

Trial Hearing

(Open Session)

ICC-01/04-02/06

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

6 Judge Chang-ho Chung

7 Trial Hearing - Courtroom 1

8 Thursday, 30 August 2018

9 (The hearing starts in open session at 9.00 a.m.)

10 THE COURT USHER: [9:00:19] All rise.

11 The International Criminal Court is now in session.

12 Please be seated.

13 PRESIDING JUDGE FREMR: [9:00:54] Good morning, everybody.

14 Court officer, please call the case.

15 THE COURT OFFICER: [9:01:00] Thank you, Mr President.

16 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor  
17 versus Bosco Ntaganda, case reference ICC-01/04-02/06.

18 We are in open session.

19 PRESIDING JUDGE FREMR: [9:01:14] Thank you, court officer.

20 Today we are going to hear remainder of the Defence closing statements. It should  
21 be completed during this session by 11 o'clock.

22 So, Mr Bourgon, I guess it will be you? Or still Mr Gosnell, okay, will continue,  
23 sorry.

24 Mr Gosnell, you have the floor.

25 MR GOSNELL: [9:01:42] Good morning, thank you, Mr President. Good morning,

1 your Honours.

2 Yesterday I left off with the submission concerning counts 6 and 9 suggesting that

3 there were no facts and circumstances defined in the Document Containing the

4 Charges on which you could properly enter a conviction under Article 74(2). And

5 we make the same submission in part in respect of counts 14, 15 and 16. Because there

6 can be no denying that the last two sentences of paragraph 95 of the Document

7 Containing the Charges do plead with sufficient particularity, we say, the facts and

8 circumstances of where Mr Ntaganda purportedly saw individuals who had been

9 enlisted in the FPLC or UPC forces and who were being trained. And that includes,

10 Mr President, with reference to paragraph 95 of the document, the visit to Rwampara

11 on 12 February 2003.

12 However, aside from those last two sentences of paragraph 95, the DCC does not

13 provide any adequate facts and circumstances to enter a conviction. In particular, in

14 respect of recruitment, at paragraphs 93, 94, where, aside from the broad temporal

15 scope that is set out therein between August 2002 and into 2003, and then paragraphs

16 96 and 97 in respect of the use, alleged use of child soldiers, there is nothing in the

17 nature of these crimes that excuses the failure to set out the facts and circumstances

18 with adequate particularity; including, for example, where the recruitment took place,

19 when it took place, where was the use, who was recruited, who directly performed

20 the recruitment.

21 Paragraphs 92 through to 99 simply do not provide adequate particularity in these

22 regards and this was not an issue, Mr President, that was in any way litigated in the

23 Lubanga case.

24 As you know, your Honours, there are other facts and circumstances that also are not

25 pleaded with adequate particularity and those are set out at paragraph 14 of our reply

1 brief. And, of course, none of that in any way is with prejudice to your Honours'  
2 own independent analysis of what you consider has or has not been adequately  
3 pleaded in the Document Containing the Charges.

4 This brings us now, Mr President, to the question of the evidence concerning child  
5 soldiers and I propose to address this evidence in the following five sections: First,  
6 the direct child soldier witnesses themselves; the observational and hearsay evidence  
7 as we have defined those terms in our brief; the videos purporting to show  
8 individuals under the age of 15 within the ranks of the FPLC; fourth, the  
9 documentary evidence; and finally, Mr Ntaganda's knowledge. Obviously, this  
10 discussion will be selective rather than comprehensive and we of course rely on our  
11 submissions in our brief and reply.

12 But the question that hangs over all of this evidence is where are the credible and  
13 reliable child soldier witnesses?

14 The problem is not that no one was willing to come forward and say that they were  
15 a former child soldier with the FPLC. We know that because of the 16 individuals  
16 who put themselves forward as such in this case and in the Lubanga case.

