

1 International Criminal Court
2 Trial Chamber VI
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06
5 Presiding Judge Robert Fremr, Judge Kuniko Ozaki and Judge Chang-ho Chung
6 Trial Hearing - Courtroom 1
7 Wednesday, 29 August 2018
8 (The hearing starts in open session at 9.00 a.m.)
9 THE COURT USHER: [9:00:24] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE FREMR: [9:01:02] Good morning, everybody.
13 Court officer, please call the case.
14 THE COURT OFFICER: [9:01:06] Thank you, Mr President.
15 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
16 versus Bosco Ntaganda, case reference ICC-01/04-02/06.
17 And for the record we are in open session.
18 PRESIDING JUDGE FREMR: [9:01:23] Thank you, court officer.
19 Before we continue with the closing arguments of the first of the Legal Representative
20 of Victims, I will briefly deal with a procedural matter.
21 On 21 August 2018, the Chamber instructed the parties via email to liaise to
22 determine whether they can agree on one or more map or maps that are already in
23 evidence and which accurately portray the area subject to the charges to serve as a
24 common understanding of where the different locations discussed throughout the
25 case are located.

On 27 August 2018, the parties indicated by email that they could not agree on one or more maps and each provided a list of maps and/or sketches that are already in evidence which in their respective submissions accurately show the relevant locations.

In addition, the Prosecution informed the Chamber that the parties have discussed the possibility to use the GeoCoordinates confirmed by expert witness, P-810, to the extent they are accepted as accurate by the Defence and to plot them on a specific map of the relevant area. This annotated map, the original of which is already in evidence, would then be submitted by the parties to the Chamber.

The Chamber considers that such annotated map would be a useful addition to the case record and instructs the parties to proceed as proposed. The parties are therefore instructed to provide within a week from now the annotated map to the Chamber, together with their express agreement as to the locations plotted on the map in order to allow the Chamber to read this as non-contested pursuant to *Rule 69 of the Rules.

Any comment or questions as regards this instruction? I don't see that it would be the case.

So it means that we can proceed with our agenda as planned. This first session, which is going to take two hours, should be devoted to presentations of closing statements by the representatives of victims.

So now I am giving floor, the first of them, to Ms Pellet.

Ms Pellet, you have the floor.

MS PELLET: [9:04:46] (Interpretation) Thank you, Mr President.

Mr President, your Honours, unfortunately Mr Franck Mulenda could not be with us today for medical reasons and so Alejandro Kiss and I will be representing the

1 283 former child soldiers in these proceedings. 140 of these people have been
2 participants since the pretrial phase of the case. Others were admitted at the trial
3 stage.

4 I have had the opportunity to underscore the importance of this trial to our clients in
5 my opening remarks during the confirmation of charges hearing and throughout the
6 course of the trial. This concern is still timely, nearly three days after the beginning
7 of the trial to the very day and more than 15 years after the commission of these
8 despicable crimes. Although the victims will never get their childhood back, this
9 trial has allowed the victims to -- allowed the world to see what has happened, the
10 harm they endured. Their voices have been heard. They have even expressed to
11 some extent their anger. I've also stressed that the justice that you shall render will
12 be on their behalf, on behalf of the victims, the many victims who have chosen to
13 forget and those who died on the battlefield.

14 The Defence may have chosen to ignore the written submissions of the victims or may
15 pretend to do so, but this does not mean one can lose sight of the importance of the
16 victims' contribution to this trial. No, the victims are not a second Prosecution. We
17 have provided extensive submissions. In this regard in our final written
18 submissions, I'm referring to filing 2276 confidential 20 April 2018, paragraphs 3 to 7.
19 I will not return to this earlier filing except to reiterate that the right of victims to take
20 part in the proceedings is an integral part of the statutory law of the Court. I would
21 like to thank the Chamber for allowing us to take part in this trial. Yes, the victims
22 do deserve some respect and this respect should not be mere window dressing. This
23 respect is perfectly compatible with the rights of the Defence to fair and equitable
24 trial.

25 This having been said, Mr President, your Honours, you have all of these submissions

1 at your disposal, and so as to avoid wasting the Chamber's time, I will reiterate these
2 pleadings very, very quickly without going into particular details. I am referring to
3 all of our filings primarily today, our closing brief that I mentioned earlier and the
4 response to the Defence closing brief. This is filing 2304 confidential 17 July 2018.
5 Of course, for the sake of the closing arguments, I will make a number of references to
6 the filings during my pleadings once I turn to the legal part of my conclusions.
7 It is incumbent upon me to stress that representation of victims in a case before the
8 Court means taking into account their views and concerns. These views and
9 concerns are then transposed into legal language for the requirements of the
10 proceedings. Gathering the views and concerns of 283 former child soldiers while at
11 the same time being in the courtroom every day is not an easy task. I would like to
12 thank Maître Franck Mulenda for always being available and I would also like to
13 thank our other contact people who made it possible to carry out this necessary and
14 important task.
15 To this end, as pointed out in the final written submissions, we undertook 16 missions
16 to Ituri, other parts of Africa and elsewhere in the world since the beginning of the
17 trial and the counsel working in the field has been in constant contact with the victims
18 24/7 and still is today.
19 These missions have allowed us to meet virtually all the victims that we represent,
20 nearly all of them we have met on several occasions. Throughout these meetings the
21 victims have always expressed their need to know the truth, what really happened in
22 relation to the events that they were victims of 15 years ago.
23 They said that they wanted to see the people responsible for the crimes to be found
24 guilty, the people who enlisted them, who conscripted them, who forced them to
25 participate in hostilities, who raped them, who kept them in sexual slavery.

1 The victims hope that one day they will receive reparations, even though contrary to
2 the Defence's assertions, and this hope is not an end in and of itself, particularly since
3 the reparations proceedings since 2012 in the Lubanga case have produced no
4 tangible outcomes in the field.

5 In this regard, Mr President, your Honours, it is particularly worrisome to see that the
6 Defence, far from recognizing the statutory right of the victims to apply for
7 reparations for the crimes they were subjected to -- no, in actual fact, the Defence sees
8 this as an inducement to not say the truth. I have addressed the various kinds of
9 victimisations that the people I represent were subjected to. I will not hark back to
10 this point and I merely refer you to my opening remarks when the trial began.

11 Although the child soldiers make up a rather heterogeneous group because of their
12 ethnicity, the crimes they were subjected to, the fact that some of them may have been
13 part of the Lubanga trial, all the same, their expectations are much the same.

14 15 years after the crimes were committed, these crimes they were victims of, my
15 clients are expecting justice to be rendered. 15 years is a very long time, more than
16 the age of the oldest victims, the ones who were recruited, used during hostilities,
17 raped, kept in sexual slavery.

18 If we look beyond the barbaric nature of these crimes committed upon children, the
19 occurrences that you have been told about throughout the trial are of considerable
20 importance. What happened has made victims of children vulnerable people who
21 enjoy enhanced protection under the Rome Statute. The youngest of these children
22 was barely seven and a half years old when he joined UPC/FPLC. The eldest turned
23 15 amongst the ranks of the militia.

24 These occurrences are particularly important given that the sexual crimes that many
25 child soldiers fell victim to were not prosecuted during the Lubanga trial. And

1 finally, the events are particularly important in light of the current context in Ituri
2 where we are seeing fresh outbreaks of inter-ethnic violence.
3 The end of impunity in this regard is fundamental and shall be a strong signal. This
4 responsibility to render justice is yours, but one must also bear in mind that this
5 responsibility goes beyond a strictly legal framework. Indeed, the right to forget is a
6 corollary that the victims -- they have this right so that they can rebuild their lives, go
7 beyond the atrocities. And yet, just filling out a participation form has meant some
8 of these victims were confronted with the despicable crimes that they fell victim to
9 15 years on. It is time for the victims to put the past behind them and move forward
10 and build their future, and this by way of a guilty verdict.
11 Before turning to a number of legal arguments, I would like to make one particular
12 remark about the Defence reply to the Prosecution's response concerning written
13 submissions from the Defence. This is filing 2307 confidential 1 August 2018.
14 Indeed, the reply is a reply only in name. It is nothing more, nothing less than a
15 second closing brief. The Defence merely reiterates the same points and further
16 expands upon them, the same points that were found in their first closing brief, filing
17 2298, and this second brief does not respond to any new issues that could not
18 reasonably have been anticipated. And these points could have been elaborated
19 upon in the respective responses and thus these submissions should be dismissed.
20 But since this so-called reply provides no new information, once again I reiterate the
21 arguments found in the final written submissions made on behalf of the former child
22 soldiers and in the response to the Defence's final submissions, which we filed
23 on 17 July 2018.
24 In writing we have shown quite clearly that Mr Ntaganda is guilty of all charges
25 against him in relation to former child soldiers. It is not necessary to reiterate an

1 argument to make it any more persuasive. However, since this filing is confidential
2 at this time, for the benefit of the general public, and since these points directly
3 impact the interests of the 283 former child soldiers that we represent, I would like to
4 ask you, Mr President, to allow my colleague, Mr Kiss, to address the Bench.

5 There is nothing confidential in the remarks he will be making and, in light of the
6 amount of time that we have, it is not possible to provide an exhaustive list of all
7 these points. And although we may not bring up a number of points at this time,
8 this does not mean that we have renounced them.

9 PRESIDING JUDGE FREMR: [9:17:22] All right.

10 MR KISS: [9:17:35] Good morning, Mr President, your Honours. First, we would
11 like to address a few evidentiary issues.

12 For the most part, the Defence challenges incriminating evidence on the basis of the
13 testimony of the accused and the logbooks admitted into the record of the case.

14 As you know, Mr Ntaganda chose to testify as the second witness during the
15 presentation of the Defence evidence. As a consequence, all Defence witnesses who
16 testified after him had the opportunity to hear his evidence which occurred, for the
17 overwhelming part, in public session.

18 Rule 140(3) of the Rules of Procedure and Evidence provides that when a witness
19 testifies after hearing the testimony of others, this fact shall be noted in the record and
20 considered by the Trial Chamber when evaluating the relevant evidence. We submit
21 that not only this fact but also the suspicious verbatim coincidences between the
22 evidence of the accused and that of the subsequent witnesses, as well as their internal
23 inconsistencies, shall be weighed by the Chamber when assessing the evidence of
24 these Defence witnesses.

25 Moreover, we submit that in its consideration of the evidence, the Chamber shall take

1 into account the jurisprudence of the Court relevant to the standard of proof and the
2 facts to which said standard applies. Indeed, contrary to the jurisprudence of the
3 Court, the Defence requests that collateral facts be proven beyond reasonable doubt;
4 and this is a standard only applicable to material facts.

5 The Defence points to a number of inconsistencies in the evidence, losing sight of the
6 fact that such inconsistencies can be properly resolved by a reasonable interpretation
7 of the relevant testimony and in view of other evidence on the record.

8 The Defence proposes a piecemeal approach to the assessment of the evidence and it
9 discredits incriminating evidence pointing to peripheral details and secondary
10 imprecisions.

11 The Defence challenges inferences adverse to the accused without showing that
12 alternative inferences are also reasonable on the basis of the case record, and it
13 challenges the credibility and reliability of individual items of evidence without
14 addressing that they are corroborated by other pieces of evidence.

15 PRESIDING JUDGE FREMR: [9:20:20] Mr Kiss, as usual, please slightly slow down,
16 because to have a precise transcript.

17 MR KISS: Of course.

18 PRESIDING JUDGE FREMR: Thank you.

19 MR KISS: [9:20:29] The accused insisted all along his lengthy testimony that there
20 were simply no children below the age of 18 in the UPC/FPLC. This allegation raises
21 one of the most significant evidentiary issues that affect the interests of the victims we
22 represent, which is the determination that the children were under the age of 15
23 during the time frame of the charges. We have noted and discussed the existence of
24 documents stating different dates of birth for the same victims and we have explained
25 why this should not be enough reason to disqualify such evidence.

1 The issue of age determination is not new to the jurisprudence of the Court and other
2 tribunals. In this regard, we wish to recall that the ICC and the Special Court for
3 Sierra Leone has accepted the evidence of witnesses who, assessing the physical
4 appearance, the behaviour and the development of children, concluded that they
5 were under the age of 15.

6 The Appeals Chamber in the Lubanga case accepted visual assessments of age even
7 where witnesses provided said evidence several years after the events. The Appeals
8 Chamber clarified that such evidence did not need corroboration and could be relied
9 on under the only condition that Chambers apply a sufficient margin of error. This
10 is developed at paragraph 233 to 235 of said judgment.

11 Second, we would like to refer to the scope of the charges.

12 The Defence alleges that the acts underpinning counts 6, 9, 14, 15 and 16 have not
13 been described with enough detail to meet the requirements of Regulation 52(b) of the
14 Regulations of the Court. We submit that the accused has had a fair trial and
15 adequate notice of the nature, cause and content of the charges has been provided.

16 In its recent judgment in the Bemba case, the Appeals Chamber has not made it
17 mandatory for the Prosecution to plead, for a Pre-Trial Chamber to confirm, and for
18 the Trial Chamber to enter a conviction in relation to specific criminal acts such as the
19 recruitment, rape or sexual enslavement of a particular child. The Prosecutor retains
20 discretion to formulate the charges in a manner appropriate to the specificities of the
21 crimes she decides to prosecute. If her investigations support the case of mass
22 criminality, when an accused is not likely personally carrying out the acts underlying
23 a myriad of crimes, the charges may be properly formulated on the basis of
24 parameters, as opposed to specific criminal acts.

25 Mr President, your Honours, the Legal Representatives referred in her response to the

1 Defence closing brief to the relevant parts of the confirmation decision and the
2 Updated Document Containing the Charges where adequate notice has been
3 provided. We have shown that the charges in the present case have been described
4 by reference to parameters rather than specific criminal acts.
5 We do not intend to take up the Court's valuable time and resources retracing old
6 grounds, but there are some important matters we need to highlight. Briefly, in
7 relation to the charges of enlistment, conscription and use of children under the age of
8 15 to actively participate in hostilities, there is no room for misunderstanding that
9 they have been formulated broadly. They have not been limited to the specific
10 criminal acts discussed in the confirmation decision but relate to a campaign, as it was
11 a case in the Lubanga proceedings.
12 There is no doubt about it given the references to, inter alia, the implementation of a
13 campaign of conscription and enlistment of soldiers including men, women and
14 children without regard to their age, and the pressure being exercised on Hema
15 families to contribute to the war effort by providing children.
16 The charges of rape and sexual enslavement of child soldiers cannot be interpreted
17 narrowly either. Indeed, the confirmation decision has been explicit in this respect.
18 It provides at paragraph 81, I quote:
19 "[t]he crimes under counts 6 and 9 are demonstrated" -- and I underline
20 "demonstrated" -- "by [a set of] findings of the Chamber." End of quote.
21 The Pre-Trial Chamber went on to set out a number of examples establishing the
22 crimes of rape and sexual enslavement. It follows that the specific instances of rape
23 and sexual enslavement discussed in the confirmation decision are not the charges in
24 the present case but evidence tendered in support, or, in the language of the Pre-Trial
25 Chamber, as "demonstration of" broader charges.

1 Mr President, your Honours, finally, we would like to address a few discrete issues in
2 relation to the applicable substantive law.

3 The Court already developed voluminous jurisprudence dealing with the legal
4 interpretation of the elements of the war crimes enlistment and conscription of
5 children under the age of 15 in an armed group, the use of children under the age of
6 15 to actively participate in hostilities; rape; and sexual slavery.

7 The Legal Representatives has comprehensively identified the relevant jurisprudence
8 in her closing brief and we request the Chamber not to deviate from this
9 jurisprudence.

10 We regard to the accused's criminal liability, the decision on the confirmation of
11 charges set out alternative modes of liability in relation to counts 6, 9, 14, 15 and 16.

12 We submit that the Chamber should resolve the concurrence of modes of liability
13 labelling the responsibility of the accused in a manner that fully expresses his
14 wrongdoing.

15 In the recent Bemba et al judgment of the Appeals Chamber, the Appeals Chamber
16 endorsed that the concurrence of offences is properly resolved by application of the
17 rules of speciality, consumption and subsidiarity. This is developed at paragraph
18 750 and subsequent of said judgment.

19 We submit that these rules must also guide the work of the Chamber when resolving
20 the concurrence of modes of liability. As set out consistently in the jurisprudence of
21 the ICTY Appeals Chamber, trial chambers are not inherently precluded from
22 entering a conviction on the basis of more than one mode of liability, if this is
23 necessary to reflect the totality of an accused's criminal conduct. For instance, the
24 ICTY Appeals Chamber reiterated this principle in its judgment in the Prosecutor v
25 Đorđević case at paragraph 831.

Trial Hearing

(Open Session)

ICC-01/04-02/06

1 In the Bemba trial judgment, Trial Chamber III acknowledged an important notion
2 that in certain circumstances a commander's conduct can be capable of satisfying the
3 material elements of more than one modes of liability. And this is at paragraph 174.
4 We submit that in order to properly reflect the totality of Mr Ntaganda's criminal
5 conduct, command responsibility should be imposed cumulatively with other modes
6 of liability. Significantly, the accused is responsible for the state of vulnerability that
7 suffer his victims. Accordingly, his duty to exercise proper control over
8 subordinates required particular measures to prevent that these children were the
9 subject of a variety of abuses, including sexual violence.

10 Without a cumulative imposition of command responsibility, this aspect of
11 Mr Ntaganda's liability would not be properly covered. Mr President, I would be
12 grateful if you could now give the floor back to Ms Pellet to conclude these closing
13 statements on behalf of the former child soldiers.

14 PRESIDING JUDGE FREMR: [9:31:12] For sure, Mr Kiss. Thank you. But before
15 doing that, may I just use your assistance in correction of the transcript: At page 14,
16 line 23, you mentioned -- you referred to ICTY appeals decision Prosecutor
17 versus -- at the moment we have "toray" (phon), which I guess is probably not the
18 right spelling. Could you correct that please.

19 MR KISS: [9:31:41] Of course. It's Đorđević, D-O-R-D-E-V-I-C.

20 PRESIDING JUDGE FREMR: [9:31:51] Thank you very much, Mr Kiss. And now
21 I am returning the floor back to Ms Pellet.

22 Ms Pellet, please.

23 MS PELLET: [9:32:08] (Interpretation) Thank you, Mr President.

24 In the concluding segment of my presentation, I would like to dwell further on the
25 three points concerning directly the personal interests of my clients.

1 The first concerns the desperate attempt of the Defence to justify the absence of
2 children under 15 years of age within the ranks of the UPC/FPLC by claiming that no
3 direct evidence of that presence was adduced in the course of the trial. Despite the
4 fact that even the Defence acknowledged this because the evidence was available in
5 abundance, since 283 former child soldiers are participating in the proceedings. In
6 so doing, and without any iota of evidence, they are calling into question the Statute
7 that you granted to these 283 individuals by explaining that each and every one of
8 them lied about their age with the sole purpose, according to the Defence, of
9 obtaining financial compensation for a crime which they were not victims of.

10 Mr President, your Honours, this reprehensible assertion is not grounded in any way
11 on any evidence admitted into the record, but rather, on prejudices that violate the
12 established standards of the Court according to which a reasonable doubt must be
13 granted on logic and common sense and must be rationally connected to the evidence,
14 the absence of evidence or discrepancies in the evidence.

15 The choice not to call victims to testify may not be used to prove or even to suggest
16 the absence of children within the ranks of the UPC/FPLC. On the other hand,
17 Mr President, your Honours, it shows that the Prosecution is alive to the fact that
18 calling witnesses to tell their stories before the Court raises not only issues of security,
19 but could also be the cause of re-traumatisation.

20 I've already mentioned this previously. 15 years after the perpetration of the crimes
21 against the victims, my clients have the right to forget, without which it would be
22 impossible for them to rebuild their lives.

23 Mr President, this brings me to my second point which relates to the issues of
24 memory of former child soldiers which were systematically used by the Defence to
25 challenge the credibility of their testimonies. In this regard, I would like to take the

1 liberty to recall what the Trial Chambers I, II and III said respectively in respect to
2 Mr Lubanga, Katanga and Ngudjolo Chui and Mr Bemba. They established this
3 clearly, and I quote this jurisprudence:

4 "The Chamber has made appropriate allowance for any instances of imprecision,
5 implausibility or inconsistency, bearing in mind the overall context of the case and the
6 circumstances of the individual witnesses. For example, the charges relate to events
7 that occurred in 2002 and 2003. Memories fade, and witnesses who were children at
8 the time of the events, or who suffered trauma, may have had particular difficulty in
9 providing a coherent, complete and logical account. There are other potential
10 reasons why a witness's evidence may have been flawed and the Chamber, when
11 assessing his or her testimony, has taken these considerations into account and they
12 are reflected in its overall assessment of the account in question."

