

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Mathieu Ngudjolo Chui - ICC-01/04-02/12
5 Presiding Judge Sanji Mmasenono Monageng, Judge Sang-Hyun Song, Judge Cuno
6 Tarfusser, Judge Erkki Kourula and Judge Ekaterina Trendafilova
7 Appeals Chamber Judgment on the Final Appeal
8 Friday, 27 February 2015
9 (The hearing starts in open session at 10.00 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 (Pause in proceedings)
14 PRESIDING JUDGE MONAGENG: Thank you very much, photographers.
15 Court clerk, please call the case.
16 THE COURT OFFICER: Thank you, Madam President.
17 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
18 versus Mathieu Ngudjolo, ICC-01/04-02/12.
19 We are in open session.
20 PRESIDING JUDGE MONAGENG: Thank you.
21 I am Sanji Monageng, Presiding Judge in the final appeal proceedings in the case of
22 The Prosecutor against Mr Ngudjolo Chui.
23 Seated directly to my right are Judge Song and then Judge Kourula. To my direct
24 left is Judge Tarfusser and then Judge Trendafilova.
25 Today the Appeals Chamber is delivering its judgment on the appeal of the

1 Prosecutor against the decision of Trial Chamber II entitled, and I quote, "Judgment
2 pursuant to Article 74 of the Statute," end of quote.

3 In today's summary, I will refer to the impugned decision as the as the "Acquittal
4 Decision."

5 Please note that only the written judgment is authoritative and not this summary. It
6 will be notified to the parties shortly after this hearing.

7 In terms of the procedural background and briefly, on 18 December 2012 Trial
8 Chamber II delivered the acquittal decision. The Trial Chamber acquitted

9 Mr Ngudjolo, within the meaning of Article 25(3)(a) of the Statute of the crimes
10 against humanity of murder (Article 7(1)(a)), sexual slavery (Article 7(1)(g)), and rape
11 (Article 7(1)(g)) of the Statute which were alleged to have taken place in Bogoro, the
12 Democratic Republic of Congo, on 24 February 2003.

13 On 20 December 2012, the Prosecutor filed her notice of appeal against the acquittal
14 decision.

15 On 19 March 2013, the Prosecutor filed her document in support of the appeal against
16 the acquittal decision.

17 Mr Ngudjolo filed his response to the document in support of the appeal on 19
18 June 2013.

19 And on 18 July 2013 and 22 July 2013, Victims Groups I and II filed their respect
20 written observations.

21 On 29 July 2013, the Prosecutor filed her reply to Mr Ngudjolo's response to the
22 document in support of the appeal and on 28 August 2013, Mr Ngudjolo filed his
23 response to the Prosecutor's reply.

24 On 21 October 2013, the Appeals Chamber held an oral hearing to hear final
25 submissions on the appeal.

1 In this appeal, the Prosecutor raises three grounds of appeal. Under the first ground
2 of appeal she alleges errors in the Trial Chamber's application of the standard of proof,
3 which is "beyond reasonable doubt." Under the second ground, the Prosecutor
4 alleges errors in the Trial Chamber's evaluation of the totality of the evidence and
5 under the third ground of appeal the Prosecutor raises an alleged procedural error
6 which she argues violated her right to have a fair trial. I shall address each ground
7 of appeal in turn.

8 You will notice that I have not asked the parties and participants to introduce
9 themselves. This will be done at the end of the delivery of this summary.

10 Ground I, this is relevant to the misapplication of the standard of proof.

11 The Prosecutor's first ground of appeal refers to several of the Trial Chamber's factual
12 findings which in her view show a consistent pattern in the analysis of the evidence,
13 whereby the Trial Chamber effectively entertained any doubt, including doubt not
14 based on evidence, reason, logic or common sense. The victims, too, make similar
15 observations with respect to other factual findings of the Trial Chamber. Given the
16 numerous factual finds in dispute under this ground, the Appeals Chamber will not
17 address each of those alleged errors in this summary. However, all the alleged
18 errors are addressed and fully reasoned in the actual judgment on this appeal.

19 The Prosecutor avers that under the first ground she is alleging errors of law.

20 Nevertheless, the Appeals Chamber considers that to the extent that the alleged errors
21 are based on challenges to the Trial Chamber's factual findings, her arguments will be
22 assessed against the standard of review for factual errors. In this respect, the
23 Appeals Chamber determines that it will apply a standard of reasonableness when
24 assessing an alleged error of fact, thereby according a margin of deference to the Trial
25 Chamber's findings. The Appeals Chamber will only intervene if it finds that no

1 reasonable trier of fact could have failed to make the particular finding of fact beyond
2 reasonable doubt, and the acquittal relied on the absence of this finding.

3 The first alleged error relates to Witness P-317, a United Nations employee who
4 testified, inter alia, that during her investigations on the situation in Ituri she met
5 Mr Ngudjolo in April 2003 at which point he stated that he had organised the attacks
6 on Bogoro and Mandro. The Prosecutor's arguments with regard to Witness P-317
7 focus on the purported "speculative" finding of the Trial Chamber that Mr Ngudjolo
8 may have lied in his alleged admission to Witness P-317 in order to advance his career.

9 The Prosecutor submits that the Trial Chamber refused to rely on the evidence of
10 Witness P-317, and I quote, "because in the Chamber's view it could not be excluded
11 that Mr Ngudjolo lied to the witness and that he 'may possibly have wanted to claim
12 responsibility' to enhance his career." The Prosecutor further submits that the Trial
13 Chamber "posed two other lesser justifications for refusing to credit Mr Ngudjolo's
14 admission," namely that the alleged admission was too general to permit the Court to
15 determine Mr Ngudjolo's precise status and role within the Bedu-Ezekere
16 groupement and that the alleged admission was inconsistent with another admission
17 he had made several weeks later to a Congolese prosecutor.

18 The Appeals Chamber finds the Prosecutor's arguments here to be unpersuasive.

19 The Appeals Chamber notes that the Trial Chamber stated that Mr Ngudjolo's alleged
20 admission to Witness P-317, although "somewhat indicative of the accused's possible
21 involvement in the preparation of the attack on Bogoro" was "too general ultimately
22 to determine the accused's precise status and role in the Bedu-Ezekere groupement."