17 And none of the 12 who testified in the Lubanga case were deemed reliable or  
18 credible. Three of those 12 were found to have lied at various times in respect of  
19 their age, and three intermediaries were found to have encouraged lies by those  
20 12 individuals to such a degree of certainty that the Trial Chamber recommended that  
21 the Prosecution pursue Article 70 investigations against those individuals which, as  
22 far as the public records of this Court show, have never come to fruition. We say,  
23 Mr President, and we think that the evidence shows abundantly clearly that the four  
24 child soldiers witnesses who testified in this case, or perhaps five, depending on  
25 the Prosecution's current position in that regard, were manifestly unreliable. They

1 were not only unreliable, they were, quite simply, untruthful. And not only  
2 untruthful, but in the case of 761, 883 and 888, they were fabricators of documents.  
3 And not only did they lie and fabricate documents, but in the case of 758, 761, 888,  
4 and at least 898 and 911, these witnesses coordinated their testimony to give a false  
5 impression of reliability. And these are serious allegations, Mr President, but they  
6 are abundantly supported by what you witnessed in this courtroom when these  
7 witnesses testified.

8 Now, if these witnesses had testified in public session, which they did not, I would  
9 have replayed for you some of the extraordinary examples of these witnesses'  
10 untruthfulness and fabrication of evidence. I would have played P-883's reaction  
11 when she was confronted with the original version of a document that she, quite  
12 obviously, had herself tampered with in order to give an impression of her age to the  
13 Court.

14 I would have played the moment when she displayed an amazing facility in French in  
15 respect of a rather complex document, I suggest, Mr President, after earlier in her own  
16 testimony in respect of a much simpler document asking the Prosecution to read it  
17 because she claims she couldn't read French.

18 I would have shown you 888's reaction when he was shown his baptismal records  
19 showing that he was four years older than he was claiming in his testimony.

20 I would have shown you a few examples of 761, unrepentantly and shamelessly lying  
21 in front of your Honours about his role in putting forward 758 as a child soldier with  
22 the FPLC. His lies about where she was born, his lies about where she grew up, his  
23 lies about whether he had any role in obtaining documents immediately after 758 had  
24 been rejected initially by this Court as a child soldier with the FPLC.

25 But these would just be sensationalist highlights, Mr President. What really matters

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1 is the careful analysis of the many, many contradictions in these witnesses'  
2 testimonies about where they were, what they did, whether they were ever with the  
3 FPLC, and when they were born. And all of those contradictions and inconsistencies  
4 are discussed at length in the brief at paragraphs 1165 through 1282.

5 These were not isolated glitches of memory caused by the passage of time or the  
6 frailties of recollection. We are talking about testimony that was manifestly false.

7 We are talking about efforts to make the testimony appear more reliable through  
8 efforts in intervening years since the events, sometimes recently, we suggest, to

9 produce false documents and to coordinate testimony. It is very difficult to believe,

10 and I say this even with respect to the testimony of the late Dr Yuille, it is very

11 difficult to believe that the testimony even could have been the result of false

12 memories, let alone merely unreliability.

13 So the real evidential difficulty for your Honours in this case is not that no witnesses

14 were available. On the contrary, an abundance of child, alleged child soldier

15 witnesses have been available. It is just that they either lied or were not reliable.

16 Now this brings us, I suggest, immediately to the second category of evidence

17 because the two --

18 PRESIDING JUDGE FREMR: [9:12:21] Sorry --

19 MR GOSNELL: [9:12:22] Yes, Mr President.

20 PRESIDING JUDGE FREMR: [9:12:23] -- Mr Gosnell, if you allow, I would like to

21 put to you one additional question. Does the Defence have any theory what could

22 be the motivation for those witnesses to lie?

23 MR GOSNELL: [9:12:33] That's a very good question, Mr President. I did think as

24 to whether I should address your Honours on this question. I can speculate, I can

25 suggest many reasons. Those of us who have spent time in Ituri probably know

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1 some of the reasons, and there will probably be different interpretations of the  
2 potential reasons, but --

3 PRESIDING JUDGE FREMR: [9:12:53] I am not insisting. No problem.

4 MR GOSNELL: [9:12:55] Yes. Thank you, Mr President. But it does raise an  
5 important question because what I suggest is that it is not really for us to speculate  
6 about these issues, but you nevertheless deal with them by asking yourselves, first,  
7 whether or not the evidence that you have seen is or is not reliable and that's the  
8 primary basis for you making that assessment. But the question that you have just  
9 asked is a very important one, because what it really points to is, why is there the  
10 need to ask that question? Why is there a lacuna, a gap in the evidence that has been  
11 brought into this courtroom to be able to allow your Honour to know the answer to  
12 that question?