13 Accordingly then, Mr President, your Honours, there is settled jurisprudence
14 according to which there are problems of memory and contradictions observed in the
15 testimony of child soldiers relating to events that took place so many years ago.

16 They are given special consideration and can quite easily be understandable. This
17 was true six years ago, and is all the more so 15 years after the perpetration of the
18 crimes. The submissions of the Defence in the matter are totally unfounded.

19 Lastly, and this will be my final point, Mr President, your Honours, I totally leave it
20 up to your discretion to figure out why the Defence is desperately trying to simply
21 cast aside the testimonies of P-0010 and P-0883 by arguing that the Prosecution has to
22 investigate them pursuant to Article 70 for possible offences against the
23 administration of justice. The only possible reason according to me is, undoubtedly,
24 the damning evidence provided in the respective testimonies of these children.

25 Like the Prosecutor, we have, as the Legal Representatives of these two witnesses,

1 explained the possible discrepancies in the testimonies of those respective witnesses
2 and proven definitely that they are not of a nature to undermine their clear credibility.

3 Mr President, your Honours, this is a frivolous assertion, especially coming from the
4 Defence of Mr Ntaganda. It is merely what the Defence themselves have
5 characterised, and I quote, as uncorroborated sensationalist nonsense.

6 Mr President, your Honours, the reality is that the entire body of evidence produced
7 in the course of this trial proves beyond any reasonable doubt that the accused person
8 contributed to the recruitment of thousands of children under 15 years of age within
9 the ranks of the UPC/FPLC, and that is when he did not recruit them directly.

10 The body of evidence on the record in this case proves beyond reasonable doubt that
11 the accused person then trained them with the intensive use of inhuman and
12 degrading treatment and participated in the setting up of training centres for these
13 children.

14 The body of evidence on record in this case proves beyond reasonable doubt that the
15 accused person later used them to participate actively in the hostilities where, under
16 the spell of drugs and alcohol, they were used to kill, pillage and sometimes to rape
17 the enemy.

18 The body of evidence on record in this case proves beyond any reasonable doubt that
19 these children were quite frequently used as the bodyguards of the accused person
20 and the other commanders of the UPC/FPLC.

21 The body of evidence adduced in the course of the trial proves beyond reasonable
22 doubt that the accused person raped some of the girl child soldiers and did not
23 prevent his henchmen and other militiamen to do the same.

24 Mr President, your Honours, at a time when ethnic violence is once against escalating
25 in Ituri, the victims that I represent no longer have any hope of rebuilding their lives.

1 As I have already said, their stolen childhoods can never restituted to them. Their
2 material situation is severely affected by dropping out of school as a result of
3 recruitment into the UPC/FPLC and shall never change significantly. Both their
4 physical and psychological wounds shall never be healed.

5 They will continue to see inevitably the faces of their rapists in the eyes of their
6 children born of the repeated rapes that they were subjected to within the ranks of the
7 militia. They will continue living in fear that their children may suffer the same fate
8 as them.

9 Mr President, your Honours, it is incumbent on you to put an end to impunity in this
10 matter by finding Mr Ntaganda guilty for all the charges made against him relating to
11 child soldiers and, thereby, give full effect to a preamble of the Rome Statute which
12 states that its final purpose is to put an end to impunity for the perpetrators of the
13 most serious crimes that affect the whole international community and to contribute
14 to the prevention of such crimes.

15 Mr President, your Honours, this concludes the presentations by the representative of
16 the former child soldiers. Thank you.

17 PRESIDING JUDGE FREMR: [9:43:33] Thank you very much, Ms Pellet.

18 And the next hour of this session will be devoted to the presentation of Mr Suprun,
19 presentation of closing brief on behalf of victims of the attacks.

20 Mr Suprun, you have the floor.

21 MR SUPRUN: [9:43:57] (Interpretation) Thank you, Mr President.

22 Mr President, your Honours, the trial which ends today marks an important page in
23 the fight against impunity in the light of the events of 2002 and 2003 in the Ituri
24 territory. Events that represent probably one of the most tragic chapters in the
25 recent history of the Ituri of the Democratic Republic of Congo.

1 To date, no one has been found convicted or punished for the extensive systematic
2 and widespread atrocities committed in Ituri against the civilian population. Many
3 victims of these atrocious acts have been abandoned for a very long time to their grief
4 and pain and have been deprived of any access to justice.

5 Finally, 15 years after the events that affected them, they are at a time of truth and
6 now have a real chance to see justice delivered to them by the International Criminal
7 Court.

8 The trial, which ends today, also marks an important page in the history of the
9 International Criminal Court since it is the largest case to date. To date, given its
10 temporal material and territorial scope, indeed the present case concerns 18 counts
11 that relate not to isolated acts, but to crimes committed in a systematic and
12 widespread manner in the context of an ongoing situation in multiple locations
13 throughout Ituri; including, Mongbwalu, Sayo, Kobu, Kilo, Bambu, Lipri, Nyangarai
14 and several other neighbouring villages.

15 The events involved in this case have given rise to a huge degree of victimisation,
16 both at the individual and community levels, and have caused not only multiple
17 forms of immediate harm but also and above all, harmful long-term consequences.

18 The victims of the attacks who are participating in the present case and who still live
19 in the villages that were most affected by the 2002-2003 events in the Ituri are deeply
20 frustrated because they have never for the past 15 years received any help or
21 assistance -- material, psychological or medical -- from anyone. Neither from the
22 trust fund for the victims nor from national or international humanitarian agencies
23 and let alone from the Congolese authorities.

24 For 15 years, the victims of the war have felt and still feel abandoned without any or
25 very little opportunity to rebuild their lives. Extreme poverty, lack of access to clean

1 water and basic medical care and a resurgence of serious diseases, such as HIV and
2 cholera, psychological trauma that has not been treated from the time of the events, as
3 well as daily and permanent stress, alcohol and drug abuse, permanent and
4 continuing uncertainty about the future, these are only an incomplete picture of the
5 situation of communities that have been affected by the war and the crisis, and this
6 can be referred to as a humanitarian disaster. The almost permanent insecurity that
7 has prevailed in Ituri for years, fed by the various local militia groups committing
8 many abuses against the civilian population is only further contributing to the
9 uncertainty in the communities, and also have pushed thousands of people to
10 abandon their homes and to flee from the clashes.

11 Lack of state authority over the region reflects a failed or dysfunctional public
12 administration, and recent tensions in the country only further contribute to the
13 exacerbation of new conflicts and only further exacerbate the humanitarian situation
14 for those who have been waiting for some help for years.

15 My colleague Ms Cherine Luzaisu will present a little later the views and concerns of
16 victims regarding the consequences they have suffered following the 2002-2003 events
17 in Ituri, and will provide in this regard several examples to demonstrate the current
18 situation of the victims and of the villages most affected.

19 Mr President, your Honours, 1,859 persons have been authorised to participate in the
20 trial in this case as victims of the attacks against the civilian population.

21 Unfortunately, 55 victims will never see the outcome of this trial because they have
22 died; 42 people, close family members of the deceased victims, were authorised to
23 continue on their behalf. This reduces to 1,846 the current number of victims
24 participating in the proceedings in relation to the attacks, and I have the honour of
25 representing them before your august Chamber.

1 Of these victims, 766 are women, 1,080 are men. They are all civilians who have
2 never belonged to any armed group.

3 Since the beginning of the events most of the victims have continued to reside in the
4 villages most affected by the war, although the recent deterioration of the security
5 situation has caused many victims to leave their respective villages to once again seek
6 refuge elsewhere outside of the Ituri.

7 Among the participating victims, 1,083 victims of murder of members of their families;
8 1,002 are victims of looting; 910 are victims of destruction of their property; 41 are
9 victims of direct or indirect sexual violence; 423 are victims of forced transfers. And
10 the vast majority of the victims were persecuted. Eighty per cent of the participating
11 victims are of Lendu ethnicity, while the rest belong to the Ngiti, Nande, Bira and
12 Nyali ethnic groups, with a few being of Hema ethnicity. But this is only a very
13 small part of all the victims of the tragic events involved in this case. In fact, during
14 the trial hundreds of persons other than the participating victims contacted the team
15 of Legal Representatives claiming to be victims of the events covered by the charges,
16 and expressing the frustration at not having had the opportunity to complete the
17 application for participation forms.

18 The story of each of the victims, although related to the same events, is unique. The
19 experience of each victim is extremely painful, even shocking. The harm suffered by
20 each victim is unique, individual, and incomparable with any other and, in almost all
21 cases, this harm or damage is irreparable.

22 In the absence of any assistance since the events, many victims still suffer physical
23 injury, and psychological as well as emotional problems; they have nightmares and
24 bad memories. Some of them have even developed disturbing signs of
25 post-traumatic stress disorder. Many victims preferred to drown their pain and

1 sorrow in alcohol or drugs.

2 The vast majority of victims have had to abandon their plans for the future or have
3 missed or lost development opportunities.

4 Several community buildings in the affected villages, such as schools, hospitals, and
5 churches remain destroyed or damaged.

6 Some of those buildings have been restored, although only partially, using the very
7 little resources of the villagers themselves.

8 Fifteen years after the tragic events the victims I represent have managed to learn
9 how to live again in peace alongside their enemies of yesterday. However, the
10 recent inter-ethnic tensions in Ituri have only demonstrated how fragile peace can be.

11 This is because when it comes to the victims of the most serious crimes at the
12 international level peace and justice are closely related concepts and peace cannot be
13 established without justice for the victims. Peace and justice are both a complex and
14 difficult blend of goal and process and, in reality, they are necessarily a long and
15 painful journey that involves the need to address the suffering of the victims and the
16 establishment of the truth, punishment of those responsible, and reparation for the
17 victims.

18 The road to peace does not provide a one-fit-all solution, but, on the contrary, is
19 always individualised. This process requires each victim to consider their own
20 painful experience, to admit it, and to identify possible ways for justice and
21 reparation. The road to lasting peace also has a community component and involves
22 for victims reconciliation with their enemies of yesterday in order to cohabit, or at
23 least coexist, without hatred and/or fear.

24 The participation and contribution of victims in the truth-seeking and clarification
25 functions of the process are essential steps in the path to reconciliation and lasting

1 peace at the family, social and community levels. They also provide healing and
2 reparation at an individual level.

3 Throughout this trial we often heard Defence argue that the victims had played the
4 role of prosecutor bis. That is wrong. It is because the essential interest that has led
5 all victims to the International Criminal Court is their desire to effectively achieve
6 through various forms of positive contributions their right to the truth and to justice
7 as set out in the Rome Statute.

8 Therefore, victims are not here to take the place of the Prosecutor. Victims are not
9 here to assist the Prosecutor. Victims are not here either to serve as a pure symbol in
10 whose name and for whom the International Criminal Court delivers justice. The
11 victims in fact play an independent and distinct role from the Prosecutor and their
12 interests may very well not coincide with the interests of the Prosecutor. In this
13 regard, victims may not fully agree with the Prosecutor's choices of the material,
14 temporal or territorial parameters of a case and they have no influence on that choice.
15 But the victims undoubtedly have the right to know exactly what has actually
16 happened within the parameters of the case as determined and, also, they have the
17 right to know who and to what extent is responsible for the atrocities of which they
18 themselves directly or indirectly suffered.

19 When a victim is called by the Prosecutor as a witness, he or she is clearly asked to
20 provide evidence. But what is essential from a victim's point of view is that the
21 testimony as a witness is the only opportunity for the victim to actually achieve his or
22 her right to be listened to and heard. And this is also another important component
23 of his or her right to the truth and justice; the opportunity to tell his or her own story
24 and to share with the Judges his or her own painful experience.

25 This individual experience of each victim is also first-hand experience on the nature

1 and the extent of victimisation arising from the commission of the crimes charged of
2 the accused, and is one of the elements to be considered for the purposes of
3 determining the criminal responsibility of the accused, as well as the form of
4 punishment to be imposed on the person who may be eventually convicted.

5 In this trial 13 victims were called by the Prosecutor as witnesses; an additional three
6 victims were called by the Legal Representatives to adduce evidence; while five
7 victims were called to present their views and concerns. Having agreed to make
8 such a long journey to The Hague and to testify before the Court, the victims showed
9 tremendous courage and commitment. This is not only because a large proportion
10 of them have never left their respective villages, but it is more important because
11 testifying at the ICC is an extremely difficult and challenging ordeal for those who
12 have themselves suffered atrocious crimes that shock the international community
13 and the conscience of humanity. And this is not only because this ordeal involves
14 the need for victims to put themselves in the solemn conditions of the courtroom, to
15 appear directly before the Judges under the scrutiny of the cameras and the public,
16 and to answer many questions from the parties and participants, but also because it
17 requires that the victims remember and recount the details of their difficult
18 experience, the experience that the victims themselves would have preferred to forget.

19 In this regard, throughout the entire trial we have heard many allegations from the
20 Defence saying that the Prosecution witnesses and the victims called by the Legal
21 Representatives apparently came to The Hague to tell lies. They allege that they
22 fabricated testimony, falsified testimony, or that they gave false declarations in their
23 applications. The logical question to be asked is this: What would the reason be, or
24 what would the goal be, for these people to come and give false testimony in light of
25 the many difficulties and challenges that the victims had to face before giving

1 testimony, during and after?

2 The Defence says that there may be a financial interest at play. But we have never
3 heard the Defence say exactly what this financial interest might be. To answer this
4 question one merely needs to travel to the places where the victims live to see the
5 conditions of dire poverty that they live in, and to see that their situation had
6 certainly not improved ever since the time that they agreed to participate in these
7 proceedings as victims or as witnesses. Quite on the contrary, their situation has
8 only worsened with time. How can one seriously call into question the sincerity of
9 all these victims who had the courage to come and give testimony and to give
10 accounts, including painful, intimate and sensitive details of what happened to them.
11 What about all the emotions they went through, the tears that they shed throughout
12 their testimony?

13 The risk of retaliation from supporters of the accused is another major challenge for
14 all the victims who agreed to come and give testimony. This is a challenge they had
15 to face square on. All the victims are fully aware of this possibility. What interest
16 other than contributing to the search for truth and justice would have motivated the
17 victims to come and give testimony, knowing full well that their testimony could give
18 rise to considerable difficulties for them: threats to their well-being, dangers to their
19 safety and that of their families once back in their home villages?

20 Many victims of the attacks have had a number of security concerns once back home
21 because of giving testimony before the Court, but none of these victims have ever said
22 that they regretted their decision to give testimony.

23 Mr President, your Honours, other than these 21 victims who had the opportunity to
24 appear before you in this Court, most of the victims of the attacks participated in the
25 trial through their legal representative. These victims, although they were located in

1 the field living in various villages within Ituri, Mongbwalu, Bambu, Nyangarai, Kilo,
2 Kobu, Lipri, although they may have been physically there, they were indeed present
3 here with us every day in The Hague. And why is this? Because throughout the
4 entire trial, the victims showed their full commitment to justice, their motivation to
5 help contribute to the demonstration of the truth and they showed that they trusted
6 the International Criminal Court, and I thank them sincerely for that trust.

7 Throughout these three years, our team of legal representation has done all it could,
8 in any event I do hope so, has done all it could to bring the victims closer to the Court
9 so that the victims would feel truly involved in the proceedings and would be able to
10 play a central role, the role that is entrusted to them under the Rome Statute. We
11 wanted to ensure that the voice of the victims would be heard before the Court.

12 Ever since the time that we were designated, our team has carried out 33 missions to
13 the field. During these missions, the victims told us what their expectations were for
14 justice, what their concerns were, their viewpoints and sometimes their frustrations in
15 relation to various aspects of the case and the proceedings.

16 What is more, the victims have had an opportunity ever since the very beginning of
17 the process to make their views and concerns known by way of a local telephone line
18 that was available to them 24/7, and I must say that the victims took advantage of the
19 this opportunity. They regularly were in touch with us. They often called even
20 during the night, and I would like to thank my colleague, Maître Cherine Luzaisu,
21 who was responsible for this phone line. I thank her for her patience and her full
22 commitment.

23 I can only give you a very small sample of the concerns and views that were
24 expressed by the victims regarding certain aspects of the trial. First of all, the victims
25 said that they were satisfied with the evidence adduced by the Prosecution during the

1 trial. They said that the evidence was a faithful reflection of what truly happened
2 during the occurrences covered by the trials.

3 All the same, the victims said that they were frustrated because there were delays in
4 the trial, there were several extensions given to parties at various phases of the
5 proceedings. The victims also hope that the Chamber's decision regarding the
6 criminal responsibility of the accused will be handed down as quickly as possible,
7 without delay. Time is a precious commodity for these victims who have been
8 awaiting justice for 15 years.

9 The victims also expressed frustration, indignation even when it came to certain
10 aspects of the accused person's behaviour during the trial; in particular, the victims
11 said that they were puzzled and frustrated in relation to the situation that the accused
12 person was to be found in at the detention unit at the ICC. He was kept under high
13 surveillance, very tight-security conditions and yet he was able to contact outside
14 people and disclose highly confidential information and give instructions so that
15 Prosecution witnesses would be intimidated.

16 The victims also expressed deep frustration when, at one point, the accused person
17 refused to attend Court because it was not possible for him to receive visits from his
18 wife. But you see, it was the behaviour of the accused person himself that led to
19 these restrictions being placed on his outside contacts.

20 According to the victims, the accused person's refusal to attend his trial for this reason
21 showed a lack of respect for justice and towards the victims.

22 Furthermore, the victims, who had listened to the testimony of the accused very
23 carefully, had concerns about the reasons underlying certain statements he made and
24 the long, long statements he gave about elements that had little or no relevance to the
25 case at hand. Statements that had to do with periods of time well beyond the period

1 of time covered by the charges. The victims noticed that in contrast, the Prosecution
2 witnesses, including the victims who are called to give testimony, were always asked
3 to restrict themselves tightly and to really speak only to the charges and the situation
4 within those parameters.

5 The victims who listened to the accused person's statements and testimony saw a
6 number of things; in particular, the victims noticed that the accused gave very clear
7 answers, very detailed answers in response to questions that had to do with past
8 events, but when it came to other events, events covered by the charges, he began to
9 give very brief responses, very general ones, very hazy answers and was constantly
10 asking for questions to be repeated as if he had not understood.

11 The victims also noted the instructions provided by the Presiding Judge to the
12 accused person to look at the Chamber during his replies. The victims asked with all
13 due respect that the Chamber assess the credibility of the accused person's testimony
14 in terms of its content and the way in which it was given.

15 In more general terms, regarding the presentation of evidence by the Defence, the
16 victims had the impression that they were listening to two parallel accounts, two
17 different realities. On the one hand, they heard the Prosecution's account or reality
18 based on ample evidence, including dozens of statements from witnesses, an
19 abundance of documentary proof and expert reports. On the other hand, the victims
20 heard another account, another reality, the reality of the Defence based solely upon
21 the testimony given by the accused himself, and the Defence preferred to provide
22 very little corroboration, if any at all to his account.

23 And on this last point and in accordance with the victims' views and concerns, allow
24 me to make a few additional remarks. The Defence argues that the accused is the
25 victim of fabrication. Some kind of plot that allegedly was devised by Prosecution

1 witnesses and intermediaries and also by the victims and, apparently, by the entire
2 world. This plot apparently was created to place all the responsibility for the crimes
3 committed in Ituri in the year 2002-2003 upon his shoulders. But since we are not
4 here to deal with all of the crimes possibly committed in Ituri, but only for the crimes
5 that are covered by the charges, there are a few questions that must be put.

6 First of all, why would this alleged plot be devised only to target Bosco Ntaganda?

7 Why? And for what purpose? Why would it be Bosco Ntaganda pointed out,
8 singled out? Wrongly, according to the Defence, deemed to be the main person
9 responsible for the crimes committed by the UPC/FPLC troops in the various villages,
10 according to all the witnesses, all the victims and by the 21 victims who came to give
11 testimony? And, by all the victims of the attacks reflected in their victim
12 participation applications?

13 Why wasn't it Thomas Lubanga or Floribert Kisembo or the UPC/FPLC commanders
14 who personally led the UPC/FPLC operations in the various villages? Why were
15 they not mentioned? Why were they not held responsible?

16 As for the UPC/FPLC troops, many witnesses and victims referred to them as Bosco's
17 people or Bosco's soldiers. They did not refer to them as Lubanga's soldiers,
18 Kisembo's soldiers, Salumu's soldiers. And finally, why did the accused acquire this
19 infamous nickname, "the Terminator", a name he was known by well beyond the Ituri
20 region? This nickname that would be rather difficult to give to someone known only
21 for his great qualities as a courageous and glorious soldier?