23 It then went on to find that, furthermore, it could not be ruled out that Mr Ngudjolo
24 "had wanted to claim responsibility for an attack so that he would be given a higher
25 rank if integrated into the regular Congolese army," but did so while specifically

1 stating that this argument "must be treated with caution." Thus, the Appeals
2 Chamber finds that contrary to the Prosecutor's arguments, the conclusion that the
3 alleged admission was "too general" for any definitive determination of the accused's
4 role was the Trial Chamber's primary finding, with the "speculative explanation" of
5 Mr Ngudjolo's possible design for career advancement being subsidiary.
6 As regards the reasonableness of the Trial Chamber's finding that Mr Ngudjolo's
7 alleged admission to Witness P-317 was too general for a conclusive determination of
8 Mr Ngudjolo's role, the Appeals Chamber notes that the Trial Chamber found the
9 witness credible and stated that it could rely on her testimony. The Appeals
10 Chamber notes, however, that Mr Ngudjolo's alleged admission appears in said
11 testimony almost in passing. It was by no means the focus of the witness's testimony;
12 she merely mentioned that Mr Ngudjolo said he had organised the attacks on Bogoro
13 and Mandro for strategic reasons. In light of the foregoing, the Appeals Chamber
14 finds that it was not unreasonable for the Trial Chamber to conclude that the alleged
15 admission, as reported to Witness P-317, was too general for a precise determination
16 of Mr Ngudjolo's status and role in the Bedu-Ezekere groupement.
17 Regarding the Trial Chamber's alleged "speculative explanation" that, and I quote, "it
18 cannot be ruled out that Mr Mathieu Ngudjolo, akin to others in Ituri at the time, had
19 wanted to claim responsibility for an attack so that he would be given a higher rank if
20 integrated into the regular Congolese army," the Appeals Chamber notes that,
21 although Mr Ngudjolo never attempted to justify his alleged admission to P-317 in
22 this manner and in fact simply denied ever having met the witness, he did provide
23 such an explanation with regard to his admission to a Congolese prosecutor.
24 Furthermore, the Trial Chamber referred to the testimony of Witness D03-11, the FNI
25 President, who testified that he had falsely claimed responsibility for the attack on

1 Bogoro. The Appeals Chamber considers that in so doing, the Trial Chamber
2 provided some evidentiary foundation for the possibility that Mr Ngudjolo may have
3 wanted to "claim responsibility for an attack so that he would be given a higher rank
4 if integrated into the regular Congolese army." The Appeals Chamber finds that
5 when viewed in this light, the Trial Chamber's findings are not speculative, but rather
6 demonstrate that, based on similar evidence on the record, it was unable to rule out
7 other explanations for Mr Ngudjolo's alleged admission. Accordingly, the Appeals
8 Chamber considers that the Trial Chamber's finding was not unreasonable and rejects
9 the Prosecutor's arguments in this regard.

10 The next alleged error relates to the Trial Chamber's findings on the attack on Bunia
11 on 6 March 2003.

12 During the trial, the Prosecutor sought to establish that Mr Ngudjolo held the position
13 of leader of the Lendu combatants from Bedu-Ezekere groupement who attacked
14 Bogoro on 24 February 2003. To this end, the Prosecutor introduced evidence
15 relating to events in the period following the attack on Bogoro, such as the attacks on
16 Mandro on 4 March 2003 and Bunia on 6 March 2003. In her closing brief, the
17 Prosecutor submitted that Mr Ngudjolo's alleged role during these attacks can only be
18 explained by the fact that he was the leader before the attack on Bogoro. It is in this
19 context that the attack on Bunia was assessed by the Trial Chamber in the acquittal
20 decision.

21 The Prosecutor's arguments under this section essentially challenge the three findings
22 underpinning the Trial Chamber's primary finding that it could not establish beyond
23 a reasonable doubt that Mr Ngudjolo directed the Lendu combatants during the
24 attack on Bunia. In the Prosecutor's view, these findings are further examples of the
25 Trial Chamber requiring "proof beyond any conceivable doubt" and thereby

1 misapplying the standard of proof.

2 In arriving at its primary finding the Trial Chamber examined a statement given by
3 Mr Ngudjolo when being interviewed by a Congolese prosecutor. In this statement
4 when asked whether he was "ever present during military operations," Mr Ngudjolo
5 replied that he "directed only the operation that took place on 6 March 2003 in Bunia."
6 In this regard the first finding that the Trial Chamber made is that Mr Ngudjolo, and I
7 quote, "appears to claim leadership of the entire operation, whereas everything points
8 to the Bunia offensive having been led by the UPDF and the Lendu combatants," end
9 of quote. The Prosecutor claims that the Trial Chamber's finding here is "speculative
10 and impressionistic" and "supported by no evidence." The Appeals Chamber finds
11 that the Prosecutor's arguments in this regard are unpersuasive.
12 Given the plain meaning of the words used by Mr Ngudjolo when being interviewed
13 by the Congolese Prosecutor, it does not appear incorrect to hold that he "appears to
14 claim leadership of the entire operation." In the view of the Appeals Chamber, it
15 was not unreasonable for the Trial Chamber to make this observation, given that there
16 was undisputed evidence that the attack on Bunia was actually led by the UPDF with
17 the assistance of Lendu combatants and that Mr Ngudjolo could therefore not have
18 had overall responsibility, a point that the Prosecutor concedes.

19 With regard to the Trial Chamber's second finding the Appeals Chamber that the
20 Trial Chamber simply reinforced its first observation when it added that Mr Ngudjolo
21 also did not indicate which troops he led. The Appeals Chamber considers that the
22 Trial Chamber's reasoning does not, as such, indicate that it required too exacting a
23 standard of proof, but merely further explains why the Chamber was not convinced
24 by Mr Ngudjolo's admission to the Congolese prosecutor. Accordingly, the Appeals
25 Chamber considers that the Trial Chamber's finding in this respect was not

1 unreasonable.

2 The Prosecutor further disputes the reasonableness of the Trial Chamber's related
3 finding that Mr Ngudjolo's admission to Witness P-317 was inconsistent with his
4 subsequent statements to the Congolese prosecutor in that Mr Ngudjolo made no
5 mention of the latter of his participation -- in the latter of his participation in the
6 battles of Bogoro and Mandro. The Prosecutor argues that the finding essentially
7 required the two admissions to be "fully symmetrical" before the Trial Chamber could
8 find them to be reliable. She further argues that it was "unnecessary for the
9 Chamber to expect that an admission by the accused of one attack would necessarily
10 have to mention the accused's involvement in other attacks."

11 The Prosecutor raises these arguments in two different contexts: (i) with respect to
12 the Trial Chamber's findings on the attack on Bunia and Mr Ngudjolo's alleged
13 admission to the Congolese prosecutor; and (ii) with respect to the Trial Chamber's
14 overall conclusions at the point of its collective evaluation of Mr Ngudjolo's
15 admissions to Witness P-317 and the Congolese prosecutor.

16 The Appeals Chamber is not persuaded by the Prosecutor's arguments. The Trial
17 Chamber did not require the two admissions to be "fully symmetrical." Rather, it
18 noted that they differed. In the view of the Appeals Chamber, the fact that two
19 admissions that an accused person made were not identical is a relevant consideration
20 that a Chamber may take into account when evaluating the evidence. Given the
21 Trial Chamber's other findings that underpin its primary finding, the Appeals
22 Chamber finds that there is no indication that the Trial Chamber gave undue weight
23 to the differences between the two admissions.

24 Second, with respect to the Trial Chamber's evaluation of Mr Ngudjolo's alleged
25 admissions to Witness P-317 and to the Congolese prosecutor in its overall

1 conclusions, the Appeals Chamber notes that, while not impugning the credibility of
2 the sources of either alleged admission, the Trial Chamber found itself "compelled to
3 note a certain inconsistency between these two items of evidence," such that, and I
4 quote, "[t]he first one fails to mention Mathieu Ngudjolo's participation in the battle of
5 Bunia and the second does not mention his participation in hostilities at Bogoro and
6 Mandro." Accordingly, the Trial Chamber held that it was "compelled to treat such
7 revelations with circumspection."