13 And this really does bring us back to the burden of proof and the burden rests on  
14 the Prosecution to make sure that the question that you have asked is a question that  
15 you are able to answer based on what was heard in this courtroom. And we say that  
16 that's not the case.

17 So this brings us back to the second category of evidence, which is a disparate mass of  
18 evidence that does indeed concern different types of information; including,  
19 interviews of purported former child soldiers; witnesses who saw subjects in the  
20 FPLC whom they visually estimated to be under 15, and, in a few cases, knowledge of  
21 subjects who they claimed were in the FPLC, but age was known on the basis of some  
22 prior association or a family relationship.

23 In her dissenting opinion in the Lubanga case, Judge Ušacka expressed her hope "...  
24 that future prosecutions of these crimes at the Court will adduce direct and more  
25 convincing evidence and preserve the fairness of proceedings, which lies at the heart

1 of criminal prosecutions and should not be sacrificed in favour of putting historical  
2 events on the record."

3 Well, Judge Ušacka's hopes have been disappointed in this case because fewer child  
4 soldier witnesses have been presented in this case than in the Lubanga case, and  
5 a greater reliance has been placed on the secondary evidence than on what we would  
6 describe as the primary evidence.

7 And the lesson that seems to have been learned from the Lubanga case is not the  
8 concern that has been expressed here by Judge Ušacka. The lesson that appears to  
9 have been learned and to have been implemented by the Prosecution in this case is  
10 that it is better to bring fewer child soldier witnesses and better to bring less direct  
11 evidence, which has inherently lower probative value, but, on the other hand, is much  
12 harder for the Defence to test and to attack and to show that it is not true.

13 And why not, Mr President? Because, after all, that evidence was sufficient in the  
14 Lubanga Trial Chamber to carry the case over the line of reasonable doubt. And  
15 since this evidence, as I just said, is harder for the Defence to discredit, why go to the  
16 trouble of calling more direct evidence that simply will be proven to be unreliable.

17 And this really goes to the heart, Mr President, of what we are doing here and what  
18 international criminal justice is about. How much will you bend the usual standards  
19 of proof that you expect in respect of a particular type of crime? How much will you  
20 accept -- and, this comes back to your Honour's question -- the unsubstantiated  
21 allegations or claims of security concerns or of re-traumatisation that precludes  
22 evidence that you would expect from coming into this courtroom to be tested and to  
23 be witnessed by your Honours.

24 I recall vividly the moment when this argument of re-traumatisation was raised  
25 during the proceedings as a reason not to put a photo board to a witness, suggesting

1 that putting the photo board would re-traumatise the witness. An utterly standard  
2 form of cross-examination, a standard form of investigation, Mr President, in respect  
3 of any serious crime. And that objection was rejected by your Honours, but the mere  
4 fact that it would be suggested shows the point that we have come to in terms of  
5 cutting the corners on ensuring the evidence that is brought before you is reliable and  
6 can be tested; that you can know it is reliable because it has been tested.

7 And just as your Honours rejected that objection, we ask you, likewise, to say -- to  
8 resist the temptation to bend those standards of proof on the basis of any suggestion  
9 that witnesses are unavailable; that child soldiers who were reliable could not have  
10 been brought to court.

11 Those claims are facially contradicted by the 16 witnesses who have come to this  
12 court and whose testimony, we suggest, is or has already been found to be unreliable  
13 and untruthful. And the question is simply, if it is true that the FPLC was an army  
14 of children, if you couldn't throw a stone in Ituri without hitting an FPLC child  
15 soldier, then where is the direct evidence of these former FPLC child soldiers?