22 For the victims the answer is simple. It is because this portrait of a prominent person
23 responsible for all the atrocities committed by the UPC/FPLC troops during the
24 events covered by the charges, this portrait that has been sketched and painted,
25 corresponds to the profile of the accused; namely, to Bosco Ntaganda and to no one

1 else, and thus any conspiracy or plot is without foundation.

2 Mr President, your Honours, on behalf of the victims of the attacks, once again the

3 Legal Representatives reiterate our written conclusions as well as our submissions in

4 the response to the Defence's written brief. And we respectfully submit that the

5 criminal responsibility of Mr Bosco Ntaganda has been established beyond all

6 reasonable doubt by the evidence adduced by the Prosecution and by the victims.

7 Thus, the accused must be found guilty of all counts standing against him.

8 With the leave of the Chamber, I would now ask my colleague, Maître Cherine

9 Luzaisu, to continue addressing the Court and to

10 provide more information about the victims of the attacks.

11 PRESIDING JUDGE FREMR: [10:18:02] Thank you, Mr Suprun.

12 All right, Ms Luzaisu, you have the floor.

13 MS LUZAISU: [10:18:18] (Interpretation) Thank you very much, Mr President.

14 Mr President, your Honours, after the unfortunate and tragic events of 2002 and 2003,

15 the situation of victims has become very precarious, most of them are living today in

16 deplorable financial and humanitarian conditions. Many victims were deprived of

17 their property. Members of their families were killed; their throats slit, they were

18 hacked with machetes. Entire houses and villages burnt down, cattle taken away,

19 farms destroyed, and businesses ransacked and pillaged, without mentioning the

20 destruction of public buildings or community buildings such as churches, schools,

21 hospitals, markets, health centres. Literally, overnight, the victims found themselves

22 with nothing, they had to go back to square one. Everything had to be rebuilt

23 simply because they were Lendu.

24 THE INTERPRETER: [10:19:28] Mr President, can the speaker slow down?

25 PRESIDING JUDGE FREMR: [10:19:31] Sorry, Ms Luzaisu, please, please slightly

1 slow down. Thank you.

2 MS LUZAISU: [10:19:38] (Interpretation) Thank you.

3 Mr President, your Honours, I will give you a few examples which show the situation
4 in which the victims of the attacks find themselves, as well as the villages affected by
5 the events of 2002-2003 in Ituri. I would like to begin by stating that, with regard to
6 the victims referred to here, we will simply present their points of view and concerns,
7 the presentation of the situations that they lived through and that they are
8 experiencing in order to demonstrate the consequences of the events on them and
9 their communities.

10 However, before I get there, I will give a non-exhaustive assessment of the situation of
11 some villages today following the attacks that led to deaths in Ituri in 2002-2003,
12 mainly in the Djugu and Mahagi territory.

13 In the centre of Bambu town, the CK20 Protestant church was destroyed and a large
14 plantation that belonged to the church was equally destroyed during the attacks.

15 The Kilo-Moto hospital was seriously damaged; doors were broken. The ambulance
16 of the hospital was taken away, roofing sheets taken away, medical equipment was
17 pillaged, and to this date nothing has been rehabilitated, given that the Kilo-Moto
18 itself is in difficulty.

19 The CK20 church that I mentioned earlier has been partially rebuilt by the faithful.

20 In the Kilo village, the roofs of the EP1 and EP2 Catholic primary schools were taken
21 away, the buildings set on fire. The property of the Protestant mission of Itendeyi,
22 which is about 9 kilometres away from Kilo, saw its hospital pillaged, and equipment
23 was taken away such as fuel, a Land Rover and radio equipment. The Kilo Mission
24 primary school was pillaged and has not been rehabilitated to this day; given that we
25 all know the value of education for children.

1 Still at Kilo Mission the Zabu Institute, which is a Catholic secondary school, was
2 pillaged and then set on fire.

3 Now let me go on to Lipri village. In this village, there was a large and well-known
4 market with many stalls, and this market was burnt to the ground, houses were set on
5 fire, and the roofing sheets of the Lipri health centre were taken away and the
6 building burned. To this day, an NGO called Atlas Logistique rebuilt the maternity
7 building and rehabilitated the health centre. The Catholic church of the village was
8 destroyed and has been partially rebuilt by the faithful.

9 In the Ngantchulu village near Lipri a primary school, EP Celi, was burnt down.
10 This school has somehow been rebuilt by villagers who have constructed four
11 classrooms in order to enable the children of the village to attend school.

12 In the Bunde village, still near Lipri, the C39 Protestant church was destroyed. In
13 Kpaky village there was a health centre with was in a straw hut and which was
14 destroyed during the attacks. So far, the villagers have rebuilt it without any
15 external assistance.

16 In Nyangarai, the CK20 church was destroyed by bombs. Houses were destroyed
17 and set on fire and the property of the villagers taken away. The roofing sheets of
18 the Nyangarai institute were taken off and the EP1 and 2 primary schools were set on
19 fire. As I speak, UNICEF has helped to rebuild the EP2 school with six classrooms.
20 They have rebuilt an office and latrines, but, unfortunately, there are no benches and
21 the students sit on the ground. The Nyangarai main market was burned, but an
22 NGO has rehabilitated two stalls. The roof of the reference hospital in Nyangarai
23 was taken away. The villagers have rebuilt a sort of a maternity but they received
24 nothing from the government or from the NGOs after the war, apart from the
25 rebuilding of the school by UNICEF.

1 In Kobu village there were several acts of destructions: schools, the Catholic church in
2 Kobu was burnt and has been rebuilt by the faithful. The multipurpose hall of Kobu
3 was destroyed. The FEPACO/Nzambe Malamu church was burned. And a church
4 was destroyed in Tchudja, which is a village in the vicinity of Kobu. It has been
5 somehow rebuilt by the villagers. The Kobu market, which had several stalls, was
6 destroyed.

7 In Mongbwalu, the general hospital was pillaged and ransacked and the laboratory of
8 Kilo-Moto was destroyed. During that time several times villages were burnt down,
9 such as Lipri, Nyangarai, Mbindjo, Buli, Jitchu, Ngabuli, and Tsili. The victims'
10 houses went up in flames.

11 Mr President, your Honours, so much immeasurable damage was done and to this
12 date these attacks remain unpunished. Several victims were subjected to inhuman
13 and degrading acts. The civilian populations which had nothing to do with this war
14 paid a high price; their property was pillaged, their farms devastated, their cattle
15 taken away, their women and children raped, and their brothers and sisters killed,
16 simply because most of them were of Lendu ethnicity. This is a case of victim
17 a/30285/15 who lost her father and her house was destroyed. Entire families were
18 destroyed, such as that of witness a/00643/13. Several members of this victim's
19 family were killed in Nyangarai; her brother's throat was slit; her sister, who was
20 pregnant, was disembowelled and the body was later found in a state of
21 decomposition; three of her sons were hacked by a machete in Lopa, and she learned
22 later that they had been buried in a mass grave. For such a mother, how can you
23 forget such an episode of your life when your children born of your womb were
24 killed in a cowardly and savage manner for interests that she still does not
25 understand today.

1 Victim a/01107/13 lost two of her brothers killed during the so-called reconciliation
2 meeting in Kobu. The mother of victim a/00045/13, who was already very old, was
3 killed by soldiers in Tekpari, as well one of her sons.

4 Victim a/01243/13 during those attacks lost one of her younger brothers, two of her
5 elder brothers, and two paternal uncles. Her junior brother and elder brothers were
6 killed by soldiers during the various attacks right in front of her, and that was in the
7 area of Buanga.

8 Victim a/30101/15 also lost her family during these attacks. She lost three of her
9 children who were killed in Buli. Then she lost four of her brothers, her sister, her
10 mother, and her father, who were killed in Kilo.

11 Most of the victims during the attacks fled to the forest to hide and life was not easy.
12 It was difficult to find food to eat. They lacked basic foodstuffs and they lacked
13 everything. The living conditions were extremely difficult. They were compelled
14 to run the risk of coming out of their hiding places to go and look for food because
15 they were afraid of dying of hunger. Many of them came face to face with FPLC
16 soldiers who controlled the area and they were killed.

17 Victim a/00795/13, who had fled the war from Sayo with her son barely 10 years old,
18 was compelled to sleep on the ground in the open with a lot of cold, and, during the
19 night, pregnant women were compelled to walk on foot for kilometres and to give
20 birth in the bush in inhuman conditions.

21 Victim a/30169/15 took refuge with her family in the bush. She sent her son of
22 11 years to go and look for food in a neighbouring farm, but he was shot dead by
23 soldiers and his body was found later in a state of decomposition. Since the body
24 was buried hurriedly, it was finally dug out and eaten by animals. Two other
25 children died of malnutrition because of the difficult conditions in the bush. The

1 civilian population could not remain put for a long time in one place because they
2 were being hunted down. They were compelled to move frequently, which was easy,
3 because of the children, the women, and the babies. During the attacks the dead
4 were hurriedly buried as animals because of the fear of being surprised by FPLC
5 soldiers. Mr President, your Honours, because of this, some victims lost their
6 families forever. They were killed in anonymity. They were bodies that were
7 abandoned and they were lifeless bodies, bodies without headstones.
8 Victim a/00429/13, for example, lost many members of her family, but they were not
9 able to bury them. Her elder sister, brother-in-law, daughter -- or, rather, son who
10 was 14 years old, as well as her uncle, were killed. They were all killed in
11 Mongbwalu and the bodies were never found.
12 The case is similar with a/0079513, who has had no news of his uncle since 2002.
13 Victim a/30012/15 had observed the abduction of his father in Kilo and he has never
14 seen him again.
15 Culturally in Africa, it is not easy to achieve closure in case of death as long as the
16 person has not been buried. The dead have high value and funerals are occasions to
17 talk about these people because it is believed that they are not really dead. People
18 carry out several activities. They gather, they eat, they drink, they sing and cry and
19 dance around the deceased people without ever leaving them.
20 Honourable Judges, these attacks have also resulted, among other things, in the loss
21 of opportunity or lack of development. Victim a/01480/13 was only nine years old at
22 the time of the attacks and sought refuge in the bush with his parents near Mbindjo
23 village. And his father went to fetch food, but never came back. His body was
24 found chopped up in the village at Mbindjo. He has been haunted by these
25 memories to this day.

1 He also witnessed the death of his younger sister more or less in nine months due to
2 the malnutrition. Due to the lack of food and the lack of drugs. Although quite
3 young at the time, he kept this memory within himself. And forced to go live with
4 his uncle in Bunia, and his sister and mother, she died in 2004, one year after the
5 death of her father because she was not able to stand the death or to bear the shock of
6 the death of her husband.

7 This victim struggled with life because his uncle also had to take care of his own
8 children. The victim would have loved to continue their studies as an engineer.

9 But as an orphan, this was difficult because of lack of financial support. His sister was
10 also not able to continue her education.

11 Now, when we have a discussion with him, his greatest regret is that if his father had
12 been alive, he would suddenly have gone far in his education. But with the death of
13 his father, his future was mortgaged and he therefore lost opportunities.

14 What about victim a/00093/13, who had a successful piggery in Djugu centre at the
15 time of the events? Everything was looted during the attacks and she barely had
16 time to save her own life. At the time of the attacks, she was married but could not
17 bear children and required medical assistance.

18 After the attacks, and mindful of the fact that her business had been looted and she
19 had lost her property, she was no longer financially able to provide for her medical
20 care. Her marriage broke down because of the lack of children. Today, she believes
21 that if the war had not happened, she would have been able to cope with her medical
22 expenses and continue her treatment and, thereby, salvage her marriage by bearing
23 children.

24 Victim a/00795/13 also thought of pursuing psychology studies at the Kisangani
25 university, but having been stripped of everything during the attacks was no longer

1 financially able to do so. Today, he manages here and there doing field work.

2 Several victims bear scars of the attacks, such as a/00256/13 who, to this day,

3 following the blows he was struck with by soldiers in Nizi, he can no longer sit

4 upright and continues to suffer to this day and will suffer to the time of his death.

5 He must be on painkillers on a daily basis.

6 Victim a/0117/13 was an exemplary teacher at the Nyangarai primary school prior to

7 the war. As a result of the war, the victim began to drink and became the village

8 drunkard. He ended up with cirrhosis and died six months ago. He did not benefit

9 from any psychological assistance which may have helped him out of this

10 unfortunate situation.

11 Mr President, your Honours, if I were to be specific about the situation of every 1,846

12 victims admitted to participate in this trial and whom we represent and to talk about

13 their physical morale and psychological loss as well as loss of opportunity, even if we

14 had 150 hours, it would not be enough to cover all this.

15 The victims of sexual abuse were many during this time. Victim a/30087/15, in

16 addition to having lost family members and two of her children, in addition to having

17 spent difficult moments in the forest and sleeping in the open air and having to do

18 deal with hunger and malnutrition, she and her two daughters, while in Ngongo,

19 were forced to carry the booty of the soldiers to Lipri and Kunda where they were

20 raped, and she was raped by three soldiers.

21 Victim a/00893/13 was raped by soldiers while trying to flee from Mongbwalu to Sayo

22 during one of the attacks in Mongbwalu. She lost consciousness and only came to

23 again in a health centre and today, to this day, she is psychologically fragile.

24 All these women experienced terrible violence. They were soiled in their intimacy

25 and, in the heat of the attacks, could not find anyone to confide to. Today, beyond

1 the rejection and stigmatisation, some of them have difficult health problems,
2 psychological problems, medical problems, high blood pressure, migraines, difficult
3 nights, nightmares, problems in their relationships. These are women who must
4 continue to fight to be able to live with those memories. They are crying and they
5 suffer when they remember these painful moments.

6 Many others who remain anonymous, do not have the courage to confide in anyone,
7 keeping inside themselves these very heavy emotional charges, they have continued
8 to live with the shame that stems from these acts, especially that the villages -- the
9 villages are small and everyone is easily broken. They have not only been exposed
10 to non-consensual sexual activities, but they are also forced to deal with matters of
11 stigmatisation and -- stigma, rather, throughout their lives.

12 Mr President, Honourable Judges, many of these victims are dying but the survivors
13 have been eagerly waiting for this day. Some have experienced the terror of death;
14 others the terror of rape and some still the terror of an uncertain future.

15 Today, almost all the victims have not been able to rebuild their financial health.

16 They have lost everything and have not recovered anything. They are poorer today
17 than before the attacks. Their family duties are enormous, especially as they have to
18 deal with the orphans of war. They may end up sometimes with 10, 12 or 15
19 children under their care. Many of them owned houses before the attacks but as the
20 villages were burnt down, and mindful of the age of some of the victims, they are no
21 longer able to rebuild their homes.

22 It is of course true that the surviving victims are trying their best to rebuild their lives
23 and to rise from the ashes because many of them are believers. When you go to the
24 villages such as Lipri, Nyangarai, Bambu, and other surrounding areas, you can feel
25 the increased measure arising from the multiple attacks of the FPLC which has left an

1 enormous stigma. Hundreds of children are sick. Many orphans who are today
2 teenagers often are not able to attend school because their families are not able to take
3 care of the survivors because of the excess burden.
4 Mr President, your Honours, we represent 1,846 victims scattered around a number of
5 about 20 villages in the Ituri and outside of that area. The victims continue to
6 contact us day and night to raise their daily problems with us. Problems of
7 rebuilding their lives, difficulties of access to health care, the difficulties of embarking
8 on income-generating work for lack of financial means, the difficulties of paying the
9 school fees for their children, the difficulties of feeding themselves and the orphans,
10 and so on and so forth.

11 They ask us about the state of the trial. They want to know when the trial will end
12 because they have been waiting for more than 10 years. Sometimes they find it hard
13 to draw a line between the work of the Court and their social welfare; so they contact
14 us, even when they do not know how to pay the school fees for their children or
15 maternity bills or bereavement expenses while waiting for financial contribution from
16 us.

17 As you can see, the victims have expressed all types of needs, financial, psychological
18 and medical. They are waiting for help, for assistance. They want to know when
19 the Court will help them. They want to know whether they will be compensated,
20 whether their houses will be rebuilt. If the schools and health centres will be rebuilt.
21 If they will be entitled to refunds.

22 PRESIDING JUDGE FREMR: [10:44:56] Excuse me, Ms Luzaisu, one hour granted to
23 LRV closing brief expired five minutes ago. I don't want to be too strict, but how
24 much time you think you will need to complete?

25 MS LUZAISU: [10:45:16] (Interpretation) Five minutes, your Honour. Five

1 minutes.

2 PRESIDING JUDGE FREMR: [10:45:21] Five minutes is fine. Please go ahead.

3 MS LUZAISU: [10:45:25] (Interpretation) Not more than five minutes, Mr President.

4 PRESIDING JUDGE FREMR: [10:45:29] All right.

5 MS LUZAISU: [10:45:30] (Interpretation) I'm obliged.

6 More than 10 years later, many have died and the survivors are becoming impatient.

7 We share with them the concerns related to the security problems in the Ituri; for

8 example, what happened between January and April 2018 when several villages in

9 the territory of Djugu were attacked. The victims were stressed, traumatised again

10 and the memories of the difficult years resurfaced. Some victims even left their

11 villages in fear of the degeneration of the events as was the case in 2002-2003. This

12 situation described above resulted, and up to this very day, in a disturbing

13 humanitarian situation for the IDPs in Djugu.

14 On behalf of the victims that we represent, we have an attentive ear all the time and

15 we have been working with them for over four years. In that time, confidence and

16 trust have been built. Even victims of sexual violence easily access us today and can

17 share their problems with us.

18 Mr President, your Honours, will time erase this tragic and painful episode in the

19 lives of victims? No. They will have to endure forever the weight of this war, of

20 these useless and selfish attacks. Time does not erase anything at all. What then

21 could replace the loss of a loved one? What could erase the traces of rape in a

22 woman's body?

23 The participating victims await the judgment of this Court. They hope that the

24 Court, in view of its jurisdiction, in view of the crimes that have been brought before

25 it, will render justice. It is true that the dead will not come back, but there is always

Trial Hearing

(Open Session)

ICC-01/04-02/06

1 a moral satisfaction attached to a just justice. The victims we represent have full
2 confidence in the International Criminal Court.

3 This brings to an end the statements by the representatives of victims of the attacks on
4 the civilian population. Thank you.

5 PRESIDING JUDGE FREMR: [10:47:58] Thank you very much, Ms Luzaisu.

6 Again, thank you very much, Mr Suprun.

7 So now we will break, but since we have a spare 10 minutes roughly, we can also
8 move those 10 minutes to the next session. So to be precise, we will now reconvene
9 at 11.20 and the next session will last till 1 o'clock.

10 Is it okay with you, Defence?

11 MR BOURGON: [10:48:34] Absolutely, Mr President. Thank you.

12 PRESIDING JUDGE FREMR: [10:48:36] All right. So now we break.

13 THE COURT USHER: [10:48:40] All rise.

14 (Recess taken at 10.48 a.m.)

15 (Upon resuming in open session at 11.21 a.m.)

16 THE COURT USHER: [11:21:25] All rise.

17 Please be seated.

18 PRESIDING JUDGE FREMR: [11:21:57] So next three sessions in fact are intended to
19 provide Defence with a possibility, an opportunity to present its closing statements.
20 Before I give floor for that to Mr Bourgon, Mr Bourgon, one question: Could you
21 just provide us with specification how many speakers will be presenting statements
22 and in which order.

23 MR BOURGON: [11:22:32] Thank you, Mr President. This is part of my
24 presentation. There will be two speakers only.

25 PRESIDING JUDGE FREMR: [11:22:38] All right. So then, Mr Bourgon, you have

Trial Hearing

(Open Session)

ICC-01/04-02/06

1 the floor.

2 MR BOURGON: [11:22:43] Good morning, Mr President. Good morning,

3 Madame la juge and Monsieur le juge.

4 Three years later, I have the honour to address the Trial Chamber and to begin the
5 presentation of Bosco Ntaganda's closing statement.

6 Mr President, it's been a long trial, and it's been a difficult trial. Number of
7 witnesses have been heard and numerous documents have been submitted in
8 evidence.

9 Yet, listening to the Prosecutor, who unfortunately cannot be with us this morning,
10 with us, listening to the Prosecution and the Prosecution team closing statement
11 yesterday, brought me back to September 2015. I respectfully submit, Mr President,
12 I could have sat before a TV screen, insert the video of the 2015 opening statement
13 from the Prosecution, press play, and the result would have been the same.

14 With all due respect, the Prosecution mistakenly takes its theory for reality.

15 Prosecution takes the view that the theory of the case it presented in September 2015
16 has not been affected by the evidence heard during the last three years.

17 Indeed, other than for isolated quotes from the evidence and sweeping statements,
18 which I respectfully submit are not very useful, we've heard the same as in 2015.