8 In the view of the Appeals Chamber, this approach of the Trial Chamber was not
9 unreasonable. As noted above, differences between two admissions of an accused
10 person are relevant to the evaluation of the evidence and may therefore be taken into
11 account by the Trial Chamber. There is no indication that the Trial Chamber gave
12 undue weight to this factor. In this regard, the Appeals Chamber also recalls that the
13 Trial Chamber's primary finding concerning Mr Ngudjolo's alleged admission to
14 Witness P-317 was not unreasonable. Furthermore the Trial Chamber found that, in
15 view of Mr Ngudjolo's alleged admission to the Congolese prosecutor, "it cannot rule
16 out the possibility that he led the Lendu combatants from Bedu-Ezekere during the
17 Bunia operation, but is nonetheless unable to do so ..." -- "... to so determine beyond
18 reasonable doubt." The Appeals Chamber considers the Trial Chamber's finding in
19 this regard not to be unreasonable.

20 The Appeals Chamber therefore rejects the Prosecutor's submissions, which fail to
21 establish that the Trial Chamber incorrectly applied the standard of "beyond
22 reasonable doubt." Likewise, with respect to the remaining errors raised under this
23 ground of appeal, the Appeals Chamber finds the findings of the Trial Chamber to
24 not be unreasonable and as a result the Appeals Chamber concludes that it has not
25 been established that the Trial Chamber was misinformed of the standard of "beyond

1 reasonable doubt," or applied a standard that was too exacting. Accordingly, the
2 Prosecutor's first ground of appeal is rejected.

3 With regard to ground II, the alleged failure to consider the totality of the evidence,
4 under this ground of appeal the Prosecutor alleges that the Trial Chamber "adopted a
5 wrong approach at each of the three different stages of the decision-making process,
6 when it (a) assessed the credibility of the evidence; (b) made factual findings; and (c)
7 reached its final decision on the guilt of [Mr] Ngudjolo."

8 To demonstrate the purported errors, the Prosecutor provides "a limited number of
9 examples at each stage of the decision-making process," which according to her "were
10 critical to the Trial Chamber's refusal to find that [Mr] Ngudjolo led the Lendu
11 combatants of Bedu-Ezekere who attacked Bogoro on 24 February 2003."

12 As under the first ground of appeal, since the Prosecutor uses examples of alleged
13 factual errors to demonstrate the alleged legal error, the Appeals Chamber will
14 analyse these examples against the standard of review applicable to factual errors.
15 Again, for the purposes of this summary not all of the alleged errors will be
16 addressed.

17 In relation to the Trial Chamber's credibility assessment, the Appeals Chamber will
18 focus on the errors alleged by the Prosecutor with respect to the Trial Chamber's
19 assessment of the credibility of Witness 250 -- P-250.

20 The Appeals Chamber notes that the Prosecutor relied on the testimony of Witness
21 P-250 to establish, inter alia, Mr Ngudjolo's role as leader of the Lendu militia that
22 attacked Bogoro on 24 February 2003. Witness P-250 claimed to have been a militia
23 member within the military structure of the Bedu-Ezekere groupement and testified,
24 inter alia, that he was a member of a delegation dispatched from Zumbe by
25 Mr Ngudjolo to Mr Katanga in Aveba where the decision to attack Bogoro was made.

1 Witness P-250 "described the strategy implemented to win the battle in addition to
2 details of the various itineraries followed by the commanders."

3 The Trial Chamber rejected Witness P-250's evidence in its entirety on the basis that
4 the witness's evidence was imprecise and contradictory. In particular, the Trial
5 Chamber relied on school reports which tended to indicate that Witness P-250 was a
6 student at the relevant time and could therefore not have been a militia member.

7 The arguments raised by the Prosecutor, which are broadly underscored by those of
8 Victim Group II, focus on the alleged failure of the Trial Chamber to consider various
9 pieces of evidence in the record which, according to the Prosecutor, tend to
10 corroborate aspects of Witness P-250's testimony that established Mr Ngudjolo's
11 authority in Bedu-Ezekere.

12 In the Prosecutor's view, when rejecting Witness P-250's testimony in its entirety, the
13 Trial Chamber failed to consider how his evidence related to and undermined the
14 evidence of Defence witnesses. This, the Prosecutor argues, demonstrates the Trial
15 Chamber's failure to consider the entirety of the evidence which it found Witness
16 P-250 lacked -- when it found Witness P-250 lacked credibility.

17 The Appeals Chamber considers that, as the Prosecutor herself pointed out, a Trial
18 Chamber may indeed rely on certain aspects of a witness's evidence and consider
19 other aspects unreliable. The Appeals Chamber further finds that the evidence of a
20 witness in relation to whose credibility the Trial Chamber has some reservations may
21 be relied upon to the extent that it is corroborated by other reliable evidence.

22 However, the Appeals Chamber also finds that there may be witnesses whose
23 credibility is impugned to such an extent that he or she cannot be relied upon even if
24 other evidence appears to corroborate parts of his or her evidence or testimony.

25 The Appeals Chamber considers that, in relation to Witness P-250, the Trial Chamber

1 found the latter to be the case. In the Trial Chamber's view, Witness P-250's
2 credibility was impugned to the extent that it affected his capacity to testify to the
3 facts in issue and his evidence became entirely divested of reliability.
4 Accordingly, even though parts of Witness P-250's testimony appear to have been
5 corroborated by other evidence, this would not, as correctly suggested by
6 Mr Ngudjolo, "re-imbue" his credibility or the reliability of his evidence. While a
7 Trial Chamber should indeed assess the credibility of a witness in part by assessing
8 whether the content of his or her testimony is confirmed by other evidence, the Trial
9 Chamber is not required to find a witness to be credible simply because other
10 evidence appears to confirm the content of aspects of his or her testimony. In
11 particular, if there are other reasons for doubting the witness's credibility, it is not per
12 se unreasonable for a Trial Chamber to reject potentially corroborative evidence when
13 making its credibility assessment.

14 In the present case, the Appeals Chamber notes that the Trial Chamber had doubts
15 that Witness P-250 was a member of the Bedu-Ezekere militia and, since his entire
16 testimony was premised on the fact that he was a member of the militia, the Trial
17 Chamber found that it could not rely on his evidence at all.

18 In light of the foregoing, the Prosecutor's argument that numerous examples of
19 testimonial evidence, as well as the soap letter, show that aspects of Witness P-250's
20 testimony were corroborated by other witnesses and that therefore Witness P-250
21 should have been relied upon, fails to establish that the Trial Chamber's findings were
22 unreasonable. The Prosecutor's arguments are therefore rejected.

23 Finally, the Prosecutor argues that the Trial Chamber failed to take into account
24 relevant evidence and facts when it assessed the credibility of the Defence witnesses
25 and the reliability of their accounts that Witness P-250 was not a member of the

1 militia. In particular the Prosecutor submits with respect to Witness D03-100 that,
2 even though the Trial Chamber acknowledged that the witness and his family had
3 been in conflict with Mr Ngudjolo's family, it nevertheless ignored the fact that
4 Witness D03-100 refused to give a direct response to repeated questions about
5 whether his testimony was unaffected by the conflict.