16 Your Honours, in almost none of this evidence, this is what we say secondary  
17 evidence, three subcategories of secondary evidence, but in almost none of this  
18 evidence were you given the names of the subjects who were said to be under  
19 15 years of age.

20 In none or almost none of the cases were you given a photograph of the alleged  
21 subject. In almost none of these cases do you have corroboration in any meaningful  
22 sense of that term in the sense that you have two independent separate sources  
23 describing or commenting upon the age of the same person.

24 In these circumstances, Mr President, it is virtually impossible for the Defence to  
25 undertake any kind of investigation to determine whether or not this type of evidence



1 is true, partly true, possibly untrue, highly likely true. These assessments are simply  
2 not possible and, we suggest, they are no more possible for your Honours.

3 And for those few witnesses who did mention the name of the subject, the question  
4 that must be asked is, what was done to find those individuals? Why were they not  
5 brought to court as witnesses to testify before your Honours? To say that, "Yes,  
6 I was an FPLC soldier and I was under 15 years of age at the time."

7 Relying on this secondary evidence is not really or only a question about hearsay; it is  
8 a question about allowing substitute evidence, evidence as a substitute for the direct  
9 evidence that should be available to be relied upon decisively in resolving these  
10 charges. But we say that is unreliable, unfair and does not meet the standard of  
11 proof that must be required by any criminal court.

12 Now, if your Honours were dealing with an issue of was it raining on a particular day,  
13 perhaps this type of evidence could be considered satisfactory. But a factual finding  
14 that a person is under 15 years of age, which is an element of the crime that  
15 your Honours must determine beyond a reasonable doubt, is significantly different  
16 for three reasons: First, assessments of age are subject to a significant margin of  
17 error. It involves a substantial measure of subjectivity and opinion and this is not  
18 reduced by resort to claims about methodology: Did the interviewer write the  
19 person's name down? Did they ask three or four questions? Did they ask someone  
20 else their opinion about the age of the person?

21 None of that lends itself to any meaningful verification and does not enhance the  
22 probative value of the claim.

23 Second, this is a finding that must be made based on the standard of beyond  
24 reasonable doubt, unlike a contextual factor or a contextual issue, such as, was it  
25 raining on a particular day. And, third, it is the evidence that you saw in court that

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1 should put you on alert that there is a serious possibility that that secondary evidence  
2 is not correct. That it is as unreliable as the direct evidence that you heard and that it  
3 is hazardous in the extreme to rely on the secondary evidence as a substitute for the  
4 unreliable evidence that you heard in court.

5 The unfairness, and, I say, the hazard of doing so is increased by the fact that a large  
6 number of these subjects claim to have been under 15 years of age are individuals  
7 whose name the Prosecution possesses and whose name was not disclosed to the  
8 Defence.

9 We -- and let me just repeat that because it is so important, Mr President.

10 The Prosecution possesses a large number of the names of the individuals whom, they  
11 say, are under 15 years of age and whom they ask you to enter a conviction against  
12 Mr Ntaganda on the basis of. They have those names and the Defence doesn't.

13 And those names were also anonymous as far as the Defence is aware to the  
14 Trial Chamber.

15 So you have a witness appearing in court, describing that someone else told them that  
16 they were under 15 years of age, the name of the source has not been revealed to  
17 your Honours or to the Defence, and that source is also the victim, and the name of  
18 that victim has not been disclosed either to the Defence or to your Honours.

19 And let's be very clear about the nature, the characterisation of that evidence. This is  
20 not evidence -- this is not information that just falls under Rule 77 as being material to  
21 the preparation of the Defence. It is hard to imagine information that could not be  
22 more relevant to assessing the credibility of Prosecution evidence, which is the heart  
23 of Article 67(2) of the Statute.

24 Now, in fairness to the Prosecution, it is not that they haven't disclosed it to us  
25 because they don't want to. It's not because they have hidden it away in a vault and

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1 we have subsequently discovered that it exists. It is not that, Mr President, and we  
2 are not suggesting that for one moment. It's that there are third parties who have  
3 placed a legal constraint on the information, the Prosecution accepted that legal  
4 constraint in receiving the information and therefore it has not been disclosed. But  
5 that is utterly irrelevant to the prejudice caused to this trial. And the prejudice,  
6 though not necessarily obvious, is insidious and wide ranging.