19 Now, regarding the quotes referred to by the Prosecution, quotes from selected
20 witnesses, but these quotes are mentioned without providing any information on the
21 context, without adding any information as to what these same witnesses said at
22 other times, or whether what they said in cross-examination.

23 Sweeping statements, let me use one example: Mr Ntaganda would like you to
24 believe that all witnesses lied without explaining why or how. That's what we heard
25 yesterday.

1 Well, we say, Mr President, that statements like this are not helpful because they do
2 not represent what the Defence has been doing over the last three years. For the
3 audience, this might raise some questions as to what really happened in Ituri in 2002
4 and 2003. But for the professional Judges of this Chamber, respectfully,
5 Mr President, we say more was required.

6 Now, regarding the witnesses who provided evidence, is it the case that many of
7 them provided unreliable evidence or straightforward lies? The answer is yes.
8 Openly, I can look at the Trial Chamber and say yes, it is the case without a doubt.
9 Now, is the number of witnesses who provided false evidence an important
10 consideration? No, it's not. It is not. What is important, and we are confident is
11 what the Chamber will do, is to look at the evidence witness by witness and assess in
12 light of the totality of the evidence whether what they said can be relied upon or not.
13 Where the Defence takes the view that witnesses provided false or unreliable
14 evidence, the Defence closing brief and the Defence reply provide details not only
15 why the information is unreliable but also, in many cases, what the motivation of the
16 witness was for doing so, even though this is not even a legal requirement.

17 Significantly, however, other than for a few exceptions, such as P-768 who, in our
18 view, is a straightforward liar, and whose evidence cannot be relied upon in any way.
19 Well, other than for these few exceptions, the Defence highlighted for the benefit of
20 the Chamber which part of the testimony of witnesses is reliable and which part of
21 the testimony of the same witnesses is either false or not reliable.

22 Let me use a few examples: P-17, P-907, P-901. By the way, P-901 appears to have
23 been kind of forgotten in the Prosecution's presentation yesterday. But these are
24 examples of the Defence approach. And I'll come back to these witnesses later.

25 Neither the Prosecution nor the Legal Representatives of Victims were happy with the

1 Defence approach of, within the testimony of a witness, saying what can be relied
2 upon and what cannot be relied upon. In their respective brief, they argue you can't
3 have a witness and agree on some parts and disagree on the other. Well, that is
4 wrong, Mr President, and we have explained why in our briefs.

5 Now, it is important to compare the Defence submissions with Prosecution
6 arguments. According to the Prosecution, all of its witnesses said nothing but the
7 truth and all of their evidence is reliable, period. I have yet to see or hear,
8 Mr President, any one observation, any note of caution expressed by the Prosecution
9 regarding a single of its witnesses. I respectfully use the word, Mr President,
10 "dreamworld". In fact, we are confident that the Trial Chamber will come to the
11 conclusion that numerous Prosecution witnesses did provide unreliable evidence and
12 draw the proper conclusions.

13 All this to say, Mr President, is that we're back to square one three years later. I
14 highlighted the fact three years ago that the Defence and the Prosecution were at
15 cross-purposes, had diametrically opposed theories that were entirely different; one
16 presents night, the other presents day.

17 Well, today, these years later, the situation has not changed. The Chamber is still
18 faced with two opposing theories based on the same evidence. Well, what we say,
19 Mr President, is that this evidence will allow the Chamber to determine which of the
20 two theories should be the basis for its judgment, and then to use the evidence
21 witness by witness to determine the responsibility of Mr Ntaganda.

22 We also respectfully submit that the Prosecution's theory, as presented in its brief and
23 as presented yesterday, is based on the internet. We are mindful, Mr President, that
24 the reputation of Bosco Ntaganda in the internet is not the best. We believe,
25 however, that this reputation on the internet is wrong. And we believe that based on

1 the evidence the real personality, actions, contributions, responsibility of

2 Mr Ntaganda will arise.

3 Let us look, Mr President, at one example, which is the Prosecution's characterisation

4 or portrayal of Bosco Ntaganda himself through its brief and through its argument.

5 Yesterday we heard the Prosecution say that Bosco Ntaganda was nicknamed The

6 Terminator because he was a notorious, violent killer.

7 Over and above the fact that I can't recall where in the evidence this comes from, this

8 is entirely wrong. A quick look at the evidence reveals just how and to what extent

9 the Prosecution's portrayal of Bosco Ntaganda is wrong.

10 Let's take a look at a few of these arguments:

11 Prosecution believes that Bosco Ntaganda interfered with witnesses. Well, I recall,

12 Mr President, and I wasn't going to raise this until the Prosecutor raised it yesterday,

13 but the Prosecution gained access to every single one of Bosco Ntaganda's telephone

14 conversations from the detention centre before and during the trial, and, yet, no

15 charges were laid for any type of interference.

16 The Prosecution says that Bosco Ntaganda committed murder. Well, we say,

17 Mr President, that the evidence reveals that he did not commit murder. If we look,

18 for example, because that's the only evidence that is charged, which is that of a priest

19 named Abbé Bwanalanga, the evidence reveals that he was not killed by

20 Bosco Ntaganda, and the evidence provided by P-768 in this regard is simply not true.

21 Now, in terms of reputation, we might look at other issues, like we go back to 2000.

22 Did Bosco Ntaganda kill Ngwene, the prosecutor who had detained Kahwa? Did

23 Bosco Ntaganda kill César, the strongman of the APC at the time? No, the evidence

24 reveals he did not. Did Bosco Ntaganda kill Claude, the strongman of Lompondo

25 in 2002? No, the evidence reveals that Bosco Ntaganda did not kill these people.

1 Rape: Prosecution would like to picture Bosco Ntaganda as a rapist, that he would
2 have raped P-10. Well, we'll address the evidence of P-10 later, but we say that the
3 record speaks for itself; Bosco Ntaganda did not commit rape. Quite to the contrary,
4 the evidence reveals what is Bosco Ntaganda's position regarding any type of sexual
5 violence within his ranks, and what he said to his troops about rape, and the actions
6 he took in that regard.

7 The Prosecution would like to picture Bosco Ntaganda as someone who committed
8 pillage. Well, I refer you, Mr President, to the evidence of P-901. This was really an
9 absurdity the way it was portrayed, and the Chamber will recall, at the end of the
10 cross-examination, how P-901 reacted to these questions.

11 As of allegations of pillage at the hospital, the Chamber will recall the testimony of
12 P-768, which is linked to those anti-personnel landmines that would have been used.

13 That's not true. The evidence establishes that there was no pillage.

14 The Prosecution would like to say that Bosco Ntaganda set a negative example. Well,
15 when we look at the example set by Bosco Ntaganda, we come back to 901 who says
16 he's the most respected individual in the FPLC. So was he the most respected
17 individual because he set a wrong example? We say, Mr President, the two don't go
18 together, and that comes from a Prosecution witness.

19 We also recalled the evidence regarding the adoption of the ideology of the FPLC to
20 which Mr Ntaganda contributed. Prosecution would like to say that

21 Bosco Ntaganda was not credible. Well, Mr Ntaganda testified for 127 hours, he
22 answered all questions, regardless of whether the questions were sensitive or not.

23 He provided straightforward answers to every question put to him regarding his acts
24 and conduct.

25 Prosecution would like to say that Bosco Ntaganda failed to take measures to prevent

1 or punish. Again, the record is replete with examples of measures taken by
2 Bosco Ntaganda. Even the Prosecution yesterday, they pleaded to this Chamber, the
3 Prosecution recognises that, other than for the crimes charged, Bosco Ntaganda took
4 all kinds of preventive measures and repressive measures.
5 The Prosecution would like to say that Bosco Ntaganda possessed a specific intent to
6 discriminate against non-Hema civilians. We'll get back to this example. But,
7 Mr President, the issue of what happened in Mandro in the spring of 2002 where a
8 number of Lendu civilians who were targeted by their own because they refused to
9 attack Hema civilians showed up in Mandro and they took refuge there and they
10 were protected. They were welcomed by Chef Kahwa and they were protected.
11 Prosecution would like you to believe that the Witness D-54, who was not
12 cross-examined, is a witness who mentioned Bosco, but she wasn't talking about
13 Bosco Ntaganda. Need I say more?
14 Mr President, what this case is about is the following, and this is what we will address:
15 This case is about Bosco Ntaganda, and we see from the few example I just raised that
16 Bosco Ntaganda is not the man that we have been hearing about for the past day and
17 a few hours. This case is about UPC/RP, Union des Patriotes
18 Congolais/Réconciliation et Paix. This case is about the FPLC, it is about an alleged
19 common plan to oust non-Hema civilians, it's about two attacks, and alleged
20 enlistment of and use of soldiers who would have been aged below 15.
21 This case, Mr President, is about the charges which are in the UDCC, the Updated
22 Document Containing the Charges, as confirmed. Not more. My colleague will say
23 further about this.
24 Our presentation, Mr President, today will be divided into a number of parts, some
25 will be longer than others. Some will be quite short. But we will address

1 Bosco Ntaganda based on the evidence, not on the internet. We will address for the
2 Chamber defining moments in the procedure and determining factual issues that will
3 impact what the Chamber and how the Chamber can assess the evidence.
4 We'll address the contextual elements of Article 7, crimes against humanity, and I
5 stand to be corrected but we haven't heard anything about crimes against humanity
6 yesterday. And we'll address of course the law applicable to the common plan. We
7 will look at Mr Ntaganda's evidence regarding alleged soldiers aged below 15.
8 More importantly, we will look at witness credibility issues and we will look at
9 Bosco Ntaganda's responsibility. And at the end we will look at command
10 responsibility issues rather quickly.

11 Allow me to begin immediately with the first part dealing with Bosco Ntaganda
12 himself.

13 Bosco Ntaganda based on the evidence. These are the issues we will address; his
14 personal background, his testimony, the Prosecution's cross-examination,
15 corroboration of his testimony, and we will suggest to this Chamber what criteria to
16 use in order to assess and accord full probative value to his testimony.

17 His personal background is important to assess the charges. The fact that he joined
18 the military in 1991 at the age of 18. That his family was a victim of the Rwanda
19 genocide. That Bosco Ntaganda contributed to fighting the Rwanda genocide.

20 Bosco Ntaganda's background as an instructor, that was his main purpose, his main
21 qualification in the military. How Bosco Ntaganda ended up to join RCD-K/ML and
22 then he became Wamba Dia Wamba's PPU commander due to his quality and his
23 courage as a fighter.

24 It is interesting, Mr President, that RCD-K/ML, as the evidence has shown, was
25 sponsored by Uganda as opposed to RCD-Goma, who was at a time sponsored by

1 Rwanda. There were no close ties between Rwanda and Bosco Ntaganda contrary to
2 what the Prosecution would like you to believe.

3 When Bosco Ntaganda came to Bunia in 2000 it was the first time he set foot there, he
4 did not know Bunia, and he was a member of the APC. Bosco Ntaganda testified
5 why he became a mutineer from the APC, because the APC had lost its bearing
6 already in 2000, and he created the Chui mobile force. We even heard yesterday that
7 the Chui mobile force included soldiers or members who would have been aged
8 below 15. I don't think there is any evidence on the record to that effect.

9 Now, what was Bosco Ntaganda's role in these events? That's important.

10 Bosco Ntaganda is an important character of course, we would not be here if he was
11 not an important character. Did he have influence on the members of the FPLC?

12 Yes, he did. He was one of the main characters of FPLC. Mr Ntaganda did not
13 hide this. He highlighted the fact that he tried as best as he could at all times to
14 ensure that FPLC would conduct its operations in accordance with his military ethos.
15 Bosco Ntaganda was highly respected. He contributed to the adoption of the FPLC
16 ideology. It is in our brief. I need not go through all the steps.

17 Bosco Ntaganda was animated, he was a soldier, animated by his desire to create a
18 disciplined army. Bosco Ntaganda said that when it was mentioned "nos enfants" in
19 the logbook, he explained that the army is a family, he was one of the important
20 members of the family. But the children in the family, that doesn't mean that they
21 are children, they are the members of the army and military commanders take care of
22 their children, they take care of all of their children. That's what we find in the
23 logbook.

24 Bosco Ntaganda was recognised as a courageous and as a qualified and effective
25 tactician and fighter. When Bosco Ntaganda responded to questions of the

1 Prosecution, says, "I will admit I was a tactician." That doesn't say anything else
2 than "I was a tactician", and we should not read more into these words than what is
3 there.

4 Bosco Ntaganda was a staff officer and not a commander. He did command, he did
5 exercise command at times in certain operations. When, Mr President, the question
6 was put to him, "What difference does it make that you're in command of
7 Mongbwalu?", Mr Ntaganda responded, "It makes all the difference in the world
8 because I'm in command, and at that point in time I exercise command." That is
9 different.

10 But at other times he was not in command, he was a staff officer. We have
11 organisational charts that were admitted in evidence, on which Mr Ntaganda was not
12 cross-examined, which show the relationship between him and Kisembo. When
13 Mr Ntaganda issued orders, it was pour ordre on behalf of Kisembo.

14 But we'll address that later.

15 He was a loyal officer. When Mr Lubanga asked him do not fire on the Lendus so
16 that they can attend the meeting in December in Arua, he abided and issued orders
17 not to fire the Lendus.

18 When Kisembo left the movement to create his own UPCK, Mr Ntaganda remained
19 loyal to Lubanga.

20 Mr Ntaganda was not a politician. And that's very important. Mr Ntaganda was a
21 soldier, a tactician. He contributed to the FPLC and, in the overall scheme of things,
22 he was a minor player in all the situation as it unfolded.

23 What is more important, Mr President, is that Bosco Ntaganda's involvement in these
24 events resulted in lesser number of victims rather than more. When he showed up
25 in 2000, when he came back in 2002 and organised the troops because it was in

1 self-defence, because civilians were being targeted by Lendu combatants and the APC,
2 he organised them so that the fighting could take place military on military; not with
3 civilians, not on the civilians.

4 Moving on to Bosco Ntaganda's testimony. We say it is the, certainly the most
5 important aspect in this trial and we invite the Chamber, as did the Prosecution
6 yesterday, to scrutinise Mr Ntaganda's testimony.

7 One caveat in terms of his testimony: There were a number of interpretation issues
8 and we invite the Chamber to be careful with respect to the words used, because there
9 were differences between the French and the English and there were differences
10 between the Swahili, the language used by Bosco Ntaganda, and the transcript.

11 I said he testified for 127 hours. Calmly responded to all questions put to him.

12 Candidly responded to sensitive questions. Did not try to evade his responsibility.

13 Whether it was questions related to César; to Patrick, who was killed when he tried to
14 assassinate Mr Ntaganda in 2000; Ngwene, Claude, Bwanalanga. Whether soldiers,
15 what was his own test for soldiers in terms of who he would recruit and who he
16 would not recruit.

17 When the Prosecution came up with a document he had not seen which was one of
18 his agenda, he immediately clarified, said, "Yeah, I stand to be corrected. That's the
19 date, that's the correct date."

20 When Mr Ntaganda travelled to Aru, Prosecution would like you to believe that he
21 travelled to Aru because he was there to order the operation on Mongbwalu.

22 Mr President, Bosco Ntaganda straightforward and very openly, he said, "I went to
23 Aru. We did provide weapons to Jérôme. We did provide uniforms to Jérôme. I
24 did go and speak to the troops of Jérôme. Jérôme was involved in fighting activities
25 with APC troops coming from Mongbwalu. But I commanded the operation which

1 is subject to the charges." Need I say more?

2 Bosco Ntaganda in cross-examination, which is quite significant, let me go back again

3 to, first, to his testimony. Mr Ntaganda during his testimony at all times responded

4 to where he was, what he did and why he did it. Now the Chamber must assess.

5 In cross-examination, 56 hours of cross-examination. The cross-examination was

6 split in two parts. Admittedly, Mr President, for us this was the worst scenario and

7 it was not very openly that we conceded to this scenario, but my instructions were

8 clear, Bosco Ntaganda said "I want to say it all. Regardless of the timing

9 considerations and when the cross-examination takes place, I want to tell my story."

10 And he did. And what he said, Mr President, is relevant to the charges, as opposed

11 to what some Legal Representatives said this morning.

12 Cross-examination with one month to prepare in the middle, yet the Prosecution

13 opted not to challenge Bosco Ntaganda on significant portions of his testimony.

14 Then the Prosecution says in its brief, well, there's no legal duty or legal obligation to

15 put questions on everything the accused testifies about. Well, in part, they are right.

16 There is no obligation. But when the accused is going to testify about a material and

17 important aspect of the Prosecution's case, responding directly to Prosecution

18 allegations, and then the Prosecution decides not to cross-examine, well, the Chamber

19 is bound to take that into account when assessing the testimony.

20 Corroboration of Mr Ntaganda's testimony: Both the Legal Representatives and the

21 Prosecution say that Bosco Ntaganda's testimony was not corroborated. Well, that is

22 incorrect, Mr President. The main source of course is Ntaganda logbooks, which do

23 corroborate Mr Ntaganda's testimony to a large extent. However, there's more.

24 Defence witnesses. Now, it has been said that because Mr Ntaganda testified early,

25 that the Defence witnesses should not be believed because they knew

1 Bosco Ntaganda's testimony. I would not surprise anyone by saying that had
2 Mr Ntaganda decided to testify last, then we would have heard today well, because
3 he testified last, it must be that it is because he heard his own witnesses. That is, in
4 our view, Mr President, for the Chamber to assess, but it is incorrect to say that the
5 testimony of Defence witnesses was impacted or influenced in any way by the
6 accused's testimony. And it's certainly not established on the record that there was
7 any knowledge of the accused's testimony with these witnesses, such as 251, and
8 witness 243, and Witness D-17, and Witness D-54 -- well D-54 testified prior to.
9 A lot of documentary evidence was used during Bosco Ntaganda's testimony which
10 corroborates his testimony. The Chamber knows that accord very -- we would like
11 the Chamber to attribute very little probative value to United Nations document.
12 What they are good for is for the purpose which use them during Bosco Ntaganda's
13 testimony, because when Mr Ntaganda described an event, when that event is
14 mentioned in a document it corroborates the event. Might not corroborate the detail,
15 but it corroborates the event. More than that, very little weight can be attributed to
16 these United Nations or MONUC documents.
17 The evidence provided by Prosecution witnesses is significant in terms of
18 corroborating Mr Ntaganda's testimony. Sudden recollection of memory by P-55,
19 which we will address later, are significant in this regard, as well as P-17. P-17 is the
20 only witness we have on the record who provided information regarding the
21 beginning of the second FPLC attempt to liberate Mongbwalu. And in this part of
22 his testimony he corroborates Mr Ntaganda. He said Mr Ntaganda was not there.
23 He showed up in Mongbwalu after the fighting in Mongbwalu had stopped.
24 Mr Ntaganda's testimony must be accorded full probative value. Mr Ntaganda
25 decided to testify even though the Prosecution had every one of his telephone

1 conversations. He decided to testify despite all the material on the internet that was
2 available to the Prosecution. He decided to testify despite 10 years or more of
3 investigation by the Prosecution. He decided to testify because he wanted to tell his
4 story.

5 The proper criteria, in our view, to address the testimony and the weight to be
6 attributed to the testimony can be found in a Supreme Court of Canada decision 1991,
7 which is R v W(D). That related of course to a trial before jury, but in that decision
8 the Supreme Court said these are instructions which should be given to the jury
9 because that's the way to assess the testimony. If you believe the evidence of the
10 accused, obviously you must acquit. If you do not believe the testimony of the
11 accused but you are left in reasonable doubt by it, you must acquit. And even if you
12 are not left in doubt by the evidence of the accused, you must ask yourself whether on
13 the basis of the evidence which you do accept you are convinced beyond reasonable
14 doubt by that evidence.

15 Moving on to the second part, defining moments in the procedure. There are a few.
16 I did not anticipate addressing these issues, but the issue of restrictions imposed on
17 Bosco Ntaganda deserve a word. The issue is not the decisions rendered by the
18 Chamber in the course of trial, now is not the time to address such issues.

19 The issue related to the restrictions is simply that the allegations of interference which
20 were submitted by the Prosecution for some reason come from the same insider
21 witnesses whom we say provided unreliable evidence. It is a factor to bear in mind.

22 The second issue of course is Prosecution knew more than the Defence when the
23 Defence was cross-examining Prosecution witnesses.