6 In this regard, the Appeals Chamber notes that the Trial Chamber found that the
7 witness himself, this is D03-100, spontaneously volunteered the information that there
8 had been a conflict between the two families. The Appeals Chamber further notes
9 that the Trial Chamber considered this acknowledgment to be "an indication of the
10 witness's attempt at transparency and that it should be taken into account when
11 assessing his credibility." In addition, the Trial Chamber considered the impact of
12 any possible tension or threats from Mr Ngudjolo's family on Witness D03-100 by
13 comparing his testimony with the testimony of other witnesses that contained useful
14 information about Witness P-250's schooling in the years 2002 to 2003. In the Trial
15 Chamber's assessment, given that the evidence of the four Defence witnesses
16 mutually corroborate -- was mutually corroborative and convincing, since they hailed
17 from different environments, their accounts reinforced the credibility of Witness
18 D03-100's statement that Witness P-250 was a student at the material time. In light of
19 this, the Appeals Chamber finds that the Trial Chamber did not ignore the possible
20 effect of threats on Witness D03-100's evidence. Rather, the Appeals Chamber finds
21 that the Trial Chamber carefully examined the evidence of other Defence witnesses to
22 test the reliability of Witness D03-100's testimony. Accordingly, the Prosecutor's
23 arguments that the Trial Chamber's findings were unreasonable are therefore rejected.
24 For similar reasons the Appeals Chamber rejects the arguments of the Prosecutor in
25 relation to other credibility assessments of the Trial Chamber in relation to

1 documentary evidence and witness testimony. Accordingly, the Prosecutor's
2 arguments in relation to the first stage of the Trial Chamber's decision-making
3 process are rejected.

4 As to the second stage of the Trial Chamber's decision-making process, the Prosecutor
5 challenges the correctness of the Trial Chamber's approach to the fact-finding process
6 throughout the acquittal decision. To demonstrate the alleged error the Prosecutor
7 refers, *inter alia*, to the Trial Chamber's assessment of hearsay evidence, referring to
8 the Trial Chamber's findings regarding Witness D02-176.

9 The Trial Chamber, in the context of assessing the evidence related to the position
10 held by Mr Ngudjolo before and during the attack on Bogoro, noted the testimony of
11 Witness D02-176 who stated that, and I quote, "he knew very well" that Mr Ngudjolo
12 was the "number one" and "commander of operations" during the attack on Bogoro.
13 According to the Trial Chamber, Witness D02-176 stated it to be a, and I quote, "truth
14 known to all," end of quote. While the Trial Chamber acknowledged that Witness
15 D02-176 was, and I quote, "well placed to state which military commanders were at
16 enemy positions, given that UPC troops had attacked Bedu-Ezekere groupement on
17 numerous occasions," end of quote, the Chamber nonetheless held that his assertion
18 was, and I quote, "founded on anonymous hearsay made by an individual who did
19 not live in Zumbe and who provided no further details on Mr Ngudjolo's status
20 within that locality," end of quote.

21 Furthermore, having examined Witness D02-176's statement, the Trial Chamber held
22 that it, and I quote, "could not rule out that the witness had associated Mr Ngudjolo's
23 status in the FNI with the position which he considered him to have held prior to the
24 attack on Bogoro," end of quote.

25 The Prosecutor argues that the Trial Chamber disregarded evidence or facts when it

1 rejected Witness D02-176's statements. In the Prosecutor's view, Witness D02-176
2 had direct knowledge of the Bedu-Ezekere Lendu commanders, some of whom he
3 attended school with in Bogoro. Furthermore, the Prosecutor avers that in finding
4 that the witness did not live in Zumbe and therefore his evidence could not be
5 accorded much probative value, the Trial Chamber failed to take into account that
6 although not from Zumbe, the witness lived in close proximity and like all Bogoro
7 residents had an interest in knowing who led their enemies.

8 The Appeals Chamber notes that the Trial Chamber assessed Witness D02-176's
9 testimony in conjunction with that of other witnesses who testified to the position
10 held by Mr Ngudjolo prior to the attack on Bogoro, and concluded that it could only
11 attach very low probative value to this evidence as a whole. The Trial Chamber
12 reached this conclusion on the basis that: (i) most of the testimony was hearsay; (ii)
13 it came from witnesses who were not actually present in Bedu-Ezekere groupement
14 prior to the Bogoro attack; and, thirdly, it provided very little detail on the authority
15 purportedly held by Mr Ngudjolo or on the manner in which he exercised it.

16 Moreover, as the Trial Chamber pointed out in stating that said evidence must be
17 treated with circumspection, and I quote, "it relates to a crucial point in the
18 Prosecution's case," end of quote. The Appeals Chamber considers that none of
19 these findings are unreasonable.

20 With respect to the specific evidence or facts that the Prosecutor alleges the Trial
21 Chamber erred by failing to take into account, the Appeals Chamber notes that this
22 evidence appears to relate to, (i) events that took place after the attack on Bogoro; (ii)
23 events that the Trial Chamber already otherwise discussed; and (iii), statements that
24 the Trial Chamber found to lack specificity to have any meaningful probative value or
25 (iv) evidence as to why Witness D02-176 might in theory have been well-placed to

1 know what was going on with his enemies in the Bedu-Ezekere groupement. The
2 Appeals Chamber finds that, at best, the Prosecutor is putting forward a possible
3 alternative interpretation of the evidence, but she has failed to establish any error on
4 the part of the Trial Chamber that would render the Chamber's approach
5 unreasonable. Accordingly, the Prosecutor's arguments are rejected.

6 For similar reasons, the Appeals Chamber rejects the arguments of the Prosecutor and
7 the Victims in relation to other alleged errors with the Trial Chamber's fact-finding
8 process. Accordingly, the Prosecutor's arguments in relation to the second stage of
9 the Trial Chamber's decision-making process are rejected.

10 Finally, the Prosecutor contends that as a result of the errors alleged in the first and
11 second stages of the Trial Chamber's decision-making process, the Chamber's
12 ultimate conclusion on the guilt or innocence of Mr Ngudjolo was therefore vitiated
13 by these legal and factual errors.

14 Having rejected the errors, the Prosecutor has -- the errors that the Prosecutor has
15 alleged in relation to the first and second stages of the fact-finding process, the
16 Appeals Chamber does not consider it necessary to address the Prosecutor's
17 argument in relation to the third stage, as she has raised no separate argument.

18 The Appeals Chamber therefore rejects the Prosecutor's second ground of appeal.
19 Now, the third ground of appeal, this has to do with the Prosecutor's right to have an
20 adequate opportunity to present her case, this ground relates to the Trial Chamber's
21 management of Mr Ngudjolo's alleged interference with witnesses and victims while
22 in detention at the Court.