7 Did the Prosecution seek out these individuals, having their names in its possession.  
8 If so, were statements taken? If statements from taken, have they been disclosed to  
9 the Defence? Have their statements been checked thoroughly for consistency and on  
10 an ongoing basis to determine whether there are inconsistencies between those  
11 statements and any of the evidence that your Honours heard in this courtroom? If  
12 there were any such inconsistencies, were applications made to the provider of the  
13 information for an exceptional disclosure to the Defence to ensure that Article 67(2)  
14 was respected? Or did the Prosecution simply undertake no investigations on the  
15 basis of this information? Did they conduct no interviews of such individuals?  
16 And if not, why not?

17 There are so many ways, Mr President, in which the unequal access to this  
18 information tilts the playing field, especially in respect of a charge like this, unfairly  
19 against the Defence. And it's not a question - again this comes back to  
20 your Honour's question - it is not a question of us needing to point out the potentials  
21 as to how in the field this might affect the fairness of investigations, the equality of  
22 investigations, the equality of what goes on in the courtroom. That's below the tip of  
23 the iceberg and not a matter that can be brought to your Honours.

24 What happens is that the rule itself is a prophylactic against those prejudicial impacts.  
25 And when the rule itself is violated to that extent, and the extent, to be clear, is

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1 massive, we are talking about a proportion of victims and sources saying that they  
2 were under 15 that is at least 17 times more than the number of child soldier  
3 witnesses who testified in this case.

4 Now, the Defence's position concerning P-46 was misrepresented on Tuesday,  
5 suggesting that our position was that she was a liar, or had coordinated with anyone  
6 in telling lies. And this is simply not true and never has the Defence given this  
7 impression.

8 The Defence's position is that her so-called verification of age amounted to nothing  
9 more than asking other individuals their opinion about those subjects' age; that this  
10 second opinion was only sought in very few cases as far as the documentary evidence  
11 shows; that in almost all cases the information about affiliation with the FPLC was  
12 hearsay, and not only hearsay, anonymous to the Trial Chamber and to the Defence.  
13 All of which we say reduces this evidence's probative value to zero. It simply cannot  
14 be relied upon to any degree.

15 I come now, Mr President, to video evidence.

16 Yesterday the Prosecution showed you some selected video clips from amongst those  
17 that they have tendered into evidence, presumably the clips that they consider the  
18 strongest in showing that there were individuals under the age of 15 with the FPLC.

19 And I will focus first on the question of those who were in uniform.

20 And your attention was drawn, if you'll recall, to two individuals sitting on the back  
21 of a truck, wearing hats; a person who is getting into the back of a white vehicle at  
22 Rwampara; and one other individual whom we see for an extremely brief period of  
23 time, whose face you can't see and whose physique and size is assessed purely on the  
24 basis of their relation with others around him.

25 Whatever initial intuition your Honours may have about the age of these individuals

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1 has to be tempered by the following question, which we say reflects properly the  
2 well-established standard of proof, which is: Is it unreasonable to say that those  
3 subjects might be 15 years of age or over?

4 That's the test. Nothing less is required to prove beyond reasonable doubt.

5 Now if you look at the pictures in front of you, which of course are far more distinct,  
6 far clearer than any of the images that you have been shown by the Prosecution, your  
7 initial reaction probably would be, well, it is quite clear that any and all of these  
8 individuals are over the age of 17. Surely they must be.

9 Yet, legal standards applicable on the context of asylum applications have  
10 commanded that in fact these individuals not be found in the eyes of the law as being  
11 older than 17.

12 And when you are asked to draw a conclusion based on a brief and poor quality  
13 video image alone, the need for caution is even greater than applies in the asylum  
14 context where individuals sit down face to face with an adjudicator, are interviewed,  
15 answer questions, and a decision is made about age.