24 But the most important aspect of this issue is the use by the Prosecution of

25 Bosco Ntaganda's telephone conversations. Prosecution was authorised to use a

1 number of conversations and their strategy backfired. How did it backfire?
2 Because the conversations that were used during Bosco Ntaganda's testimony
3 highlight the fact that Bosco Ntaganda very shortly after arriving in The Hague,
4 5 April 2003, Bosco Ntaganda was discussing with Rafiki their trip to Mongbwalu
5 using Rafiki's vehicle. That's the trip that was before the trip to Rwanda.
6 Bosco Ntaganda was discussing with Peter, his personal secretary, the event about the
7 execution at Ndromo involving theft at the house of a Nande family.
8 Bosco Ntaganda was discussing the trips he went -- he took to Goma with Peter in
9 September 2013, way before any hearing on the confirmation of charges. Peter
10 acknowledged in these conversations going to Aru with Bosco Ntaganda. What we
11 can see from these conversations, they are not straightforward evidence, but they do
12 support and corroborate issues testified about by Mr Ntaganda.
13 I won't linger long on the disclosure of evidence issue, but one issue will be
14 mentioned later on during these submissions regarding the identity of persons
15 interviewed by P-46, which is an issue that we just managed to confirm recently, and
16 that deserves some submissions.
17 I move on to the evidence that was neither adduced nor called by the Prosecution.
18 Now, that's an interesting one and I'll refer to one example which is, in our view, very
19 important. It is the fact that many aspects of the evidence adduced by the
20 Prosecution call upon military knowledge which, we respectfully submit, goes
21 beyond the normal knowledge of judges: The range of weapons, the use of certain
22 weapons, the workings of an état-major, the relationship between chef d'état-major
23 général and his two chef d'état-major général adjoint. What is the difference
24 between a staff and line relationship. Whether an operation can be undertaken by an
25 officer in a certain area without seeking permission of the higher chain of command.

1 Preparations for an attack. All of these issues require military knowledge for which
2 the Prosecution omitted to call a military expert.

3 Let me use one example again referring to the first attack. Prosecution
4 cross-examined Mr Ntaganda, but argues that two brigades were involved and that it
5 is not normal that Bosco Ntaganda, as the overall commander of the operation, was
6 not there with them. Well, had a military expert testified - and it was the duty of the
7 Prosecution to put that knowledge before the Chamber - then it would understand
8 that what Mr Ntaganda testified is the proper way it is done.

9 In respect of military issues, clearly explained by Mr Ntaganda, and where no expert
10 knowledge was adduced, we say that not only the benefit of the doubt must go in
11 favour of the accused, but the Chamber must not look further than the testimony of
12 the accused who is a military expert.

13 I move, Mr President, to determining factual issues in the case.

14 What are these determining issues? Well, they are issues that arose during the trial,
15 mostly factual, which impact the assessment of the evidence as a whole in favour of
16 Mr Ntaganda. Issues which constitute a turning point regarding the overall
17 responsibility of Mr Ntaganda.

18 So let us look, Mr President, together at some of these issues: First one, Lendu
19 civilians targeted by Lendu combatants took refuge in Mandro, where they were
20 protected by Chef Kahwa and Bosco Ntaganda. We've already -- I've already
21 mentioned this event earlier and the fact that the Prosecution did not cross-examine
22 D-54. Why is it important? Well, because it shows the attitude of UPC and APC
23 mutineers because FPLC did not exist at the time; it shows the attitude of
24 Bosco Ntaganda regarding the civilian population even before the creation of
25 UPC/Réconciliation et Paix and FPLC; it shows proactive measures taken to protect

1 non-Hema civilians. It is determining, Mr President, because it confirms the absence
2 of a policy to attack civilians. It also confirms that there was no Article 7 attack. It
3 also confirms that UPC/RP and FPLC did not discriminate against civilians, let alone
4 non-Hema civilians. And it also shows that Bosco Ntaganda did not harbour a
5 specific intent to discriminate.

6 Bosco Ntaganda's logbooks. Well, first, they are Prosecution exhibits. We have the
7 numbers on this slide which is on the screen. Prosecution has said and repeated
8 yesterday that the logbook contains contemporaneous internal records of the UPC's
9 military activities on a near daily basis from 19 November 2002
10 until 22 February 2003.

11 Before I comment on this Ntaganda logbook, one issue which must be mentioned is
12 we find in the Prosecution brief, and I think in the submissions yesterday, about the
13 short Ntaganda logbook. Prosecution submits that the short Ntaganda logbook, the
14 applicable dates were October 2002 until 2 June 2003. Well, that's not what the
15 evidence says, Mr President, and I stand to be corrected, but I don't know where these
16 dates come from. The dates are on the record.

17 Now Bosco Ntaganda's logbook, they represent the actual words pronounced by
18 main characters, including Bosco Ntaganda. These were accessible only to a few
19 FPLC members. They are contemporaneous evidence. More importantly, they are
20 considered or they were considered as confidential documents not accessible to the
21 enemy. They are a reliable representation of FPLC *modus operandi*. We invite the
22 Trial Chamber to carefully scrutinise the logbook, which will determine that it does
23 not show anywhere either a policy to attack civilians, either attacks on civilians, or
24 any type of crimes being committed by FPLC.

25 Now, that's a long period, Mr President, from 19 November until 22 February. Why

1 would the actions of the FPLC be different before or after? When we look at this, we
2 see the true nature and character of the FPLC. We see how they were conducting
3 their business. That's important.

4 It is determining because, when Bosco Ntaganda commented on the messages, it
5 allowed the Trial Chamber to have very useful inside information. It's also very
6 useful to assess witness testimony. We find in the logbook messages authored by
7 P-768 about measures taken to discipline, actually to execute a member of the FPLC
8 for killing a Lendu civilian, and yet it was denied by the witness. It confirms the
9 absence of attacks pursuant to Article 8, which is war crimes, and it confirms all the
10 measures taken to prevent or punish.

11 Next issue is the range of FPLC VHF radio communications. There are two types.
12 Communications between two handheld VHF portable radio, and communications
13 involving one VHF radio and using the base, which the Chamber will recall was a
14 device much more powerful than a handheld radio VHF, and the fact that what
15 frequencies were used and the inability to communicate between certain areas. It is
16 clearly established in the evidence, Mr President, that from Bunia it was not possible
17 to use a VHF radio to communicate with operations conducted away from Bunia,
18 either because of the frequency used, but, more importantly, about the capacity or the
19 range of these communications.

20 It is important because it allows the Chamber to know what was possible and what
21 was not and to assess the relevant testimony.

22 Where P-17 testifies about alleged conversations between Kitembo, who was in
23 Mongbwalu or he could have been in Kilo, along with Salumu, who would have been
24 in Kobu, well, we know, Mr President, that these type of conversations are not
25 possible. If they are not possible, it is determining to assess why did P-17 adduce

1 such evidence.

2 Measures taken by Bosco Ntaganda in Komanda. This is immediately after the

3 departure of Lompondo. Before the creation of FPLC. Operation in Komanda, we

4 have a witness who described this operation during which no crimes were committed

5 and civilians had left, yet some members started to loot. As soon as Mr Ntaganda

6 got the information, he immediately reacted, ordered for the items to be looted, and

7 publicly punished those soldiers responsible. Now, that is not benign action by

8 Mr Ntaganda. This sends a strong message and everyone who were there present in

9 this operation would remember clearly Mr Ntaganda's position regarding looting.

10 Why is it important? Because it was the message. It illustrates that FPLC ideology

11 was not theory, it was in practice. It is determining because it confirms measures

12 taken. It confirms the will and the attempt to create a disciplined force, and it

13 confirms that Bosco Ntaganda did not harbour the mens rea for pillage.

14 Next issue: The first execution of an FPLC member by firing squad. Mr President,

15 the ultimate punishment which can be imposed in any army, it's a form of

16 punishment found in the military codes of many states. It was until very recently

17 still in the Canadian Military Court of Justice. It is no longer there anymore, but it

18 was. Nande civilians were victims of looting. An investigation immediately

19 conducted by Bosco Ntaganda, a punishment approved by the commander-in-chief.

20 It is the most powerful and effective form of deterrence. Is it foolproof? No, it is

21 not. But you cannot go further than that in terms of deterrence.

22 The Prosecution would like to use this example to show that Mr Ntaganda was

23 trigger happy, that he shot everyone left and centre. That's not what the evidence

24 reveals. The evidence revealed that Mr Ntaganda took this measure, investigated

25 this case in accordance with his own military ethos. When Mr Ntaganda testified, he

1 confirmed that the person executed, the FPLC member executed, happened to be
2 P-16's brother, which might explain and provide reasons as to testimony or evidence
3 provided by P-16.

4 This first execution is important and it is determining because it shows the absence of
5 discrimination against civilians. The victims were Nande. It confirms the absence
6 of a policy to attack civilians. It confirms no Article 7 attack and it confirms that
7 Bosco Ntaganda did not harbour either the mens rea for pillage or the specific intent
8 to discriminate.

9 Next determining factual issue: Mandro video. Military parade, a gathering of
10 FPLC members who were trained in Mandro. We have soldiers on that video who
11 came from Aru, Jérôme's forces, who were not Hema and who were not of the Hema
12 ethnic group. The gathering takes place shortly before Bosco Ntaganda's mission to
13 Aru and it takes place before the soldiers trained in Mandro were organised into a
14 formal brigade, a brigade the command of which was entrusted to Salumu.
15 Chef Kahwa's speech is a powerful one. It is direct instructions given by the political,
16 the executive to its armed branch or to its military arm. It is in evidence in the
17 speech record that Bosco Ntaganda contributed to the speech. Soldiers were
18 informed about the objectives of UPC/RP end policy.

19 Now it is important because the soldiers that you see on this video proudly wearing
20 their new uniforms, proudly showing their weapons and explaining how their
21 weapons worked to Chef Kahwa, are the same soldiers who took part in the first
22 attack as charged, the operation in Mongbwalu.

23 FPLC ideology was addressed, discipline was addressed, protection of civilians were
24 addressed, lack of discrimination was addressed. It is determining because it
25 confirms the multi-ethnic composition of the brigade which went to Mongbwalu

1 because instructions were given to those who took part in that operation. No policy
2 to attack civilians. This is straightforward evidence of an absence of a policy to
3 attack civilians let alone non-Hema civilians.

4 Now, the Prosecution here, I referred earlier on to where the Prosecution had in our
5 view a duty to call a witness because the Prosecution argues that this Mandro is
6 propaganda, and I'll address the issue of propaganda later. But at a minimum, if
7 someone is to argue that it was propaganda, it would be nice to have one witness who
8 was present who would say, "Oh, this was a fix." I refer to the words of the
9 Prosecution yesterday. Why else would one reporter be present if it wasn't for
10 propaganda?

11 Mr President, where is the evidence that what was mentioned in that speech is not
12 true? Where is the evidence that this speech was not delivered openly and with a
13 purpose to FPLC troops?

14 Next determining factual issue: The second execution of an FPLC member by firing
15 squad. Again, the ultimate form of punishment which can be imposed. Early
16 January 2003, a Lendu civilian victim of murder by an FPLC commander called Liripa.
17 An investigation is conducted within 401 brigade and within the southeast
18 operational sector. It involves the commander of the 401 brigade and it involves the
19 commander of the southeast operational sector.

20 This investigation is referred to in Ntaganda's logbook. The execution takes place in
21 public. A report, procès-verbal of the execution is drawn up to be sent to higher
22 headquarters. That's in the logbook also. Again, the Prosecution attempt to use
23 this incident to say that members of FPLC were trigger happy simply is not what the
24 evidence reveals.

25 This issue is determining because again it shows a lack of discrimination. It shows

1 what was happening in Mongbwalu in January 2003. It confirms that when
2 members of FPLC did commit breaches or when there were problems, they were
3 reported in the logbook and the logbook begins as early as 19 November. That
4 allows the Trial Chamber to determine what was the real situation.
5 These messages are referred to in the Defence closing brief. All these messages
6 issued by commander of 401 brigade where it reports on the situation, on patrols
7 being out there looking at what's happening, on the situation being calm, it's all there.
8 And that's important, Mr President, to assess what was the situation and it is also
9 determining to assess credibility of insider witnesses, (Redacted).
10 Next determining issue: P-290 travelled to Mongbwalu with Bosco Ntaganda as
11 established in the evidence.
12 This, Mr President, established that P-290 did travel with Bosco Ntaganda to
13 Mongbwalu. It is explained in detail, first, in the Defence closing brief and then in
14 the Defence reply to responding to Prosecution arguments. It is directly related to
15 evidence regarding the first attack as charged. It is directly related to
16 Bosco Ntaganda's testimony, and it is determining because it does corroborate
17 Bosco Ntaganda's testimony.
18 Now, the Prosecution argues at one point we did not know that Bosco Ntaganda
19 would testify that he travelled to Mongbwalu with P-290. That's really amazing,
20 Mr President. P-290 is a Prosecution witness. Need I say more.
21 Next determining issue: Bosco Ntaganda reached Mongbwalu by foot. That's what
22 the evidence establishes. P-17 also reached Mongbwalu on foot. And the evidence
23 establishes, both on maps and the testimony of Mr Ntaganda, that it was not possible
24 to use a vehicle between Dala and Mongbwalu. Why is it important? Because it
25 establishes that during the operation in Mongbwalu, there were no vehicles that could

1 reach Mongbwalu and there were no vehicles there other than those seen in the
2 Mongbwalu video.

3 It is determining because it contradicts the unreliable evidence provided by insider
4 witnesses as well as even by other Prosecution witnesses. That's in our Defence
5 closing brief, and it corroborates Bosco Ntaganda's testimony.

6 The next determining factual issue: Mongbwalu video. Importantly, this is a video
7 that was a Prosecution exhibit, but it does display for the benefit of the Chamber the
8 situation in Mongbwalu from the moment the FPLC delegation headed by Kisembo
9 arrived, until the following day when Kisembo accompanied by Bosco Ntaganda
10 visited various areas in Mongbwalu.

11 (Redacted) along with a journalist named Mike Arereng.

12 We invite the Chamber to carefully look at the evidence provided by P-2, which will
13 allow the Chamber to determine that there was no -- P-2 was not forced; it was not
14 propaganda. He was openly with all of his heart talking about the situation in
15 Mongbwalu.

16 But when we look at the Mongbwalu video, it is important because of course there is
17 no structural damage in Mongbwalu. In evidence is the fact that the Mandro
18 brigade, commanded by Salumu, had what we call heavy weapons. Had the FPLC
19 wanted to flatten Mongbwalu, they would -- they could, sorry. That's not what the
20 video shows. There is no structural damage. And it's also very important because
21 when you look at houses on the video with corrugated iron rooves, the roofs were
22 still there. So why is it that the FPLC would go to Mongbwalu and leave those
23 corrugated iron roofs, but take all those away in Sayo?

24 Asking the question provides the answer. They didn't.

25 It shows also the absence of vehicles in Mongbwalu. It shows that the Usine was

1 destroyed long before these events. It shows that the civilian population is returning
2 to Mongbwalu. It showed that the atmosphere is peaceful. It shows the attitude of
3 Kisembo, of the FPLC, of the UPC/RP and of Bosco Ntaganda regarding civilians,
4 non-Hema civilians. It displays the willingness from the FPLC for all civilians to
5 return.

6 That's an important consideration which defeats numerous Prosecution arguments.

7 Not only does the Mongbwalu video corroborate the testimony of Bosco Ntaganda, it
8 contradicts the non-reliable testimony provided by insider witnesses, confirms that
9 there was no policy to attack civilians pursuant to Article 7. No Article 7 attack.

10 No discrimination against civilians, let alone non-Hema civilians. No specific intent
11 to discriminate against non-Hema civilians. And it also confirms very significantly
12 that this operation in Mongbwalu did not reach Nzebi. Anything that the Trial
13 Chamber has heard about Nzebi was placed on the record by P-768; simply not part
14 of the operation. We can see that on the video. Nzebi is not there. It was made
15 up.

16 Next determining factual issue: December meeting held in Arua. Completely
17 different issue, but I tried to move in a chronological pattern.

18 This meeting was initiated by Uganda. The aim was to sign an agreement between
19 Uganda and UPC/RP, a voluntary participation from the UPC/RP.

20 The delegation of UPC/RP is headed by a non-Hema, Djalum Jéconie, who was one of
21 the main, if not the main, secrétaire national. At the meeting, the delegation is
22 ambushed by a Ugandan delegation, and we learn that two political parties created in
23 Uganda are to be included in this agreement. The UPC/RP delegation refused to
24 sign.

25 I said earlier, the FNI Lendu delegation -- well, I shouldn't say "FNI" because it did

1 not exist at the time yet, but the Lendu delegation were able to attend this meeting
2 only as a result of Bosco Ntaganda ordering 505 brigade not to target the plane. Yet,
3 as the meeting was taking place, we hear from Thomas Lubanga that UPDF are
4 bombing FPLC units in Ndrele.

5 This marks a turning point, Mr President, between Uganda and UPDF and UPC/RP.
6 It illustrates a willingness of UPC/RP to negotiate, to enter into an agreement with
7 Uganda. It issues respect for orders issued by President Lubanga. It marks the
8 event or the beginning of events leading to the 6 March 2003 conflict in Bunia, which
9 has nothing to do with civilians. It is a straight, political-power conflict with UPDF
10 from that point on becoming de facto -- an enemy of UPC/RP. It confirms the double
11 play of the UPDF pretending to be helping the civilians in and around Bunia and yet
12 attacking civilian positions close to Ndrele. It confirms absence of policy to attack
13 civilians. Absence of Article 7 attack. Absence of discrimination against civilians.
14 It paved a way, this agreement, to FNI attacks against civilians.

15 Next issue: Lubanga's plan to cooperate with the FNI to ensure the departure of the
16 UPDF. Mr President, from that point on, the conflict takes a completely different
17 picture. You have UPDF, you have APC, you have Lendu combatants and you have
18 the central government all of which are taking measure. Why? Because they see
19 that the UPC is effective and is about to really solve the problem and solve the issues
20 in Ituri. And there's a plan to provide weapons to Ugandan rebels. Mr Ntaganda
21 testified that the friends of your enemy are your enemy or something like that, but we
22 know what he meant. That's why weapons were provided. Few people were
23 informed. Some of who were informed but did not acknowledge it when testifying.
24 Now, this plan to ensure the departure of UPDF shows that Lubanga is willing to
25 reach an agreement and to work with the Lendu combatants because his priority is

1 Ituri. It has nothing to do with Lendus or chasing non-Hema. It has to do with
2 ensuring that UPDF, which has created problems, which wants to hang on to its
3 position in Ituri, is the problem. And UPDF has to go. There are agreements in
4 evidence which say that UPDF was supposed to go, but it was refusing to go. But
5 when Museveni from Uganda learned about this, he bombed Kpandroma.
6 This plan to cooperate with the FNI to ensure the departure of UPDF, it confirms that
7 there were no policy to attack civilians. There was no Article 7 attack. There was
8 no discrimination against non-Hema civilians. Bosco Ntaganda was sent to deliver
9 weapons himself to negotiate face to face with Lendu combatants. He did so. He
10 did deliver the weapons in Libi. Is that someone who harbours a discriminatory
11 intent? Not at all, Mr President.

12 Next issue: Witness P-55, described yesterday as a senior military insider, had a
13 conversation over the two-way with Bosco Ntaganda on 2 March 2003.
14 Mr Ntaganda testified he was in Mahagi at the time, which was confirmed by P-55.
15 P-55 was in Bunia along with Kisembo and Rafiki and the purpose of the conversation
16 are corroborated by United Nations or MONUC documents.

17 It is important because that conversation was not mentioned during the
18 examination-in-chief of P-55. He suddenly recollected this conversation. Why?
19 Because he knew very well, Mr President, he knew that Bosco Ntaganda was aware of
20 that conversation. And he recollected the conversation, which establishes where
21 Mr Ntaganda was at the time and it establishes that Kisembo returned to Bunia before
22 Mr Ntaganda did.

23 It establishes that this senior military insider did not speak to Bosco Ntaganda from
24 the time Mr Ntaganda left to Mahagi until he returned to Bunia. It allows to assess
25 the credibility and the reliability of evidence and it corroborates Mr Ntaganda's

Trial Hearing

(Open Session)

ICC-01/04-02/06

1 testimony.

2 In fact, Mr President, I will go as far as to say that this conversation deconstructs - if
3 it's the right English word, I'm not sure, I was looking in the dictionary
4 yesterday - P-55's testimony regarding the events, which took place during the second
5 attack as charged.

6 Next determining issue is that of the absence of knowledge by MONUC
7 representatives and NGOs to a certain extent. They did not have any information in
8 February or early March 2003 regarding alleged crimes committed in Kobu. That's
9 all explained in the Defence closing brief.