23 Under the third ground of appeal, the Prosecutor submits that the Trial Chamber
24 "committed critical errors in its management of the trial that materially affected the
25 Prosecution's right to present and prove its case, thereby violating the Prosecution's

1 right to a fair trial under Article 64(2)." More specifically, the Prosecutor submits
2 that the Trial Chamber, and I quote, "erred in procedure by refusing the Prosecution's
3 persistent requests and by failing to exercise its own powers to ensure the fairness of
4 the trial proceedings," end of quote.

5 Preliminarily, the Appeals Chamber will address whether the Trial Chamber's
6 decisions on the telephone monitoring are *res judicata* and therefore may not be
7 raised in the context of this appeal.

8 Mr Ngudjolo contends that all decisions by the Trial Chamber on the issue of
9 monitoring his telephone calls are *res judicata* and that "*res judicata* constitutes a
10 ground of inadmissibility." In particular he argues that because the Prosecutor
11 already unsuccessfully requested leave to appeal the Trial Chamber's oral rulings on
12 telephone call monitoring, and was specifically denied the right to use this material
13 when examining Witness P-250, the Prosecutor should be barred from rehashing a
14 matter that has been definitively resolved.

15 Mr Ngudjolo argues further that the issue concerning the monitoring of his telephone
16 calls was never the subject of adversarial proceedings and as such cannot be
17 considered to be evidence discussed at trial for the purposes of Article 74(2) of the
18 Statute.

19 The Appeals Chamber finds that Mr Ngudjolo's argument that the decisions the Trial
20 Chamber rendered during the proceedings are, as such, *res judicata*, is not persuasive.
21 The principle of *res judicata*, which is well-established in international law, is defined
22 as, and I quote, "a matter that has been adjudicated by a competent court and which
23 therefore may not be pursued further by the same parties" or as "a thing adjudicated"
24 meaning that "once a lawsuit is decided, the same issue or an issue arising from the
25 first issue cannot be contested again," end of quote.

1 The Appeals Chamber recalls that, in the context of interlocutory appeals, it has held
2 that procedural errors that may have arisen prior to an impugned decision, but which
3 are "germane to the legal correctness or procedural fairness of the Chamber's
4 decision" may be raised on appeal. For reasons more fully explained in the
5 judgment of this appeal, the Appeals Chamber considers that the aforementioned also
6 applies if the impugned decision is a "decision under Article 74 of the Statute." The
7 Appeals Chamber considers that to decide otherwise would, indeed, as submitted by
8 Victim Group I, deprive the parties of the ability to raise procedural errors in final
9 appeal proceedings. In the view of the Appeals Chamber, this is irrespective of
10 whether the proceedings before the Trial Chamber took place on an ex parte basis or
11 not - as a consequence, Mr Ngudjolo's argument that the relevant proceedings were
12 not adversarial need not be further considered.

13 Accordingly, Mr Ngudjolo's arguments on res judicata are rejected.

14 Now, turning to the merits of the third ground of appeal, the Prosecutor submits that
15 the Trial Chamber committed a procedural error by, and I quote, "by refusing the
16 Prosecution's persistent requests and by failing to exercise its own powers to ensure
17 the fairness of the trial proceedings, and that this error violated the Prosecution's right
18 to a fair trial under Article 64(2)."

19 The Prosecutor further submits that, and I quote, "[d]isregarding the broad powers
20 afforded to it by the Statute, the Trial Chamber took no action during the proceedings
21 to ascertain whether critical witnesses had been intimidated and whether others may
22 have colluded to provide false testimony. In so doing, the [Trial] Chamber
23 disregarded its own authority to manage the trial and, at least as importantly, its
24 obligation to arrive at the truth and that "[a]s a result of the cumulative effect of the
25 Chamber's decisions and its passivity, the Prosecutor's right to a fair trial under

1 Article 64(2) was violated."

2 In support of her contention, the Prosecutor submits that in light of the, and I quote,
3 "clear and probative value that [Mr] Ngudjolo and third persons acting on his behalf
4 had disclosed the identity and the evidence of protected Prosecution witnesses,
5 orchestrated a consistent line of defence evidence and exerted pressure over
6 witnesses," end of quote, the Trial Chamber "committed critical errors in its
7 management of the trial."

8 More specifically, the Appeals Chamber understands the Prosecutor to allege that the
9 Trial Chamber made three errors when it: (i) prevented the Prosecutor from getting
10 full access to Mr Ngudjolo's recorded conversations; (ii) rejected the Prosecutor's
11 request to use the parts of the Registry reports that she had access to in order to
12 examine Mr Ngudjolo and Witness D03-88; and, thirdly, improperly prohibited the
13 Prosecutor from eliciting explanations from Witness P-250 regarding the
14 inconsistencies in his testimony.

15 Before addressing these arguments, the Appeals Chamber will address Mr Ngudjolo's
16 argument that the Prosecutor is not entitled to raise alleged violations of fair trial
17 rights.

18 In this regard, the Appeals Chamber recalls that the Prosecutor couches her
19 arguments broadly as violations of her fair trial rights. The Prosecutor submits that
20 her "right to a fair trial is guaranteed under Article 64(2) [and that this right] obliges
21 the Court to ensure that neither party is put at a disadvantage when presenting its
22 case."

23 The Prosecutor avers that the right to a fair trial involves in particular her right to,
24 and I quote, "exercise the powers and fulfil the duties listed in Article 54, [to have] the
25 genuine opportunity to present [her] case," as well as to be in a position "to tender

1 evidence free of any external and/or undue influence and to question witnesses

2 comprehensively," end of quote.

3 The Appeals Chamber recalls that the right to a fair trial is a fundamental right

4 protected at the regional and international levels. It is commonly understood that

5 the right of a -- to a fair trial or fair hearing in criminal proceedings first and foremost

6 inures to the benefit of the accused. Indeed, the specific rights entrenched in Article

7 67(1) of the Statute are specifically tailored to the needs of the accused person.

8 The Appeals Chamber does not consider it necessary to determine whether and to

9 what extent the Prosecutor has a "right to a fair trial" in the abstract. What is at issue

10 is not the overall fairness vis-à-vis the Prosecutor. Rather, at issue is a fundamental

11 aspect of the trial which touches upon the core functions of both the Prosecutor and

12 the Trial Chamber; namely the objective of establishing the truth as well as the

13 Prosecutor's ability to present evidence in order to prove the charges against the

14 accused. With regard to the latter, Article 69(3) of the Statute provides that, and I

15 quote, "[t]he parties may submit evidence relevant to the case, in accordance with

16 Article 64."

17 The Appeals Chamber considers that the principle that the parties must be afforded

18 an adequate opportunity to present their case must be seen in the context of Article

19 54(1)(a) of the Statute, which enjoins the Prosecutor "to establish the truth." The

20 establishment of the truth is one of the principal objectives of the Statute to which the

21 Trial Chamber must actively contribute. In this context, the Appeals Chamber notes

22 that Article 69(3) of the Statute gives the Court the power "to request the submission

23 of all evidence that it considers necessary for the determination of the truth."

24 Given the Trial Chamber's duty to contribute to the establishment of the truth, the

25 Appeals Chamber considers that the Prosecutor may raise errors alleging that her

1 ability to present her case has been violated as procedural errors under Article
2 81(1)(a)(i) of the Statute.