16 And the need for caution is enhanced not only by the fact that you are not sitting face  
17 to face with the individuals alleged to be under 15, but you are dealing with  
18 individuals of a different ethnicity, which was expressly cited in the Merton case  
19 from the United Kingdom as a reason for even greater caution in making judgments  
20 about age.

21 And in this case, unlike in the asylum context, it is not proof on a balance of  
22 probabilities, it's proof beyond a reasonable doubt to decide that a man should be put  
23 in jail on the basis of your assessment of a two-second clip from a video in which you  
24 can't see the face of the person, and that's going to be the basis to send a person to jail  
25 because they have used or conscripted child soldiers.

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1 When you are properly guided by these principles, Mr President, I suggest that it is  
2 not possible to make a determination that the individuals who were pointed out to  
3 you on the videos are under 15 years of age.

4 But more importantly, perhaps, your Honours, is the fact that the isolation of these  
5 four individuals, amongst all of the video evidence at the Prosecution's disposal,  
6 especially when compared to the appearance of the scores of other FPLC soldiers  
7 whom you see in uniform in those videos, confirms that the FPLC was anything but  
8 an army of children, that it must have been applying a standard of age, and that even  
9 that those who came even close to appearing to be under the age of 15 were not  
10 enrolled within the ranks of the FPLC as a matter of course, which is the Prosecution's  
11 case.

12 These isolated exceptions actually prove the rule, that the FPLC must have been  
13 applying standards of age to ensure that child soldiers were not enlisted and enrolled.  
14 And the Prosecution seems eager for you to -- or to overcome this problem or  
15 possibly recognise it to some extent in stating what you see on the page in front of  
16 you, which is, we say, an outright and blatant reversal of the burden of proof. They  
17 are saying you to say, in effect, I think, Mr President: Well, maybe there aren't very  
18 many people who appear to be obviously or we say are clearly under the age of 15,  
19 but there are a whole bunch who appear to be in the age range of 16, 15, 17, well,  
20 surely the law of large numbers means that some of them must be under 15.

21 Entirely fallacious reasoning in a criminal case, Mr President. It's not a basis, not  
22 a proper basis to conclude that anyone was under the age of 15. And it, in fact,  
23 implicitly recognises that the Prosecution knows that the very vast majority of  
24 individuals who were visible on those videos are not, not even visibly, not even  
25 plausibly under the age of 15.

1 Documentary evidence.

2 And I come to the document of Mr Adubango, a document on which such decisive

3 reliance was placed in the Lubanga case. And so it is quite clear that the Prosecution

4 has known since the beginning of this case that it would place an equally heavy

5 reliance on this document. And what this document actually says is that

6 a programme is being set up in favour of child soldiers aged 10 to 15 to 16 years.

7 Now, the Prosecution asserts and suggests to you that this is therefore a statement of

8 fact about the nature of the ages of individuals in the FPLC. And obviously, since

9 Mr Adubango is the author of the letter, and since Mr Adubango is in the FPLC, this

10 document is being accorded particular significance because it is in a sense

11 a declaration against interest. And it is also contemporary. So in that sense the

12 Prosecution cites this document as being a matter of particular probative value.

13 But what you don't know is whether Mr Adubango ever visited an FPLC training

14 camp. You don't know who was the instigator of this DDRRR programme that he is

15 discussing. And we suggest you don't know why he adopted this age range. Was

16 he intending to offer a description of the actual ages in the FPLC, or was he seeking to

17 avoid that anyone from anywhere from any armed group should be excluded on the

18 basis of age?

19 Now let's look at a few documents, Mr President, that might shed some, albeit limited,

20 light on this question. Because we say that the obligation of shedding light on those

21 questions and answering those questions was on the Prosecution. And

22 the Prosecution could have shed light on those questions by asking questions to

23 witnesses about this person, by calling this person, for example.

24 We don't say that the conventional rules of authentication of documents apply in this

25 courtroom, but your Honours do need information about who created the document,

1 what was the basis of their information, what did they mean to refer to, especially  
2 when it is a document on which such heavy reliance is placed.