10 The Prosecution's suggestion that MONUC learned of these events or of these crimes
11 from Lubanga during a meeting, which is recorded in a video, simply does not walk.
12 Why is it important? Because it is directly related to the testimony of P-55. Directly
13 related to allegations that "everyone" quote/unquote knew about crimes allegedly
14 committed in Kobu. That wasn't the case at all. It is determining because it
15 contradicts P-55. It confirmed that he fabricated his evidence in this regard. It
16 corroborates Mr Ntaganda's testimony and it demonstrates that the Prosecution's
17 theory regarding general knowledge of crimes allegedly committed in Kobu is either
18 false entirely or not supported by the evidence.

19 Last determining factual issue, very shortly I think my colleague will address that in
20 more detail, it is significant, regardless of the fact that 283 persons were authorised to
21 participate as victims in this case as being alleged child soldiers. The fact of the
22 matter remains that the Prosecution attempted to call five of these witnesses and in
23 the five cases, the evidence shows that they were not child soldiers at the time. And
24 that should be the best that there was available, but my colleague will say more on
25 that.

1 Mr President, there are a number of other such determining issues. Events related to
2 César, to Ngwene, to Claude, to the ousting of Lompondo by UPDF, to the fact that
3 Bosco Ntaganda did not kill Abbé Bwanalanga, to the fact that Bosco Ntaganda did
4 travel to Rwanda on 14 to 17 February, that Bosco Ntaganda did deliver weapons to
5 FNI Lendu combatants in Libi, to the fact that Bosco Ntaganda was on mission in the
6 Mahagi area from 21 February until 3 March, that Bosco Ntaganda did fight APC
7 Lendus and UPDF forces together in Mandro on 4 March all day long, that
8 Bosco Ntaganda was in command of the FPLC operations in Mongbwalu in June 2003
9 during which no crimes were committed.

10 All of these are determining issues, but I will move on to the next part of our
11 presentation, which is the contextual elements of Article 7.

12 We haven't heard yesterday, I said that already, about crimes against humanity and
13 the elements. There are three elements pursuant to Article 7: Widespread or
14 systematic attack directed at any civilian population and pursuant to or in furtherance
15 of a state or organisational policy to commit such attack. The existence of an
16 organisational policy is an essential contextual element. Thus, in the absence of an
17 organisational policy, there cannot be a crime against humanity. The case for the
18 Defence, elaborated in detail in our closing brief, is that neither the UPC/RP nor the
19 FPLC had or acted pursuant to or in furtherance of an organisational policy to commit
20 attack against any civilian population.

21 Mr President, I would like to recall in this regard the decision, the confirmation
22 decision in Mbarushimana. It's an interesting decision. When you read this
23 decision, the conclusion was, even though there were -- we can see that there were
24 some Article 8 attack, we come to the conclusion that there were no policy to commit
25 an attack directed against any civilian population, and therefore Mr Mbarushimana

1 will not be tried before this Court.

2 Policy is much bigger, much more important than what the Prosecution -- policy is,
3 that's your *raison d'être*. That's what you do in life, that's what you want, that is
4 your objective. That's not what the evidences reveals, neither for UPC/RP, neither
5 for -- and also for FPLC.

6 Article 7(1) says, pursuant to Article 7(1), however, it is in the text of the essential
7 element a "'policy to commit such attack' requires that the ... organisation actively
8 promote or encourage such an attack ..." This is not what the evidence reveals.
9 Quite to the contrary.

10 Now, not only is the policy important for crimes against humanity, it is also
11 important with respect to the common plan. Common plan is a different concept.
12 But if you don't have the policy to commit attacks directed against any civilian
13 population, then you cannot have a common plan as alleged by the Prosecution.

14 Again, I refer the Chamber to the Mbarushimana confirmation decision. They said
15 because we can't find the policy to launch attacks directed at any civilian population,
16 we cannot find the common plan alleged by the Prosecution.

17 Now, what is interesting, that this is a decision at confirmation stage. The standard
18 at that time is substantial grounds to believe. The Chamber could not even find
19 substantial grounds to believe that there was such a policy. We are at trial. This is
20 beyond reasonable doubt. And when you compare the evidence in both cases, it
21 would be clear cut that the decision must show that there was no such policy.

22 Now, looking at the policy since the beginning of this case there's one comment that is
23 necessary and that is the fact that the Prosecution and the Pre-Trial Chamber did the
24 same, they said UPC, UPC/RP, FPLC, put that all in one bag and that's the same bag.
25 That's not correct, Mr President.

Trial Hearing

(Open Session)

ICC-01/04-02/06

1 UPC was a political movement created in 2000. UPC/RP is the de facto political
2 government or political leader of Bunia starting in September 2002. And FPLC is the
3 official or created military arm of FPLC. And it is important because in order to see
4 whether there was a policy to attack any civilians, it's necessary to look at one
5 common theme and we need to look at the evidence separately to come up with the
6 answer, and that is the Prosecution allegations of propaganda. I mentioned that
7 earlier. That's a common theme and it was mentioned on a number of occasions
8 yesterday.

9 Well, that's not new, we see that all the time. On the one hand evidence of UPC/RP
10 FPLC information or actions which go contrary to the Prosecution's theory is
11 automatically labelled as propaganda. And the Prosecution argues that it is
12 deserving of no weight.

13 On the other hand, evidence of UPC/RP information or actions which tends to
14 support the Prosecution's theory, well, that must be true, Mr President, and this must
15 be deserving of probative value.

16 Mr President, such an approach is neither credible nor worthy of much consideration,
17 in particular in the course of a criminal trial.

18 Propaganda. What is propaganda? The spreading of ideas or rumour for the
19 purpose of helping or injuring an institution, a cause or a person. That's the Webster
20 definition. This definition calls for the following elements: The spreading of ideas,
21 for a purpose, and information which is false.

22 Unless the Prosecution has proved these elements, its propaganda arguments must be
23 disregarded.

24 How do we prove these elements? Does the information or the action really exist?

25 Is it proved? What evidence is there that the information was not true? Witness,

1 documents? Is there any evidence that the information was created for the purpose
2 of achieving an objective? Is there any evidence that the information was
3 disseminated, that we tried to use the information or it was publicized by the
4 organisation?

5 Not only do we not know, for example, using the Mandro video whether this video
6 was used, whether there's any falsity to the information in the video, we have no idea,
7 no information, no evidence that this video was used with anyone. Why was that
8 information not publicized to MONUC or to others? Because it wasn't made for
9 propaganda purposes.

10 Mr President, let me use one example, and I'm about to close on my time for this
11 morning, an example of Prosecution arguments for propaganda which must fail.
12 Pacification efforts of UPC/RP FPLC. Now, these efforts are expressly mentioned in
13 documents. UPC/RP assigns or appoints non-Hema secrétaire national to head the
14 pacification project. There is a programme document created. It's all in evidence.
15 Numerous persons are selected and appointed to be members of the Commission de
16 vérité, paix et réconciliation at all levels. These members are appointed locally, not
17 by UPC/RP, but they are selected by their own communities. That's in evidence.
18 Various CVPR, Commission vérité, paix et réconciliation travel across Ituri. A report
19 and reports of activities of CVPR are produced. The Commission vérité, paix et
20 réconciliation is inaugurated in public in the presence of members of all communities.
21 An official UPC/RP delegation headed by non-Hema secrétaires nationaux negotiates
22 with Lendu chiefs in Ngongo under the guidance of Thomas Lubanga. Following
23 these negotiations concrete actions are taken. A secondary road is opened between
24 Lipri and Bunia allowing free access for all.

25 When an FPLC officer is involved in unauthorised fighting in the area of Lipri he's

1 arrested and he's detained.

2 More importantly, the ultimate achievement of UPC/RP, a peace agreement is signed

3 in Nyankunde involving all communities with the exception of two members of a

4 five-member delegation. All others signed. The purpose was achieved. The

5 strategic objective of UPC/RP was achieved. A press conference is held and

6 Mr Lubanga talks about this peace initiative, talks about this peace agreement.

7 That's not propaganda, Mr President. This is an example of UPC/RP FPLC having

8 concrete objectives, taking action to address these objectives, achieving concrete

9 results and informing the population of the true and concrete results achieved.

10 Prosecution's propaganda argument related to UPC/RP pacification efforts must be

11 disregarded entirely.

12 The same type of argument or analysis can apply to many other arguments by the

13 Prosecution.

14 Now, before we end, I think we have a few minutes, I'll just say in order to look at

15 whether there was a policy, we need to look at a number of things. We need to look

16 at the events, in which chronology the events took place, and we need to look at the

17 UPC, documents, speeches, objectives and actions. We need to look UPC/RP,

18 documents, founding documents, speeches, expression of views, objectives and

19 actions. And we need to look at the FPLC, documents, operational documents,

20 FPLC ideology, including the content of training dispensed to FPLC members, FPLC

21 objectives, adopted and disseminated, operations conducted by FPLC, orders issued

22 to FPLC units and measures taken to prevent or repress the commission of crimes or

23 breaches of discipline.

24 We need to look at all of these events and to understand these events from before the

25 UDCC until later.

Trial Hearing

(Open Session)

ICC-01/04-02/06

1 I believe, Mr President, the time is set for --

2 PRESIDING JUDGE FREMR: [12:58:07] Mr Bourgon, it's not about one minute.

3 You can just find convenient moment for you to break.

4 MR BOURGON: [12:58:14] I think it is convenient because I will look at the evidence
5 related to UPC, UPC/RP and FPLC in the next part of my presentation. I think I
6 have about 15 minutes on this topic and a second speaker will take over from me
7 at a time.

8 PRESIDING JUDGE FREMR: [12:58:30] Okay. So we will break now? Okay, fine.

9 But I have one additional question. You provided with arguments of the Defence
10 that this Mandro video was not made for propaganda. According to Defence, was
11 there then any other purpose of making this video?

12 MR BOURGON: [12:58:49] Absolutely, Mr President. All armies in the world make
13 videos and produce what is called a diary. It's normal practice. You always make
14 videos of all important events and you make a diary. I contributed to the diary of
15 the army of my country and that's absolutely normal to make such videos. This is
16 for the posterity of the armed movement.

17 PRESIDING JUDGE FREMR: [12:59:16] Clear answer. Thank you.

18 So we will break now and we take other regular break for 90 minutes, which means
19 that we will reconvene at half past 2.

20 THE COURT USHER: [12:59:29] All rise.

21 (Recess taken at 12.59 p.m.)

22 (Upon resuming in open session at 2.30 p.m.)

23 THE COURT USHER: [14:30:33] All rise.

24 Please be seated.

25 PRESIDING JUDGE FREMR: [14:31:06] Good afternoon, everybody.

1 The afternoon session will give the Defence further opportunity to present, in fact, the
2 second part of its closing statement.

3 So now, Mr Bourgon, you have the floor.

4 MR BOURGON: [14:31:24] Thank you, Mr President.

5 Mr President, when we left before the lunch break I was suggesting to the Chamber
6 the evidence which should be looked at in order to determine that there was an
7 absence of policy to commit attacks directed against any civilian population.

8 What I propose to do over the next few minutes is to go over the evidence related to
9 UPC, UPC/RP and FPLC.

10 Mr President, it is necessary to examine the context in which the UPC political
11 movement was created. It was created in September 2000 while RCD-K/ML was in
12 power. An ethnic conflict had been ongoing since 1999. The basis of the conflict,
13 we can say, opposed members of the Lendu community to members of the Hema
14 community for reasons that are akin to what happened in Rwanda, but the situation
15 there was much more complex with many additional ethnic groups included.

16 Within the population there were a lot of violence between villages from various
17 communities. The APC, the military arm of the RCD-K/ML, did try to put an end to
18 that conflict from the moment they arrived in Bunia. At the beginning they were
19 impartial and they did have good intentions.

20 The evidence reveals, however, that as of 2000, at best, the RCD-K/ML was unable to
21 stop violence of civilians against civilians; at worse, the RCD-K/ML was in fact taking
22 sides with one part of the community, namely, the Lendu community.

23 In this context, in September 2000, the UPC was created. We have a founding
24 document which establishes, of course, that the absence of any policy within the FPLC
25 to commit crimes or attacks directed at the civilian population. This document

1 establishes, for example, at Article 5 that the aim of the UPC as a political movement
2 was to put an end to exclusion and intolerance. It was to rehabilitate the people in
3 all of its rights.

4 Looking at Article 6, it made clear that Article 6 says that every member of the
5 Congolese population, all Congolese, can be members of the UPC. And that is an
6 important consideration.

7 Moving on to 2002, on 17 April. There was another document important and it is
8 referred to in English as a "managerial staff declaration." Managerial staff means
9 notables. I disagree or I don't like managerial staff as a translation. Notables means
10 those who were notable and who were not in the RCD-K/ML. The notables included
11 not only Hema, but also members from other ethnic groups.

12 Now this is not a UPC document per se, but many signatories to this document also
13 signed UPC-founding documents.

14 So what happened between September of 2000 and April of 2002? Well, there were
15 many developments. What is known, however, is that the situation deteriorated
16 significantly. The importance of this document is huge, because it addresses the
17 concept of Kivu holding. What is Kivu holding concept?

18 Ituri notables complain that all important positions in the administration were given
19 to people coming from the Kivus, as opposed to Iturians. That was the problem and
20 that was the complaint of the notables in this document.

21 This document has nothing to do with chasing non-originares. The concept
22 advanced by the Prosecution as part of its common plan against non-originares does
23 not deal with the civilian population. It is a political concept, whereas people were
24 holding people and Iturians, not only Hema, but Iturians in general wanted to rule
25 and say "l'Ituri aux Iturians", that was the concept. Not to do with the civilians or

1 targeted at civilians.

2 Looking this document, we see at paragraph 5 that the notables are asking soldiers to
3 keep calm. When they are referring to soldiers they are referring not to soldiers of
4 Thomas Lubanga or not to soldiers that are Hema. They are talking about our
5 glorious soldiers, FAZ, FAC and APC, who are left to their sad fate by the
6 discriminatory politics of RCD-K/ML. That's what the soldiers that are referred to in
7 this document.

8 Now, although notables want to ensure that Iturians would get those positions in the
9 administration, they are open and they welcome everyone in Ituri. This is what you
10 see in Article 6 where it is said, and I quote: "Let us reassure our Congolese brothers
11 and ex-patriots living in Ituri of our legendary hospitality and assuring them peace
12 and security."

13 The Kivu holding concept has nothing to do again with violence against civilians.
14 Moving on to a document of 16 May 2002. Following this political declaration
15 a movement called FRP, Front pour la Réconciliation et la Paix, was created by these
16 same notables of Ituri. This memorandum also reveals the absence of a policy to
17 commit crimes against any civilian population.

18 Thomas Lubanga is not the leader of this FRP movement at that time and this
19 significantly happens very shortly after the death of Claude, after the separation of
20 Bunia in two parts and after the meeting sponsored by Uganda and UDPF in Kasese,
21 all of which are referred to in the evidence.

22 Now, the conclusion of this document by FRP announces the following aim: To
23 achieve reconciliation between Iturians, to establish a dialogue with Kinshasa, aiming
24 at national reconciliation. This document demonstrates the opposite and it focuses
25 on the problems which had been created by Mbusa and the need for reconciliation.

1 As we know, Mr President, following this document, in August of 2002, the
2 Lompondo political movement, who was the governor and the military sector
3 commander, were chased from Bunia by UPDF. And the context of this chasing is
4 known.

5 Members of the FRP present in Bunia at the time, I'm talking about following
6 Lompondo's departure, began to fill the political vacuum, because when Lompondo
7 departed, of course, there were no more people in power. We do have a reference to
8 the vice governor, who actually was working with the people who remained behind.
9 As the evidence reveals, Thomas Lubanga is not in Bunia at the time, he is in Kinshasa.
10 Why? Because he has been detained there or placed on house arrest with other
11 members of FRP by the central government. With whom? With the collaboration
12 of the Ugandan government.

13 This document on 11 August 2002 is important because it establishes also the absence
14 of a policy to commit any attacks directed at the civilian population.

15 If we look at the conclusion of this document dated 11 August, it talks about the
16 implementation of a structure. For what purpose? For the purpose of ensuring
17 pacification and reconstruction of Ituri and for the purpose of working with Kinshasa.
18 This declaration establishes reconstruction and pacification and does not establish any
19 kind of policy to direct attacks against any civilian population.

20 In less than a month later, Thomas Lubanga did return to Bunia, along with the DRC
21 minister of human rights, I believe, Ntumba Luaba. On the day of their arrival in
22 Bunia, both of them addressed the population.

23 Let's look together at an extract of Thomas Lubanga's speech on that occasion. The
24 slide before you has the text in English, which is a translation done by the Defence,
25 but let's look together at the video.

1 (Viewing of the video excerpt)

2 MR BOURGON: [14:44:12] Thomas Lubanga, who went on to become the president
3 of UPC/RP, his speech establishes an absence of a policy to commit crimes against any
4 civilian population. Quite to the contrary, his statement aims at putting an end to
5 the cycle of violence and at protecting the civilian population.

6 Moving on to UPC/RP itself. All of the preceding information was related to UPC.

7 Now we look at the de facto political body created. It was the ruling political
8 movement in Bunia. The document reflecting the composition of UPC/RP executive
9 is highly relevant. It demonstrates the multi-ethnic composition of the executive,
10 putting in place an effective administrative structure.

11 The evidence reveals, Mr President, that non-Hema secrétaires nationaux were truly
12 empowered by UPC/RP and Thomas Lubanga to accomplish and to rule and to run
13 this effective administration.

14 In light of this document and in light of other documents, moving on to the strategic
15 objective of the UPC/RP, well, we say that the UPC/Réconciliation et Paix had the
16 following objective, which stems from the evidence:

17 One, peace and reconciliation.

18 Two, putting an end to the cycle of violence in Ituri.

19 Three, ensuring a true and effective dialogue with Kinshasa.

20 Fighting intolerance and exclusion, thereby ensuring rehabilitation of all Congolese
21 people in their rights.

22 Creating an effective governmental administration.

23 And creating a national army capable of protecting the people and defending the
24 territorial integrity of Ituri.

25 The Prosecution attaches great importance to the word "national". We urge

1 the Chamber to take the opposite view. Why do they use the word "national"? It is
2 the same reason for which they refer to secrétaires nationaux rather than ministers.
3 Ministers were for the national government. Secrétaires nationaux were for Ituri,
4 and yes, they wanted to create a military arm. And it is significant that why they did
5 so? Chef Kahwa clearly explained why they felt the need to do so in the speech he
6 delivered later in Mandro.

7 Moving on to the absence of a policy in respect of the first attack as charged.

8 In early November UPC/RP called upon the FPLC, its military arm, to conduct an
9 operation in Mongbwalu. From the orders given to Mr Ntaganda, the following
10 political objectives of this operation can be summarised as follows:

11 One, to liberate the people of Mongbwalu. There is plenty of evidence on the record
12 which highlights the mistreatment of the population in Mongbwalu, the majority of
13 which was, according to the Prosecution, Lendu. That was in line with UPC/RP
14 objectives and that was one of the aims of the operation.

15 And two, of course, to try and move away the APC because they did not want the
16 APC to be able to come back to Bunia and to hurt the civilian population.

17 Significantly, Mr President, following the liberation of Mongbwalu, civilians returned
18 living in Mongbwalu, and amongst the civilians who returned, there were Lendus.

19 I move on, Mr President, to December, which is the meeting in Arua. Now the
20 objective of that meeting was to negotiate with Lendu chiefs and, as mentioned before,
21 the UPC/RP delegation was headed by a non-Hema secrétaire national, Djalum
22 Jéconie. It displays the willingness to meet with the Lendus, the willingness to
23 negotiate with Lendus, and the measures taken to ensure that the Lendu chiefs could
24 attend this meeting.

25 The orders issued to Bosco Ntaganda and then from Bosco Ntaganda to the FPLC to

1 ensure that this could take place are significant.

2 Moving on to 1 January, Mr President, UPC/RP held a large event in Bunia inviting all
3 representatives from all communities, including MONUC and UPDF, to attend
4 a swearing-in ceremony of new secrétaires nationaux and, of course, holding
5 festivities for the new year. On that occasion, Thomas Lubanga delivered a speech
6 which demonstrates the absence of a policy to commit any attacks against any civilian
7 population.

8 Quite to the contrary, Mr President, this speech delivered by Thomas Lubanga
9 focuses on one thing, it focuses on bringing all communities to one table. And it is
10 not speech without action. Les babines ont suivi les bottines ou les bottines ont suivi
11 les babines. There were actions taken which led to the signing of a peace agreement.

12 Moving on to 13 January, UPC/RP organised the official launch of the Commission
13 vérité, paix et réconciliation. I have addressed this event already. What is
14 significant is that the members of the CVPR were not selected by UPC/RP but within
15 their own local communities. We have documents in evidence that show the
16 members not being selected by UPC/RP. This event defeats any suggestion of
17 a policy to commit crimes against any civilian population.