3 Mr Ngudjolo's argument in this regard is therefore rejected.

4 In relation to the Prosecutor's argument that the Trial Chamber did not provide her
5 with a "genuine opportunity to present [her] case," when it refused her full access to
6 the recorded conversations, the Appeals Chamber notes that by a series of decisions
7 issued by the Registrar the post-factum listening of all non-privileged
8 communications was ordered of both Mr Katanga and Mr Ngudjolo from the Court's
9 detention centre as of 1 October 2008 and thereafter during intermittent periods until
10 28 January 2010.

11 In parallel, the Registrar produced numerous reports analysing the recorded
12 conversations and alerted the Trial Chamber to possible witness intimidation and
13 disclosure of confidential information concerning witnesses by Mr Ngudjolo via his
14 outside contacts.

15 The Trial Chamber reacted by notifying these reports to Mr Ngudjolo and the
16 Prosecutor, in redacted form, and by taking measures to protect witnesses who may
17 have been at risk, as well as prohibiting on a provisional basis all contact between
18 Mr Ngudjolo and the outside and separating him from other detained persons.

19 For the reasons that follow, the Appeals Chamber is not persuaded by the
20 Prosecutor's argument that the Trial Chamber erred by denying her full access to
21 Mr Ngudjolo's recorded conversations. The Appeals Chamber recalls that a Trial
22 Chamber's decision to grant or deny full access to monitored information pursuant to
23 Regulation 92(3) of the Regulations of the Court is a discretionary decision.
24 Accordingly, the Appeals Chamber will consider whether the Trial Chamber erred
25 against the standard of review for discretionary decisions.

1 According to that standard, and I quote, "the Appeals Chamber will interfere with a
2 discretionary decision only under limited conditions; [namely]: (i) where the
3 exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is
4 exercised on patently incorrect conclusion of fact; or (iii) where the decision is so
5 unfair and unreasonable as to constitute an abuse of discretion."

6 The Appeals Chamber notes that the Trial Chamber refrained from providing full
7 access to the recorded conversations on the basis that such information fell, and I
8 quote, "within the purview of Article 8 of the European Convention on Human Rights
9 or the right to mount [a] defence," end of quote, which could only be interfered with,
10 and I quote, "in accordance with the law and [if] necessary and proportionate to the
11 legitimate aim pursued," end of quote.

12 In this regard, the Trial Chamber concluded that the, and I quote, "necessity
13 requirement" was not met given inter alia that the Prosecutor had not demonstrated
14 how a "lack of access to such information would, in this instance, deprive [her] of any
15 possibility of achieving the objective prescribed by Article 54(1) of the Statute." Thus
16 the Trial Chamber considered that the Prosecutor already had access through the
17 Registry reports, and I quote, "to all the information of relevance to [her] and which
18 potentially impacts on witnesses," end of quote.

19 The Appeals Chamber notes that the Registry reports which contain analyses of many
20 hours of non-privileged conversations between Mr Ngudjolo and his outside contacts
21 were, with the exception of the first report, provided to the Prosecutor in redacted
22 form. The reports were redacted to safeguard information pertaining to
23 Mr Ngudjolo's private life and/or defence strategy, but contained detailed and explicit
24 excerpts from the actual transcripts of the recorded conversations.

25 Furthermore, the Appeals Chamber observes that the conversations were at times so

1 closely linked to Mr Ngudjolo's defence strategy that the Registrar was in doubt as to
2 whether they should be disclosed to the Prosecutor. In these instances, the Registrar
3 included the information for the Trial Chamber's evaluation.

4 In view of the above, the Appeals Chamber is not persuaded that the Trial Chamber
5 acted unreasonably when it refused to grant the Prosecutor full access to the recorded
6 conversations. Rather, the Trial Chamber balanced the interests of both
7 Mr Ngudjolo and the Prosecutor. As such, no error in the Trial Chamber's decision
8 may be discerned.

9 As to the second argument that the Trial Chamber erred in refusing the Prosecutor
10 the use of the Registry reports to cross-examine Mr Ngudjolo and Witness D03-11, the
11 Appeals Chamber notes that on 8 July 2011 the Prosecutor requested the
12 reclassification of five of the Registry reports in order to use them in
13 cross-examination of inter alia Mr Ngudjolo and Witness D03-88.

14 Relying in particular on the first report, the Prosecutor indicated that it was necessary
15 to refer to the excerpts of the recorded conversations: (i) to assess the credibility of
16 inter alia Mr Ngudjolo; (ii) to cross-examine Mr Ngudjolo on his statement reflected
17 in the recorded conversations concerning Mr Katanga's possible participation in the
18 attack on Bogoro; and (iii) to prove that Witness D03-88 was in collusion with
19 Mr Ngudjolo and was biased.

20 The Prosecutor argues that, since she was prohibited from using the reports to
21 cross-examine Mr Ngudjolo, she was unable to question him, and I quote, "on his
22 (and his associates') efforts" to locate protected Prosecution witnesses and their family
23 members "in order to pressure them to recant or refuse to cooperate," end of quote, or
24 on, and I quote, "his efforts to ensure that Defence witnesses presented a consistent
25 and approved line when testifying on his behalf," end of quote.

1 With regard to Witness D03-88, the Prosecutor argues that she was prohibited from
2 demonstrating that the witness lied when he testified that he had only spoken to
3 Mr Ngudjolo once when Mr Ngudjolo was in the detention centre.

4 The Appeals Chamber considers that the determination of the truth is a central aspect
5 of any criminal trial to which not only the Prosecutor, but also a Trial Chamber is
6 under an obligation to actively contribute. The Appeals Chamber further considers
7 that a Trial Chamber's role in this regard is heightened in circumstances where the
8 Chamber is aware of possible efforts to distort witness testimony or the truth finding
9 process.

10 The Appeals Chamber observes that in the case at hand the Prosecutor was seeking to
11 use the Registry reports, in particular the unredacted first report, the disclosure of
12 which the Trial Chamber had authorised, to elicit from Mr Ngudjolo and Witness
13 D03-88 whether witnesses had been intimidated, coached or otherwise induced to
14 testify in a certain way. The Appeals Chamber considers that the fact that the
15 information contained in the Registry reports was obtained for another purpose,
16 namely the protection of witnesses and safeguarding the non-disclosure orders of the
17 Trial Chamber, through the monitoring of Mr Ngudjolo's non-privileged telephone
18 conversations from the detention centre, does not per se preclude its use during the
19 trial. The Appeals Chamber notes in this context that the Registry reports had
20 previously been screened as regards their content, information considered to relate to
21 Mr Ngudjolo's private life or his defence strategy was withheld from the Prosecutor
22 and consequently could therefore not have been used during cross-examination.
23 In addition, the Trial Chamber could have resorted to closed session if it considered
24 that there were legitimate reasons as to why some or all of the information should not
25 be in the public domain. In that case, only the other parties and participants who

1 would have been legally obliged to respect the classification of the information would
2 have become privy to such information. In these circumstances, the Appeals
3 Chamber finds that, by denying the Prosecutor the opportunity to use the Registry
4 reports in the trial to cross-examine Mr Ngudjolo and Witness D03-88, the Trial
5 Chamber placed undue weight on the need to protect Mr Ngudjolo's rights as
6 opposed to the need to establish the truth. Accordingly, the Trial Chamber exercised
7 its discretion unreasonably and therefore erroneously.