3 And what we suggest is that in fact there are other reasonable interpretations of the  
4 document because, in fact, this document appears in a line of documents that address  
5 demobilisation not from the FPLC, but demobilisation from other armed groups and  
6 from self-defence forces. And we know that these self-defence forces continued to  
7 exist even after the existence of the FPLC and that at times they were a problem for  
8 the FPLC. And here we see the document from Kisembo of 30 October 2002  
9 indicating to sub-commanders that you must disarm all children under the age of 18,  
10 even in the autodefense forces.

11 10 December 2002, Thomas Lubanga. What we see in this document, and we can  
12 turn to the next page as well, is Thomas Lubanga on 10 December expressing concern  
13 about a large number of weapons circulating amongst the civilian population which  
14 he believes to be a threat to security and calls for a census and registration of such  
15 weapons as soon as future municipalities are pacified and inter-ethnic conflicts have  
16 been suppressed.

17 10 January 2003. Here we have the UPC again calling for the dissolution for the  
18 comité de paix, noting that they are not following the UPC/RP's ideology and are  
19 undermining pacification.

20 And let's remember, this is just a little more than one month before the Adubango  
21 document.

22 And what these documents show is that the self-defence forces were in existence, to  
23 some degree at least, that the FPLC and the UPC were trying to bring these  
24 self-defence forces under control, that the FPLC and the UPC were trying to disarm  
25 these groups, and that indeed there would have been a need for a demobilisation



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1 programme to those ends.

2 So to easily look at the Adubango document and say, well, this must be a factual  
3 description, a factual statement, that there were child soldiers in the FPLC young as  
4 10 years of age, may be one possible interpretation of the document, but it's certainly  
5 not an interpretation that can be said to be the only reasonable interpretation. And  
6 we say that that is the high standard that your Honours need to apply to that  
7 document, because we suggest it as a matter that you would place almost decisive  
8 reliance upon in order to come to this conclusion.

9 And of course this is where the Prosecution undoubtedly will respond, but there are  
10 other pieces of evidence that confirm that there were children under the age of 15 or  
11 suggest that there were children under the age of 15 in the FPLC and so that this is  
12 really no more than one card in a deck of 52 and that you can assure yourselves that  
13 that's what the document meant.

14 And we say that that reasoning is wrong. It's undoubtedly true that you must  
15 address yourself to the totality of the evidence, but what is wrong is to say that every  
16 piece of evidence is equally relevant or equally probative of every other piece of  
17 evidence. And I say that because we have the principle of corroboration, and  
18 corroboration, we say, requires a degree of convergence in the fact that needs to be  
19 proven, and a degree of independence of the sources.

20 We don't say that it is more than a question of degree. We don't say that it's not  
21 a question of fact. We don't say that your Honours don't have a wide range of  
22 discretion in determining what is relevant, what piece of evidence is relevant to  
23 establishing the reliability of another piece of evidence. But what we do say is that if  
24 you set your lens at the level of just saying: Well, does this prove the charge? If  
25 you say that P-46's documents are probative of this document, then that is an error,

1 that is a mistake. Because then you are turning, you are essentially abandoning the  
2 requirement of analysing to at least some degree, the appearance, the independent  
3 appearance of reliability and probative value of individual pieces of evidence.  
4 And we say, Mr President, that this document, this Adubango document, is not  
5 meaningfully corroborated. It is not meaningfully supported by the circumstantial  
6 evidence that you would expect to see for such a major claim as the fact that  
7 there were, a factual claim that there were 10-year-olds in the ranks of the FPLC.  
8 I come now to Mr Ntaganda's knowledge of children under 15 in the FPLC, and  
9 the Prosecution's submission on Tuesday at page 31 that he testified inconsistently in  
10 saying, on 27 June, that the primary focus of evaluating age was physical testing  
11 instead of the questions asked to the subject, whereas after the summer break, he  
12 purportedly said it was obligatory and this is said to have been a major change.  
13 The Prosecution ignores, however, that on the very next day after 27 June, before the  
14 summer recess, Mr Ntaganda offered a further explanation of the testing and how the  
15 testing fit in with the questions to the witness. And that's at transcript 214, page 33,  
16 line 12.  
17 And we say that that shows that in fact he was not thinking about the answer to give  
18 over the summer recess in order to make it look better. In fact, when you see the  
19 answer, you will see that it appears to be, I suggest, a genuine and spontaneous  
20 explanation of how asking the question about age fits in with the physical evaluation  
21 of a person's age.  
22 And lest it be suggested that it is implausible that recruits would show up and not  
23 know their age or give the wrong age, I direct your Honours' attention to paragraphs  
24 31 and 32 of the child soldiers brief, which I assure your Honours the Defence has  
25 read assiduously, which refers to an electoral law which states, and I quote, and I will