18 I move to a very important event, mentioned this morning also, but it is necessary to
19 look at a video. The Ngongo pacification meeting or negotiations. On 14 January,
20 a delegation headed by three non-Hema secrétaires nationaux took part in
21 negotiations with Lendu FNI leaders in Ngongo. Let's take a look, Mr President, at
22 a video recorded on that day, involving Tinanzabo, secrétaire national à la
23 pacification et réconciliation, who is also, as the Chamber is well aware, non-Hema.
24 (Viewing of the video excerpt)

25 MR BOURGON: [14:53:30] As mentioned, Mr President, a result of this negotiation,

1 a secondary route was opened from Lipri to Bunia, allowing civilians to circulate
2 freely between the town and these villages. This video further defeats any
3 suggestion that UPC/RP had a policy to commit crimes against any civilian
4 population. The opposite is a reality.

5 On 23 January, a meeting with Ugandan delegation took place in Bunia. The aim
6 was to take Thomas Lubanga to Uganda because Uganda was worried that the
7 UPC/RP was making too much progress. It is a two-part event. Thomas Lubanga
8 wanted Ugandan representatives, an official delegation, including the son of
9 Museveni, to get a feel for what the population's opinion was regarding the presence
10 of UPDF in Bunia.

11 The notables voted departure of UPDF. That's in evidence. The notables included
12 notables not only from Hema but from all communities. The population in the
13 second part of the meeting clearly expressed the view that UPDF should go.

14 There is a link between this event, Mr President, and Thomas Lubanga's plan to
15 provide weapons to Lendu combatants. Thomas Lubanga wanted the UPDF to
16 leave through political action, but of course he was also willing to negotiate and
17 collaborate with Lendu combatants to ensure that they would go.

18 UPDF was a source of discontent, paving the way for violence against the population.
19 I said the son, I made a mistake, Mr President, it's more the younger brother of
20 Museveni, Salim Saleh, who was a general in the Ugandan army, who was part of that
21 delegation.

22 I move, Mr President, to RCD/Goma's visit to Bunia. Now, this is the most
23 significant accomplishment of the UPC/RP. On 6 to 8 February, following the
24 signing of a political alliance, signed in Goma, a visit had four different aspects to it:
25 The arrival of the delegation; public speeches by Lubanga and Onusumba, who was

1 the leader of RCD/Goma; the signing of a peace agreement during a visit in
2 Nyankunde; and the press conference. I invite you, Mr President, to take a look at
3 an extract of the press conference and this is Thomas Lubanga addressing the media.
4 (Viewing of the video excerpt)

5 MR BOURGON: [14:57:26] As you can see from this video, Mr President,
6 Mr Ntaganda was present during that press conference. Mr Ntaganda was involved
7 in all of these peace initiative along with Thomas Lubanga. This agreement was
8 a success and a concrete achievement. Nothing in this video or these events
9 highlights a policy to commit crimes against any civilian population.

10 To the contrary, it highlights UPC/RP's strategic objectives to sign, and success to sign
11 an agreement with all communities.

12 Mr President, as we know, on 6 March, a little soon thereafter, UPC/RP was ousted
13 from Bunia. Thomas Lubanga fled to Goma, leaving behind only a few members of
14 the UPC/RP executive.

15 People left behind. Nonetheless, during that time frame, many things happened.

16 First, as we know, many people left. There was a massive exodus of people because
17 they knew that UPDF could not protect them, could not ensure their security.

18 A second, the Commission de pacification de l'Ituri held its works during that time.

19 Well, despite the fact that UPC/RP had been ousted, they nonetheless participated in
20 the CPI work and they signed the final document of the Commission de pacification
21 de l'Ituri.

22 What is significant is that during that time period Bunia and the surrounding areas
23 became free territory for FNI attacks of all sorts. I recall just one attack that is

24 referred to in the evidence in Drodro. A major massacre. Nothing compared to

25 other events involving, the alleged events involving Hema. A major massacre, one

1 of the major, with many, many people killed.

2 It is amazing to me to see the Prosecution and the Legal Representative blaming

3 UPC/RP for everything that went on when really the situation, one, was much more

4 complex, and crimes were not committed by UPC/RP, but by others. It's not a

5 tu quoque argument at all. It's simply looking at the complexity of the situation at

6 the time.

7 In early June, Thomas Lubanga returned to Bunia. In a speech to the population he

8 addressed the security problem. Nothing in this speech comes even close to

9 demonstrating a policy to direct attacks against any civilian population. Quite to the

10 contrary, it demonstrates UPC/RP intent to restore stability and security in Bunia.

11 Lastly, with respect to UPC/RP, we can look at the June to December 2003 period,

12 arrival of Artémis, departure of FPLC from Bunia at the request of Artémis, numerous

13 attacks launched by FNI during that time frame. And what does Lubanga do? He

14 imposes restraint on FPLC troops.

15 Again, absence of policy to attack any civilian population. And this, even though

16 Hema villages with Hema majority are the victims of large massacres and attack. To

17 name but one, the situation which happened in Nizi.

18 Mr President, I move to FPLC.

19 FPLC, looking at these issues will allow or should allow the Trial Chamber to

20 determine the absence of a policy to commit any attacks against any civilian

21 population.

22 I will look at each of those very quickly. The first one, the training of future FPLC

23 members in Mandro. Training in Mandro was conducted for self-defence purposes.

24 The training in Mandro did lead to the creation of the FPLC. The training was based

25 on what? On the raison d'être of the military to protect all civilians.

1 This stems from the evidence and from Mr Ntaganda's testimony, but not only from
2 Mr Ntaganda's testimony. The training was conducted pursuant to military
3 organisation.

4 Is that wrong? No, that's not wrong. This is what Mr Ntaganda was good at.

5 Mr Kisembo would tell him what to do and he would do it. And we have the
6 organisational chart of the Mandro training in evidence.

7 The evidence establishes that the training in Mandro -- or nothing in the training in
8 Mandro demonstrates a policy to attack any civilian population.

9 Ideology training. Well, we know that there was ideology training in Mandro and
10 Bosco Ntaganda explained what this ideology was, but when Lompondo was ousted
11 in August 2002, many former APC members joined UPC. And Bosco Ntaganda and
12 Kisembo and others wanted to ensure, if we are going to get APC members on board,
13 those APC members who have lost their bearings and who are committing attacks
14 against the civilian population, they will at first go through ideology training in
15 Mandro. This is what happened.

16 The official creation of the FPLC is significant. It was the official military arm or
17 armed branch of the UPC/RP. There was an official appointment by a civilian
18 governmental body de facto, appointment of one chef d'état-major général and two
19 chefs d'état-major général adjoints. The organisation followed a genuine military
20 structure, including a chain of command.

21 Now, even though the structure was like a normal army, this was still a rebel group.
22 This was still a group without resources, but the intent, the intent was there to create
23 a good army with a chain of command. And numerous measures were taken by
24 FPLC and UPC/RP together.

25 What are those measures? FPLC ideology. Heavy weapons training. If you give

1 a heavy weapon, if you give a B-10 to someone who doesn't know how to operate the
2 B-10, it will be a carnage either for his own troop, but more likely for the target.
3 They insisted on training people on those heavy weapons so that they could be used
4 properly.
5 They obtained uniforms. That's the basic international humanitarian law, to be able
6 to distinguish yourself from the civilian population. If you have a uniform, then you
7 can distinguish yourself. That means that you can trust that your soldiers will be
8 known and will operate pursuant to the chain of command and orders.
9 Implementation of communication. They had no resources. They had to go to
10 P-243 to get VHF base, la base. They to go through a civilian to ensure that they
11 could speak on the radio over longer distances. But why? Because they want to try
12 and ensure the best possible chain of command in the circumstances.
13 Then we have the exchange of troops.
14 It was important to get the troops from Jérôme. This expanded the territory that
15 would be covered by the military arm of UPC/RP. It was important to expand, to
16 ensure that they could protect the population, not only in Bunia, but in other areas.
17 But to ensure that it is well done, say, "Jérôme, you are going to send me 300 of your
18 troops of a different ethnic origin, I'm going to send you 300 of mine. You don't
19 have weapons. I will send my troops with weapons, you send your troops without
20 weapons. And then Bosco Ntaganda will travel there to ensure that everything is,
21 the glue to everything is put together to ensure proper conduct of operation".
22 And lastly, of course, the directives issued by UPC/RP executive directly to the
23 soldiers.
24 The only negative side to this, Thomas Lubanga should have addressed the soldiers
25 himself. But he did in Rwampara. On that day, where was he? I don't know.

1 But he entrusted Chef Kahwa to do so.

2 FPLC ideology, we have covered before, but that is in evidence. I will move on.

3 The Chef Kahwa's speech in Mandro. We talked many times. I invite you,

4 Mr President, to take a look at his speech in Mandro. We have an English translation

5 on the screen and we will see the original in the video.

6 (Viewing of the video excerpt)

7 MR BOURGON: [15:09:17] Not necessary, Mr President, to repeat that the troops

8 addressed by Chef Kahwa on this occasion are the troops that went on to participate

9 in the FPLC operations with Agnès (phon), there were two of those, two attempts in

10 Mongbwalu, as revealed by the evidence. It is significant that in its brief

11 the Prosecution alleges that these two attempts were separated by a long period,

12 which is absolutely not the case pursuant to the evidence.

13 And I move on to the contextual attacks as alleged by the Prosecution. We have to

14 look at those too. There are six of them. Four before the first attack as charged and

15 two after the second attack as charged.

16 First of all, the Prosecution's submissions are wholly incomplete. Can we use those

17 two words together? I'm not sure. But they are incomplete. Contextual attacks by

18 the Prosecution represent an incomplete overview of all operations.

19 The Prosecution does not address in its submissions what happened in Loga pursuant

20 to the testimony of D-17. What happened to Komanda, testimony of Mr Ntaganda

21 and D-17. Lendu combatants attack on Nyankunde against FPLC. That was also

22 involving. That's when Kisémbu was injured. Kandoyi and other FPLC operations

23 in the north-east operational sector. Not a word about that. FPLC operations

24 conducted after the first attack and before the second attack. UPDF attack against

25 the FPLC following the 6 March fighting in 2003. FPLC third operation in

1 Mongbwalu in June during which no crimes were committed by FPLC and little, if
2 any, evidence has been adduced by the Prosecution. Restraint manifested by FPLC
3 following the arrival of Artémis, despite multiple attacks launched by FNI. When
4 you look at all these operations you cannot look at the six contextual attacks and draw
5 any conclusions without looking at also those attacks.

6 Now, it is significant that the logbook as mentioned this morning gives you the
7 complete picture, the true picture of the conduct of operations between 19 November
8 and 22 February. The logbooks clearly establish the absence of a policy to commit
9 attacks.

10 Regarding the four attacks prior to the -- the first contextual attack before the first
11 attack as charged. There is very little incriminating evidence adduced by
12 the Prosecution. And Prosecution evidence is directly contradicted by Defence
13 reliable evidence.

14 We have to look for these attacks at P-34, P-14, but they were not involved. At P-989
15 and P-888, we say their evidence is wholly unreliable, as is that of P-907. It is simply
16 not possible to derive the existence of an FPLC policy to attack any civilian
17 population from the evidence available in relation to these attacks.

18 Prosecution also ignores the testimony of Mr Ntaganda who explained what he did
19 immediately after Lompondo left, all the forces that were deployed on the orders of
20 Kisembo. And why? To prevent the APC or others to attack Bunia.

21 Regarding the two alleged contextual attacks after the second attack as charged, again,
22 very little direct incriminating evidence. And, again, the Prosecution evidence is
23 directly contradicted by Defence reliable evidence.

24 Now, on 6 March the FPLC attacked UPDF. I remember the Trial Chamber asking,
25 "Well, who attacked?" Well, Mr Ntaganda explained, "We did". He did not walk

1 back, he did not try to say that UPDF had attacked. He said "We did". Why?

2 Because they could not -- they were not up to par, they could not face UPDF other

3 than in a surprise operation. And they did attack, but no crimes were committed.

4 If crimes were committed on that day, the crimes were committed by FNI, as the

5 evidence reveals.

6 From the departure of UPDF on 6 May 2003, this is the second one, it's FNI who

7 committed all kinds of crimes and all kinds of attacks directed at any civilian

8 population. The involvement of FPLC was limited to liberating Bunia on 12 and

9 13 May. It cannot be derived that there was an FPLC policy to attack any civilian

10 population even from these two attacks, either considered individually or collectively.

11 Conclusion, Mr President, when we look at the training in Mandro, we look at the

12 ideology of former APC members. We look for ideology training. We look at the

13 measures to ensure that FPLC will be a law-abiding and disciplined military force,

14 including all the numerous measures to prevent taken by Mr Ntaganda, as recognised

15 by the Prosecution. We look at the conduct of FPLC operations as revealed by

16 Ntaganda logbook. We look at the June 2003 FPLC operation in Mongbwalu where

17 no crimes were committed.

18 We look at the restraint demonstrated by FPLC after the arrival of Artémis. When

19 we look at all of that, it is evident, Mr President, that neither the UPC/RP nor the

20 FPLC had or acted pursuant to or in furtherance of a policy to commit attacks against

21 any civilian population.

22 Consequently, it is not necessary to look at the other essential elements related to

23 crimes against humanity and Bosco Ntaganda must be acquitted of counts 1, 3, 4, 5, 10

24 and 12.

25 Now, the relationship as introduced earlier with respect to the absence of a policy to

1 direct attacks against any civilian population and the alleged common plan, as was
2 done in Mbarushimana, we say that the absence of a UPC/RP or FPLC policy to
3 commit attacks directed against any civilian population also defeats the Prosecution
4 allegation that a common plan to drive out members of the non-Hema population,
5 Lendu and non-originares, according to the Prosecution, from the areas they took
6 over.

7 In Mbarushimana, this is what the Chamber -- the Pre-Trial Chamber said:

8 "... the Chamber ... recalls the finding made in the context of the analysis of the
9 contextual elements of crimes against humanity, namely that in light of the analysis of
10 the evidence as a whole, the Majority is unable to be satisfied to the threshold of
11 substantial grounds to believe that the FDLR pursued the policy of attacking the
12 civilian population. This finding leads the Majority to take the view that, based on
13 the analysis of the evidence as a whole, there are likewise not substantial grounds to
14 believe that the FDLR leadership constituted 'a group of persons acting with a
15 common purpose' within the meaning of Article 25(3)(d) of the Statute, in particular
16 in light of the requirement that the common purpose pursued by the group must have
17 at least an element of criminality."

18 Now for the record, and in ending, Mr President, I will say when we look at the FDLR,
19 Mr Ntaganda on the internet, despite his reputation, is a child compared to what the
20 internet says the FDLR would have done in the area. And yet, this was the result of
21 the evidence and we say the same result should be adopted or should be found by
22 the Chamber.

23 We move to the legal consequences of the absence of a common plan to drive out
24 members of the non-Hema population from the areas, which will now be addressed
25 by my colleague, Christopher Gosnell.

1 Thank you, Mr President, unless you have questions from my presentation?

2 PRESIDING JUDGE FREMR: [15:19:43] I don't have any question at the moment. I
3 thank you very much, Mr Bourgon.

4 MR BOURGON: [15:19:48] Thank you, Mr President.

5 I need to ask for the floor to be given to the external computer on the other side, so
6 that they can operate the PowerPoint.

7 PRESIDING JUDGE FREMR: [15:19:59] Court officer, please assist.

8 THE COURT OFFICER: [15:20:24] You do have the floor.

9 PRESIDING JUDGE FREMR: [15:20:26] Mr Gosnell, please.

10 MR GOSNELL: [15:20:28] Thank you, Mr President. Good afternoon,
11 your Honours.

12 Before eventually coming on to the issue of the Prosecution's evidence in respect of
13 child soldiers, it falls to me, as foreshadowed by my colleague Maître Bourgon, to
14 address you on some legal issues, and three legal issues, in fact, that we consider to be
15 particularly important in guiding and governing your analysis of the very extensive
16 and complex evidence in this case. And those three issues are, first, the standard
17 and burden of proof; the findings necessary to enter a conviction for the extended
18 forms of commission under Article 25(3)(a); and the scope of the charges on which
19 you can properly enter a conviction under Article 74(2).

20 Your Honours, we all know and it scarcely bears repeating that the burden in
21 a criminal case rests on the Prosecution to prove beyond a reasonable doubt and that
22 burden and that standard applies to each and every element of the crime and mode of
23 liability with which the accused is charged in the UDCC.

24 When inferences are based on circumstantial evidence, that is a body of disparate
25 pieces of evidence that purportedly should lead you to a particular conclusion, that

1 inference must be the only reasonable inference available. Not just one of several
2 and not even the most likely or most reasonable. It must be the only reasonable
3 inference available.

4 And this standard means that an individual who is likely guilty, or even probably
5 guilty, must be found not guilty in the eyes of the law. That's the nature of the value
6 that this justice system places on individual liberty and on ensuring that no one is
7 wrongly convicted.

8 On the screen in front of you, you see the statement from the Bemba appeals
9 judgment that the standard -- if we can go back one screen, please -- that the standard
10 applies to those facts that correspond to the elements of the crime and mode of
11 liability. And in this case that includes the age of any alleged child soldier; that
12 includes whether or not the alleged child soldier was actually enlisted; that includes
13 whether or not an alleged child soldiers was used; that includes whether or not there
14 is a widespread or systematic attack against a civilian population and it applies to
15 each and every one of the intent and knowledge elements for each and every crime
16 and mode of liability charged against Mr Ntaganda.

17 We say that's important to bear in mind and easy to forget, especially when
18 confronted with submissions concerning the continuous nature of crimes, the
19 collective nature of crimes, the fact that they were repeated, pleadings that were very
20 general in terms of geographic scope and temporal scope. But at the end of the day,
21 what must be remembered is that indeed the standard applies to each and every
22 element of the crimes charged.

23 What is reasonable doubt? Answering that question is a little bit like trying to
24 describe the colour blue, you know it when you see it but it is not very easy to put
25 into words.

1 Your Honours, but it is nevertheless useful to pause for a moment and consider the
2 extraordinary context in which you are called upon to make this assessment. Almost
3 none of us in this room have any intimate knowledge of Congolese society, almost
4 none of us speak the language of most of the witnesses, almost none of us are so
5 immersed in the culture or customs from which those witnesses came to be able to
6 distinguish on some occasions between something that was normal and something
7 that was preposterous.

8 And the exercise that is demanded of your Honours is far removed from the
9 cornerstone of a fair trial in many countries, where there is a right to be tried by a jury
10 of one's peers. In other words, those from the community in which the crimes are
11 alleged to have taken place and who presumptively are the ones who are best placed
12 to assess complex issues and subtle issues like credibility, like plausibility.

13 We need only imagine what it would be like if we were alleged to have committed a
14 crime in our own countries and we were then taken away, removed from our country,
15 removed from our language, our native language, and put on trial before judges who
16 don't speak our language and don't speak the language of most of the witnesses.

17 And to imagine all of the contextual factors that we would see, that we would
18 understand, that we would know because we grew up in the society, because we
19 speak the language that we know or at least suspect or believe that the judges might
20 have a very difficult -- and the lawyers for that matter -- might have a very difficult
21 time accessing and understanding.

22 Now, Mr President, we have faith that your Honours can nevertheless do that. Not
23 least because of your collective experience in the unique setting of international
24 justice. And yet not infrequently over the last three years, I suspect that you have
25 shared, at least my own puzzlement on occasions about exchanges with witnesses

1 and whether what I was listening to was an outright shocking lie or something that
2 was just based on an innocent misunderstanding. Whether it was something
3 entirely implausible or just a reflection of a context that I could not understand or
4 empathise with as so inconsistent with previous statements that you couldn't help but
5 come to the conclusion that the witness was lying or whether or not it was something
6 as innocent as an interpretation error.

7 Now, of course, the purpose of this discussion is not to say that the outcome of any
8 international criminal trial should be an acquittal or that we should just throw up our
9 hands and walk away from international justice. But the purpose of this discussion
10 is to remind ourselves of the many unknowns that exist in international trials that
11 simply do not exist in domestic cases. And those unknowns permeate this case,
12 whether it comes to weighing the plausibility of a witness's narrative; assessing the
13 likelihood that a contradiction was an indication of lying as opposed to an innocent
14 mistake; assessing the age of a person based on physical appearance; evaluating the
15 likelihood of contamination or collusion amongst witnesses; weighing the extent that
16 ethnic animus might influence testimony and weighing the testimony of
17 Mr Ntaganda himself, such as was brought up this morning with the suggestion that
18 he asked for clarifications too many times and the inferences that should be drawn
19 from that.