8 As to the third argument that the Trial Chamber improperly prohibited the
9 Prosecutor from eliciting explanations from Witness P-250 regarding inconsistencies
10 in his testimony, the Prosecutor submits that during his testimony Witness P-250, and
11 I quote, "retracted several confined but critical statements contained in his pre-trial
12 statements such as the presence and deaths of civilians during the Bogoro attack; the
13 presence of child soldiers under the age of 15; the existence and the content of songs
14 that the Bedu-Ezekere group sang before attacking Bogoro; and the destruction of
15 properties during the Bogoro attack," end of quote.

16 The Prosecutor recalls that she requested an opportunity to refresh the witness's
17 memory and to put his prior statements to him in order to clarify the inconsistencies
18 in his testimony, however, the Trial Chamber rejected her request. On a subsequent
19 occasion the Trial Chamber again rejected the Prosecutor's request stating that the
20 witness could not be described as hostile because he had answered with precision a
21 great majority of the questions put to him by the Prosecutor and that evasive answers
22 or answers minimising previous statements did not justify a declaration of hostility.

23 The Prosecutor submits that as a result of these rulings, in respect of which she had
24 unsuccessfully sought leave to appeal, the, and I quote, "Trial Chamber improperly
25 prohibited the Prosecution to show Witness P-250's prior statements or to ask him

1 leading questions without declaring him hostile, in order to enable him to explain the
2 reasons underlying his inconsistencies -- whether his retractions were mistakes, true
3 changes in recollection or the result of threats or other improper pressure exerted
4 upon him and his family," end of quote.

5 The Appeals Chamber finds merit in the Prosecutor's argument insofar as she argues
6 that in circumstances where Witness P-250 expressed fear for the safety of his family,
7 the Trial Chamber, at a minimum, should have allowed the witness to be examined
8 by the Prosecutor in order to ascertain whether his demeanour and retractions were
9 due to threats or other improper pressure exerted on him or his family.

10 In this regard, the Appeals Chamber observes that during the trial and under
11 cross-examination by the Defence counsel, Witness P-250 stated that he had told the
12 Prosecutor in prior statements that persons close to him were dead because he was
13 afraid for their lives. The witness explained further that he had only said that to
14 avoid the possibility that someone would be sent subsequently to kill them. The
15 Appeals Chamber notes that the witness did not substantiate why he believed that his
16 family could be in danger, but offered this explanation as to why he was contradicting
17 his prior statements.

18 In these circumstances, the Appeals Chamber considers that, had the Trial Chamber
19 allowed the Prosecutor to put leading questions to Witness P-250, the Trial Chamber
20 would ultimately have been enlightened as to whether the discrepancies between the
21 witness's pre-trial statements and his oral evidence were indeed due, as suggested by
22 the Trial Chamber, to, and I quote, "such factors as the lack of familiarisation
23 procedures by the parties themselves at the Court, the witnesses' travel to The Hague,
24 the formality of the hearings and the ordeal of cross-examination," end of quote, or,
25 potentially, the passage of time, or whether, in fact, other factors may account for

1 those discrepancies.

2 Accordingly, the Appeals Chamber finds that the Trial Chamber should have allowed
3 the Prosecutor an opportunity to put Witness P-250's prior statements to him and
4 allowed her to ask the witness leading questions to elicit the effect, if any, of any
5 interference or pressure that may have been exerted on him. By failing to do so, the
6 Trial Chamber exercised its discretion unreasonably and, therefore, erred.

7 The Appeals Chamber recalls that, for the Appeals Chamber to reverse or amend a
8 decision under Article 74 of the Statute, or to order a new trial before a different Trial
9 Chamber, it is not sufficient for the appellant to establish that an error occurred. In
10 accordance with Article 83(2) of the Statute, it must also be demonstrated that "the
11 decision appealed from was materially affected by that error." In this regard, the
12 Appeals Chamber has stated that as part of the reasons in support of a ground of
13 appeal, an appellant is obliged not only to set out the alleged error, but also to
14 indicate with sufficient precision how this error would have materially affected the
15 impugned decision. In the view of the Appeals Chamber, this requirement is
16 explained by the fact that a Trial Chamber's decision, at the end of what will often
17 have been a lengthy trial, should not be disturbed lightly. In particular, in the case
18 of an acquittal, it is not justifiable to put the person through the ordeal of a new trial
19 or even to reverse the acquittal and enter a conviction, unless it is shown that the
20 error indeed materially affected the decision under review.

21 The Appeals Chamber notes that this standard is high. It must be demonstrated that,
22 had the Trial Chamber not erred in procedure, the decision under Article 74 of the
23 Statute would, as opposed to "could" or "might," have been substantially different.
24 In the circumstances of this case, it has to be established that there is a high likelihood
25 that the Trial Chamber, had it not committed the procedural errors, would not have

1 acquitted Mr Ngudjolo.

2 The Appeals Chamber recalls that it has determined that the Trial Chamber
3 committed a procedural error when it refused to allow the Prosecutor to use the
4 Registry reports to impeach Mr Ngudjolo and Witness D03-88. The Appeals
5 Chamber has further determined that the Trial Chamber erred by not allowing the
6 Prosecutor to put Witness P-250's prior statements to him or to ask the witness
7 leading questions in order to enable him to explain the reasons underlying the
8 inconsistencies between his pre-trial statements and his in-court testimony.

9 With respect to the first error, the Prosecutor submits that the error materially affected
10 the acquittal decision because she was prevented from showing collusion between
11 Mr Ngudjolo and Witness D03-88. The Appeals Chamber notes that the Prosecutor's
12 argument does not actually address the material effect that the error had on the
13 acquittal decision, in the manner I've just described. Rather, the Prosecutor
14 argument merely refers to the consequences of the procedural error on the
15 proceedings. Regardless, for the reasons that follow, the Appeals Chamber finds
16 that it cannot be said that the Trial Chamber's error materially affected the acquittal
17 decision.

18 The Appeals Chamber considers that the Trial Chamber made pertinent observations
19 regarding Witness D03-88's and Mr Ngudjolo's behaviour when questioned about
20 their contact with each other while Mr Ngudjolo was in the detention centre. The
21 Trial Chamber concluded that given their behaviour, and I quote, "a degree of
22 caution," end of quote, had to be applied when assessing their evidence.

23 Furthermore, the Appeals Chamber notes in particular that the Trial Chamber
24 emphasised that a great deal of caution had to be applied to those parts of Witness
25 D03-88's testimony concerning Mr Ngudjolo's liability. By applying caution in this

1 assessment of their testimony, the Appeals Chamber finds that the Trial Chamber
2 addressed the impact of any possible collusion between Mr Ngudjolo and Witness
3 D03-88. It is clear from the acquittal decision that the Trial Chamber did not attach
4 much, if any, weight to Witness D03-88's testimony as far as Mr Ngudjolo's liability is
5 concerned. In other words, Witness D03-88's testimony appears not to have had any
6 impact on the Trial Chamber's finding that Mr Ngudjolo's individual criminal
7 responsibility -- sorry, that Mr Ngudjolo's individual criminal responsibility for the
8 attack on Bogoro has not been established beyond reasonable doubt.

