conduct of hostilities.²⁶⁰⁰

1167. In the view of Judge Ibáñez Carranza, the narrow interpretation of attack adopted by the Trial Chamber is contrary to the object of the provision, namely to prevent attacks against protected buildings in the context of non-international armed conflicts.²⁶⁰¹ Such interpretation is also at odds with the object and purpose of the Rome Statute to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, including for acts that are undoubtedly serious violations of international humanitarian law.²⁶⁰² Finally, the interpretation proposed would not be in line with the ‘established framework of international law’ as stipulated in the chapeau of article 8(2)(e) of the Statute.²⁶⁰³

1168. In line with the above considerations, Judge Ibáñez Carranza is of the view that the term ‘attack’ includes the preparation, the carrying out of combat action and the

²⁶⁰⁰ [Confirmation Decision](#), para. 46 (emphasis added and emphasis in original). See also [Antiquities Coalition, Blue Shield International and Genocide Watch’s Observations](#), para. 7: ‘the definition of “attack” should recognize the continuous nature and duration of acts of violence carried out in continuing pursuit of an overall military objective. Crimes committed under Ntaganda’s command, both during and after the immediate “conduct of hostilities”, occurred in the context of continuing UPC/FPLC operations and thus, were part of a continuing attack’.

²⁶⁰¹ See [Antiquities Coalition, Blue Shield International and Genocide Watch’s Observations](#), para. 13: ‘[i]f the decision of the Trial Court is not reversed, “attacks” on cultural property under Article 8(2)(e)(iv) would not be punishable unless they occur during the immediate “conduct of hostilities” or heat of battle. If the protected site is attacked during the conduct of hostilities, the Court would recognize the harm to the victims. If the site is attacked after the heat of battle has subsided, but during continuous activities serving the military objectives of the attackers, the Court would not recognize the harm to the victims. This would not be a logical result’. See also [Mr Heyns et al. Expression of Interest as Amici Curiae](#), pp. 5-6.

²⁶⁰² See [Ms Gamarra’s Observations](#), para. 22: ‘[i]n any “attack”, including a *ratissage* operation, there is [no] justification for not respecting the protected objects. Every military operation is governed by the rules of customary international law, in particular by the principles of proportionality and necessity’. See also [Public International Law and Policy Group’s Observations](#), paras 9, 11.

²⁶⁰³ See [Public International Law and Policy Group’s Observations](#), para. 5: ‘the “*established framework of international law*,” which shapes the meaning of all subparagraphs in Article 8(2)(e), protects hospitals and cultural property well beyond the hostilities phase of armed conflict. Under [International Humanitarian Law], such properties are protected “*at all times*” and against all “*act[s] of hostility*,” meaning all substantially detrimental “*act[s] arising from the conflict*”’ (emphasis in original, footnotes omitted).

immediate aftermath thereof, including criminal acts committed during *ratissage* operations carried out in the aftermath of combat action.²⁶⁰⁴ The assaults on the hospital in Mongbwalu and on the church in Sayo committed by UPC/FPLC forces in the aftermath of combat action,²⁶⁰⁵ fall squarely within the definition of attack under article 8(2)(e)(iv) of the Statute.

3. Overall conclusion

1169. In light of the foregoing, the Appeals Chamber by majority, Judge Ibáñez Carranza dissenting, rejects the Prosecutor's appeal.

VI. APPROPRIATE RELIEF

1170. In an appeal pursuant to article 81(1) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed or order a new trial before a different trial chamber (article 83(2) of the Statute). In the present case it is appropriate to confirm the conviction of Mr Ntaganda.

With respect to Mr Ntaganda's appeal, Judge Morrison and Judge Ibáñez Carranza append separate opinions, whilst with respect to the Prosecutor's appeal Judges Morrison and Hofmański, as well as Judge Balungi Bossa append separate opinions. Judge Eboe-Osuji appends a partly concurring opinion with respect to Mr Ntaganda's appeal, which also contains his separate views in relation to the Prosecutor's appeal.

Done in both English and French, the English version being authoritative.



Judge Howard Morrison
Presiding

²⁶⁰⁴ See [Public International Law and Policy Group's Observations](#), para. 2: 'the meaning of "attack(s)" is broader in the context of hospitals and cultural property and [...] must account for the conduct of hostilities and its aftermath. This would include a *ratissage* operation, which is a series of acts committed outside the conduct of hostilities' (emphasis in original).

²⁶⁰⁵ [Conviction Decision](#), paras 500, 512, 514, 526.

Dated this 30th day of March 2021

At The Hague, The Netherlands