20 And we say that, in respect of all of these issues, which all involve unknowns, and
21 more, eliminating reasonable doubt must be approached with an awareness of those
22 unknowns. And those unknowns affect one other dimension of your reasoning,
23 which is seldom referred to but extremely vital to your analysis and that is, what kind
24 of evidence do you expect to be brought to the Court in order to establish proof
25 beyond reasonable doubt? This is something that I suspect, I have never been

1 a judge, I have worked with judges and I suspect that this is something that judges
2 come to learn based upon long experience of many cases in the courtroom. You
3 know what kind of evidence should be available. You know when the evidence that
4 should be available is not presented and you do necessarily draw inferences from the
5 non-presentation of that evidence, unless there is a good explanation for it.

6 Mr President, to be clear, the Defence bears no burden whatsoever. If there is any
7 burden whatsoever, it is to show only that there is reasonable doubt in
8 the Prosecution case and that the Prosecution has not met its burden. This burden is
9 terribly easy to, that's very easy for me to say, but it is also very easy to misapply.

10 As is the Prosecution's criticism of the Defence at, for example, paragraphs 42, 56, 71
11 of their response brief in which they criticise the Defence for relying on Prosecution
12 witnesses in part who are otherwise suggested as being unreliable or untruthful.

13 But, Mr President, the Defence is entitled to do that and it's entitled to do that without
14 explanation. This is the case because the testimony of a Prosecution witness that is
15 otherwise unreliable or untruthful can still raise doubt about the Prosecution case,
16 especially when the Prosecution itself continues to rely on the reliability of the
17 entirety of that witness's testimony.

18 The same is not true, however, when the Prosecution tries to pick or choose or
19 suggest that one of its own witnesses either lied or was unreliable in part. Given the
20 burden of proof, it's up to the Prosecution to provide an explanation to your Honours
21 as to why you should be able to rely on some part of a witness that even
22 the Prosecution says, in part, was either a liar or untruthful.

23 Now, I must say that the Prosecution has almost never done this at all, because in the
24 end it appears that the Prosecution takes the view that each and every one of its
25 witnesses, even Witness P-10, was truthful in their entirety. Not a single witness

1 presented by the Prosecution whom the Prosecution says was unreliable in any
2 degree.

3 Other examples of the reversal of the burden of proof in the Prosecution's
4 submissions is its suggestion that the anonymity of the sources relied on by P-315
5 during her testimony, her failure to disclose, should be disregarded because, quote,
6 "the Defence did not seek to compel P-315 to provide them." Unquote, paragraph 98
7 of their response.

8 The assertion that the Defence had presented, quote "no reliable evidence that the
9 absence of logbook messages meant that Ntaganda's phone was switched off or not
10 plugged in". Response paragraph 106.

11 Asserting at paragraph 166 that the Defence had, quote, "conceded" unquote that
12 P-898 had been enlisted in the FPLC by noting his testimony at paragraph 579 of the
13 Defence brief about what he purportedly saw. So even when the Defence says that it
14 is only purportedly, this apparently is to be used against us as a concession.

15 Asserting at paragraph 179 of the Prosecution's response brief that the Defence has
16 conceded that 50 individuals mentioned in one of the documents of P-46 were under
17 15, whereas it is crystal clear from that analysis that the Defence's position is that that
18 is merely taking the Prosecution evidence at its highest.

19 And yesterday's claim that the purportedly late notice of an alibi, which we reject,
20 incidentally, Mr President, that that late notice, quote, "is a basis for your Honours to
21 infer recent fabrication," unquote, by Mr Ntaganda. And that was at page 30.

22 All the foregoing suggestions to your Honours of reasoning that you should follow
23 are based on either the stated or unstated premise that the Defence bears a burden,
24 but it does not.

25 Now, Mr President, we come to the second issue, which is the proper interpretation

1 and elements of the extended forms of commission under Article 25(3)(a) that have
2 provoked some discussion between the parties in their submissions and yesterday.

3 The UDCC alleges that Mr Ntaganda committed all the crimes listed therein through
4 a common plan to which he agreed and which he participated with other persons.

5 In fact, that's at paragraph 1 of the UDCC.

6 Now, as you can see, and I'm sure your Honours are terribly familiar with this
7 paragraph, this alleged common plan mixes criminal and noncriminal elements.

8 And of course there is nothing wrong with that, that is permissible. The Prosecution

9 can refer to ulterior objectives of a common plan if it wishes. But we nevertheless

10 should be clear, and it's not always clear in some of the submissions we have heard,

11 that assuming military and political control of a region of territory, even through

12 force, is not an international crime. Expelling civilians is an international crime, and

13 using murder, rape, sexual slavery and other international crimes for that purpose or

14 for any purpose at all are also international crimes.

15 Now, Article 25(3)(a) says, quote, "a person shall be criminally responsible and liable

16 for punishment for a crime within the jurisdiction of the Court if that person commits

17 such a crime, whether as an individual, jointly with another or through another

18 person".

19 25(3)(a) therefore extends commission liability beyond the situation where the

20 perpetrator acts on his or her own, as when a person swings a machete to execute

21 a person, to situations of acting jointly with another or through another person, such

22 as swinging a machete together with another person or getting another person to

23 swing that machete.

24 Do these extensions of the physical manner of committing a crime that are set out in

25 25(3)(a) modify or change the mens rea of commission? No.

1 Article 25(3)(a) says nothing about mens rea. Article 25(3)(a) does not set different
2 levels of mens rea for any of these forms of commission, which means that
3 Article 30(2) and Article 30(3) apply equally to all three forms of commission set out
4 in Article 25(3)(a).

5 We hope, Mr President, that that much, at least in that far, we are in common
6 agreement with the Prosecution.

7 The issue becomes difficult and is difficult to analyse because it is relatively easy to
8 discern criminal intent when a person swings a machete to decapitate someone, as
9 opposed to people who have more remote connections to the act itself. In other
10 words, when the alleged co-perpetrators' contribution is removed from the crime.

11 And, by the way, let's remember what mens rea means. Mens rea is not a general
12 disposition, it is not about your character, it is not about whether you are a good or
13 a bad person, it is not about whether or not you say discriminatory things or have
14 discriminatory ideas. Mens rea is the purpose with which the contribution is
15 performed.

16 Now, Article 30 defines the intent with which the act set out in Article 25(3)(a) as
17 requiring that the person either, quote, "In relation to a consequence, that person
18 means to cause that consequence or is aware that it will occur in the ordinary course
19 of events."

20 The notion of a person who means to cause a prohibited consequence is readily
21 understood, but what does the phrase "is aware that it will occur in the ordinary
22 course of events" mean? There is already rather extensive jurisprudence about this
23 at the ICC and, in fact, extensive Prosecution submissions in those cases. Both that
24 jurisprudence and those submissions have used the terminology of second degree
25 intent.

1 But without getting into a discussion about terminology, what really matters is the
2 content of the concept. And one of the most useful descriptions, we say, of the
3 content of the concept was set out in the Article 70 trial judgment in the Bemba case,
4 which said, quote, "dolus directus in the second degree requires that the witness does
5 not need to have the will (intent) or desire to bring about the material elements of the
6 offence ... Rather, he or she is aware that those elements will be the almost inevitable
7 outcome of his or her acts or omissions."

8 And then the last sentence reads, "In this case, the cognitive element overrides the
9 volitional element, i.e., the witness's awareness that his or her acts or omissions 'will'
10 cause the undesired proscribed consequence."

11 Now these words, your Honours, are clear enough and probably require no
12 additional comment, except to say this, because it's irresistible: What you can see
13 from reading this passage is that, first of all, these are considered both types of direct
14 intent; and secondly, that the notion of cognitive awareness that is deemed sufficient
15 is very close to the notion of wilfulness itself.

16 Now the Prosecution itself in the past had no difficulty, except perhaps with the Latin,
17 in referring to Article 30(2)(b) as indeed referring to direct intent and characterising
18 that indeed as direct intent of second degree. That's what the Prosecution previously
19 has been submitting is the meaning of Article 30(2)(b).

20 In fact, the submissions that you see in front of you, of course, were from the Lubanga
21 case when the Prosecution argued that the Trial Chamber had not erred. Why?
22 Because the Trial Chamber had not applied a standard lower than what you see on
23 the screen in front of you.

24 The Prosecution also said, and this is particularly salient for some of the submissions
25 that you have now before you, quote, that the standard applied by the Lubanga

1 Trial Chamber, quote, "is consistent with the literal interpretation of this provision."

2 So even the Prosecution in Lubanga said there is no problem and no inconsistency

3 between this labelling or this terminology and the content of the provision itself.

4 This same standard of intent applies in the case of all three forms of commission in

5 Article 25(3)(a). Thus, when committing a crime jointly with or through another

6 person, the necessary standard of intent is that a crime is the almost inevitable

7 outcome of his or her acts or omissions. That was the exact language that was used

8 in Lubanga.

9 And this is the standard that applies in the case of an alleged common plan through

10 which co-perpetration is committed.

11 However, this standard must always be assessed, and this is harking back to the

12 language of paragraph 1 of the UDCC, it must always be assessed with reference to

13 the criminal purposes, not with the non-criminal purposes.

14 And this is where the language of critical element of criminality in the common plan

15 comes from and why it is so important, because even though there can be an ulterior

16 motive, even though there can be an innocent objective, even though there can be

17 other reasons why someone is pursuing a particular objective, at the end of the day

18 what is required for a conviction is that there be this critical element of criminality in

19 the common plan which the accused shares and agrees to, according to the standard

20 that we have just been discussing, either that you want that outcome or that the

21 cognitive awareness of that outcome as a virtual certainty is present.

22 Liability does not arise - and this is very important to remember, but easy to lose sight

23 of - merely because an accused associates with others in a plan whose implementation

24 may result in a crime. It does not arise when the crime is foreseeable or highly likely

25 to the accused. It does not arise merely because those crimes were actually

1 committed. And it does not arise based on a standard even that the accused was
2 negligent or that he voluntarily undertook the risk that such crimes would be
3 committed and nevertheless associated himself and made contributions to that plan.
4 If you do not have the exigent standard of intent that I have just been discussing, then
5 there is no liability under Article 25(3)(a). What is required is awareness that the
6 events will occur, which has been described as meaning a virtual certainty.
7 And this standard is important not just in order to ensure that your Honours apply
8 the same law that has been applied in the past to other accused, it's not just that this is
9 the most faithful interpretation of Article 30(2)(b), it also serves a vital policy purpose
10 which is to ensure that your Honours are not placed in the position of indirectly
11 criminalising non-international armed conflicts. To do so would far surpass the
12 jurisdiction of the Court. And the fact that a particular rebel movement is viewed by
13 the United Nations as, at a particular point in time, unfavourable, the fact that the
14 rebel movement may be pursued as destabilising the central government, the fact that
15 there may be neighbouring countries that are actively opposed to the group or who
16 say that this group causes instability, none of these things, Mr President, are properly
17 relevant to your analysis of mens rea.
18 And this comment might be considered unnecessary except that when you read
19 paragraphs, for example, 826 to 962 of the Prosecution brief, it is very hard to see how
20 the Prosecution is, in fact, establishing in any way any facts that are relevant to
21 Mr Ntaganda's intent.
22 Since each crime with which Mr Ntaganda is charged in the UDCC through
23 co-perpetration has distinct elements, the standard of virtual certainty must met
24 separately in respect of each category of crime. Hence, virtual certainty of
25 persecution does not lead to the application of any lower standard of intent for

1 murder.

2 This is the approach that controversially was adopted at the ICTY on the basis of its
3 view that this reflected customary international law, and that view was rejected at the
4 ECCC. In any event, this ICTY jurisprudence is based on much different statutory
5 language than that that is in the ICC Statute, and therefore this jurisprudence is not
6 only irrelevant, but in fact also repudiated by the Prosecution itself yesterday
7 helpfully in saying that it was not seeking the application of a *dolus eventualis*
8 standard.

9 Mr President, the Prosecution urges you in its brief, in its response, as well as in its
10 oral submissions yesterday, however, that you should adopt an interpretation of
11 Article 30 that is, quote, "in keeping with the Statute including the aim to end
12 impunity," but ending impunity also requires adhering to deeply cherished and vital
13 legal principles, including interpreting criminal Statutes strictly, for example.
14 The Prosecution's assertion that the principle of ending impunity militates in favour
15 of modifying or lessening or liberalising or changing or extending the clearly defined
16 mode of liability and the jurisprudence that has consistently interpreted it in favour of
17 a more permissive standard should, if that's what they are asking, should be rejected.
18 Incidentally, Mr President, Article 25(3)(d) sets no lower standard of *mens rea* for
19 liability. Article 25(3)(d)(i) defines the minimum threshold of liability as, quote,
20 "knowledge of the intention of the group to commit the crime" and. Article 30(3)
21 defines knowledge in exactly the same way with exactly the same words, "awareness
22 that a circumstance exists or a consequence will occur in the ordinary course of events.
23 'Know' and 'knowingly' shall be construed accordingly".
24 I think I heard the Prosecution agree with that proposition yesterday, and if I
25 misunderstood what was said, I am sure that they will clarify in their reply.

1 We come now, Mr President, to the third legal issue, and that concerns Article 74(2) of
2 the ICC Statute. Article 74(2) states clearly and unambiguously that a conviction
3 decision "shall not exceed the facts and circumstances described in the charges and
4 any amendments to the charges."

5 Your Honours, the UDCC does not specify a single incident of rape or sexual slavery
6 of any child soldier upon which you could properly convict. Not one location, not
7 one date, not one victim, not one perpetrator is identified in the UDCC.

8 What we do have is paragraph 100. The charge accordingly is that Mr Ntaganda
9 should be available to be liable for these crimes, for any of these crimes committed
10 over a period of 16 months anywhere.

11 This is actually much less limited than the temporal and geographic framework that
12 was found to be insufficient of more specific particularisation found to have been not
13 an appropriate basis for a conviction in the Bemba case under Article 74(2). In that
14 case the insufficiently defined temporal and geographic framework was that the
15 crimes of murder, rape and pillage were committed over a period of 4.5 months in the
16 entire territory of the CAR.

17 Now, as the Appeals Chamber held in Bemba, quote, "simply listing the categories of
18 crimes with which a person is to be charged or stating, in broad general terms, the
19 temporal and geographical parameters of the charge is not sufficient to comply with
20 the requirements of Regulation 52(b) of the Regulations of the Court and" this is the
21 part that's important for your Honours "does not allow for a meaningful application
22 of Article 74(2) of the Statute."

23 Now we say that those words are every bit as applicable, if not more so, to the UDCC
24 in this case, especially in respect of counts 6 and 9.

25 In fact, many of the submissions that you have heard and that you have read in the

1 Prosecution submissions and that you heard yesterday were either the same or
2 similar to arguments that have already been considered and rejected in the Bemba
3 case. The first argument that you heard was that any deficiencies in the UDCC have
4 been, quote, "cured", unquote, through subsequent notice, and that accordingly there
5 is no prejudice to Mr Ntaganda.

6 But this argument conflates the pleading requirements of Article 74(2) and the
7 constraints that puts on your Honours in terms of the facts and circumstances on
8 which you convict, with the notice requirements that arise under Article 67(1) and
9 67(2). This distinction and the Prosecution's failure to understand the distinction
10 was noted by the Bemba Appeals Chamber. And here we see at paragraph 98 that in
11 fact the Appeals Chamber noted that the Prosecution made this same argument
12 before it and that the argument was misplaced because it did not address the issue of
13 how your Honours -- or how, in that case, their Honours in the Bemba case were to
14 properly apply Article 74(2). It is nothing to do with notice, your Honours.

15 And these are two separate issues and two separate requirements for a very good
16 reason.

17 If all defects in an indictment could simply be cured by subsequent notice, then the
18 function of the Pre-Trial Chamber that's set out in the Statute in Article 61 would be
19 completely circumvented. A prosecutor could define charges extremely vaguely,
20 leaving substantive notice of the charges at a later time. But this would not fulfil the
21 requirements of the Statute and it would sidestep the obligation and the duty and the
22 authority of the Pre-Trial Chamber to exercise judicial control over the content of the
23 charges against the accused.

24 Second argument presented by the Prosecution, both yesterday and at paragraph 13
25 of its reply, is that the Lubanga Appeals Chamber judgment has already, quote,

1 "endorsed" unquote, the manner in which the charges have been pleaded in this case.
2 As a preliminary matter, this clearly is not the case in respect of counts 6 and 9 which
3 were not charged in Lubanga. But second, and more importantly, the Lubanga
4 Appeals Chamber was seized of a ground of appeal concerning notice under
5 Articles 67(1) and 67(2), not the requirements of Article 74(2) that a conviction must
6 not exceed the facts and circumstances described in the charge. The issue that was
7 decided in the Bemba Appeals Chamber was not raised, was not before and was not
8 decided in the Lubanga appeals judgment.

9 The third argument that you heard from the Prosecution is that it had no choice but to
10 plead counts 6 and 9 as vaguely as they are pleaded.

11 According to paragraph 13 of its response, this vagueness was, quote, "not only
12 permissible, but necessary, given these crimes' nature."

13 This is simply incorrect, Mr President. Rapes are commenced and completed at
14 specific times and places by specific individuals against specific victims. These are
15 the facts and circumstances that must be pleaded under Article 74(2). Whether those
16 acts are committed repeatedly instead of just once, does not relieve the Prosecution of
17 its obligation to set out these facts and circumstances, at least in some fashion. And
18 furthermore, the possibility of rape being committed repeatedly does not set it apart
19 from any other crime known to the ICC Statute, whether it be murder, pillage or any
20 other crime.

21 In fact, rape was precisely one of the crimes in Bemba that was found not to have
22 been pleaded with sufficient particularity, even though there were numerous and
23 repeated rape incidents that were charged and subsequently the basis of the
24 conviction in the Bemba Trial Chamber.

25 So the Prosecution's claim from yesterday at page 36 of the transcript that the Bemba

1 case did not involve crimes committed as part of a pattern is not correct.

2 Incidentally, sexual enslavement is no different, as was proven so adroitly yesterday
3 by Ms Rabanit in her discussion at pages 62 to 63 when she identified the specific
4 discrete instances when the Prosecution says that there was sexual slavery in response
5 to your Honour's questions. In fact, the elements of crime specifies that this crime
6 can be achieved by even a single event of a sexual nature.

7 Mr President, I am mindful of the time. If you just give me five minutes, I can wrap
8 up this point.

9 PRESIDING JUDGE FREMR: [15:59:46] Five minutes is no problem.

10 MR GOSNELL: [15:59:48] Thank you, Mr President.

11 The Prosecution's fourth argument is that this case and the way in which counts 6 and
12 9 in particular, but also other counts, have been pleaded fit into the exception that was
13 articulated in Bemba that, quote, "this is not to say that adding specific criminal acts
14 after confirmation would in all circumstances require an amendment to the
15 charges - this a question that may be left open for the purposes of disposing at the
16 present ground of appeal." Unquote. That is Bemba appears judgment
17 paragraph 115.

18 The first aspect of this dictum, and it is a dictum not a holding by the
19 Appeals Chamber, is the use of the term "specific criminal acts" as opposed to
20 "criminal charges". The Appeals Chamber, I suggest, appears to be contemplating
21 that there may be certain collective crimes defined with sufficient particularity to
22 permit the addition of specific acts within those charges.

23 One example with which your Honours may be familiar is the notion of the crime of
24 extermination at a particular location, at a particular time, or over a period of several
25 days. It might indeed be difficult in respect of such a crime to set out in the UDCC

Trial Hearing

(Open Session)

ICC-01/04-02/06

1 all of the specific victims, all of the specific incidents of killing, and, indeed, those
2 specific incidents would only be evidence of the larger crime, which is by its nature
3 a collective crime.

4 And we suggest that that is a possible scenario that would fall into the scenario
5 hypothesised, albeit without much explanation, by the Appeals Chamber in the
6 Bemba case. But we say that that scenario is very different from the entire absence of
7 any temporal or geographic scope that you see in respect of count 6 and 9 which, in
8 any event, do not involve crimes that are intrinsically collective. These are crimes
9 that are specific, discrete, individual crimes that simply are not properly charged by
10 saying that they occurred somewhere over a period of 16 months.

11 Mr President, that does present an opportunity for a break, and I would suggest that
12 we adjourn, with your leave, until tomorrow.

13 PRESIDING JUDGE FREMR: [16:02:33] Exactly. I am on the same page.

14 So we completed further part of Defence closing statement. We will continue with
15 the same topic tomorrow morning. According my information, Defence used so far
16 slightly more than three hours; three hours, five/six minutes, something like that. So
17 there is, I guess, a good chance that we could complete presentation of Defence
18 closing during the first morning session, which may take two hours.

19 So we will break now and we will reconvene again tomorrow at 9 o'clock.

20 THE COURT USHER: [16:03:23] All rise.

21 (The hearing ends in open session at 4.03 p.m.)