9 With respect to the error concerning Witness P-250, the Prosecutor submits that the
10 acquittal decision was materially affected because the Trial Chamber rejected the
11 evidence of Witness P-250 as not credible without considering that the witness and/or
12 his family had been threatened or pressured and the effect that such pressure had on
13 his testimony.

14 The Appeals Chamber considers that the Trial Chamber's failure to allow the
15 Prosecutor to elicit the effect of any interference or pressure that may have been
16 exerted on Witness P-250 may indeed have substantially affected the Trial Chamber's
17 observations concerning the witness's demeanour and many contradictions in his
18 testimony. However, the Appeals Chamber notes that, ultimately, the Trial
19 Chamber's rejection of P-250's testimony as unreliable was based on other findings of
20 the Trial Chamber that were independent of its observations on the witness's
21 demeanour.

22 In this regard, the Appeals Chamber observes that the Trial Chamber, while
23 acknowledging the inconsistencies in Witness P-250's testimony, rejected his
24 testimony on the basis of other evidence, which cast doubt as to whether the witness
25 was a member of the militia between September 2002 and July 2003. More

1 specifically, the Trial Chamber concluded that the witness could not have been
2 simultaneously, and I quote, "simultaneously a militia member in Zumbe and a
3 student in Kagaba," end of quote. The witness's testimony was therefore deemed to
4 be unreliable for this reason and not because of his demeanour. Thus, the Appeals
5 Chamber considers that the Trial Chamber's findings as to the witness's lack of
6 credibility would not have changed, because its decision not to rely on the witness
7 was based on other evidence.

8 Accordingly, the Appeals Chamber finds that the Trial Chamber's errors had no
9 material impact on the acquittal decision.

10 In sum, the Appeals Chamber, by majority, Judge Tarfusser and Judge Trendafilova
11 dissenting, confirms the acquittal decision and rejects the appeal.

12 I shall now very briefly summarise the dissenting opinion of Judges Tarfusser and
13 Trendafilova.

14 Having considered carefully the grounds of appeal raised by the Prosecutor, the
15 impugned decision and the case record of the entire proceedings, we cannot join the
16 majority in their findings. The appeal sub judice involves fundamental questions
17 which have a bearing not only on the present case, but more importantly on the
18 Court's operations for the years to come. We dissent from the majority on all three
19 grounds of appeal, save for the preliminary findings which the Appeals Chamber was
20 called upon to address.

21 Our dissent follows a reverse order due to the nature of the errors identified and their
22 impact on the acquittal decision.

23 Starting with the third ground of appeal, we disagree with the majority in viewing the
24 purported errors respectively namely as a mere alleged violation of Article 54(1) of
25 the Statute. In our opinion, the errors raised under this ground of appeal pose a

1 broader fundamental issue of fairness of the proceedings under Article 64(2) of the
2 Statute. This said, we are of the opinion that the Trial Chamber erred by its
3 consistent pattern of preventing the Prosecutor from having full access to
4 Mr Ngudjolo's recorded conversations and by denying the Prosecutor's request or
5 requests to rely on the Registry reports in cross-examining Mr Ngudjolo and some of
6 the witnesses in the case. These errors not only have an adverse impact on the
7 fulfilment of the Prosecutor's duties under the Statute, but more importantly they
8 reveal an inexcusable violation of the duty of the Trial Chamber to establish the truth.
9 This finding is also germane to our disagreement with the majority on the second
10 ground of appeal. The majority did not find an error in the methodology applied by
11 the Trial Chamber which assessed the evidence in isolation. As a result, trustworthy,
12 coherent and vital evidence was disregarded to the detriment of the establishment of
13 the truth.

14 Finally, we are in disaccord with the majority on the first ground of appeal. By
15 contrast to the majority, we are of the view that the Trial Chamber erred in applying a
16 standard of proof beyond any doubt, in entertaining forced doubt, as well as in
17 embracing a speculative approach in reaching some of its findings.

18 In view of the foregoing, we believe that the Trial Chamber committed a series of
19 errors which materially affected the acquittal decision. Therefore, it is our strong
20 belief that the majority should have amended or reversed the Trial Chamber's
21 decision and ordered a new trial before a different Chamber.

22 Now, as I observed earlier, for the record I will ask the parties to introduce
23 themselves, starting with the Office of the Prosecutor?

24 MR STEWART: Madam President, for the Appellant Prosecutor, I'm James Stewart,
25 Deputy Prosecutor. I'm accompanied by Helen Brady, senior appeals counsel;

- 1 Eric MacDonald, senior trial lawyer; Reinhold Gallmetzer, appeals counsel; and Priya
2 Narayanan, appeals counsel. Thank you.
- 3 PRESIDING JUDGE MONAGENG: Thank you.
- 4 The Defence of Mr Ngudjolo?
- 5 MR KILENDA: (Interpretation) Thank you. Thank you, your Honour. The
6 Defence of Mathieu Ngudjolo is comprised of Professor Jean-Pierre Fofé, co-counsel.
7 Just behind him, Mr Bokolombe, our legal assistant, and also working at the
8 department of criminology in the University of Kinshasa. Beside him is
9 Ms Manolescu, our case manager. And I am Jean-Pierre Kilenda, member of the
10 Brussels Bar and Mr Ngudjolo's counsel.
- 11 PRESIDING JUDGE MONAGENG: The legal representatives of Victim I?
- 12 MR LUVENGIKA: (Interpretation) Good morning, your Honour. I am Fidel
13 Luvengika. With me today is my legal assistant, Ms Aline Delehay, a member of
14 the Paris Bar, and Ms Nadia Galinier, who is our case manager. Thank you.
- 15 PRESIDING JUDGE MONAGENG: Thank you, sir.
- 16 Legal representatives for Victim Group II?
- 17 MR GILISSEN: (Interpretation) Your Honours, I am Jean-Louis Gilissen. With
18 me today is my case manager, Julie Goffin, who is a member of the Brussels Bar.
19 Thank you.
- 20 PRESIDING JUDGE MONAGENG: Thank you.
- 21 Mr Registrar, your team please?
- 22 MR VON HEBEL: Good morning, your Honour.
- 23 Herman von Hebel, Registrar, and with me Osvaldo Zavala-Giler, our legal
24 assistant - or special assistant - and Jasmine Toumaj, who is the legal officer.
25 Thank you.

- 1 PRESIDING JUDGE MONAGENG: Thank you very much.
- 2 This now concludes our proceedings. We have summarised the judgment and it
- 3 only remains for me to thank the parties and participants, the interpreters and the
- 4 court reporters. I would also like to thank the Registry staff for having facilitated
- 5 this hearing.
- 6 Thank you. The session is closed.
- 7 THE COURT USHER: All rise.
- 8 (The hearing ends in open session at 11.25 a.m.)