1 speak a few words in French, "(Interpretation) "If the person does not know the exact  
2 date of his birth, the officer shall record the date". (Speaks English) So if the person  
3 doesn't know the exact year of birth, not just the exact date, the exact year of birth, it  
4 will be up to the official to make a visual assessment, I assume, and write in the name.  
5 That's the extent to which this phenomenon is a reality. It had to be incorporated  
6 into the law that the official could do this.

7 The Prosecution asserted on Tuesday at page 84 that 13 witnesses saw Mr Ntaganda  
8 using children in one capacity or another. The 13 weren't identified. I can only  
9 assume that they are referring to P-901, who testified that Mr Ntaganda's bodyguards  
10 were approximately 14 or 15, that they intend to refer to P-55, who said that only  
11 some may have been 14 or 15, and P-290, who said that the individuals whom he  
12 rejected from training at Ntaganda's residence were 15 or so. They have also  
13 apparently neglected to mention D-17's testimony that none of Mr Ntaganda's  
14 bodyguards were below 16 or 17, D-251's testimony that his youngest escort was 16.  
15 And we say, Mr President, in fact, that the conflation of the word, or ambiguous use  
16 of the word "children", as often referring indiscriminately to those below and above  
17 the age of 15, is one that was not only to be seen in the Prosecution's submissions on  
18 Tuesday, but, in fact, often throughout this case. And we suggest that your Honours  
19 need to be cautious in that regard.

20 The Prosecution also said on Tuesday, quote, "The accused also admitted to UN  
21 officials and to a researcher" that P-315 -- excuse me, "and to a researcher that he knew  
22 that there were children amongst the UPC."  
23 This is absolutely wrong. Unless you interpret the word "children" as meaning  
24 anyone under 18, because that's all that P-315's evidence showed. And if  
25 the Prosecution is referring to P-31, his testimony was contradicted by P-46, the

1 person to whom P-31 said Mr Ntaganda was speaking. And P-46 said that that  
2 never happened.

3 P-109's lurid testimony about Mr Ntaganda storming into a classroom in Mudzipela  
4 should be accorded no probative value. It was contradicted by D-57, totally  
5 uncorroborated. This an event that surely many witness would have seen, if it had  
6 occurred.

7 The Rwampara video of those in civilian clothing, and the Prosecution's reliance on  
8 parsing words of Mr Lubanga to suggest that every last person at the assembly must  
9 already have been accepted for training. The exact words of Mr Lubanga cannot  
10 possibly bear such an inference. They do not contradict Mr Ntaganda's and D-80's  
11 account that some of those individuals had just recently arrived in Rwampara and  
12 that he instructed that they be rejected from the training. And even P-30 confirms  
13 that some of the individuals there that day were, and I quote, "civilians who want to  
14 join up." That is DRC-OTP-2054-2951 at page 2981.

15 Paragraph 33 of the Prosecution reply goes even further and says, quote, "Everyone at  
16 the Rwampara training camp was either a soldier or a recruit. Ntaganda testified to  
17 that effect." Unquote.

18 That's a bald-faced misstatement of the evidence, Mr President. I invite  
19 your Honours to look at what the Prosecution has cited in support of that claim at  
20 footnote 132 and you will see the extent to which what I have just said is correct.

21 So the Prosecution's suggestion that the Rwampara video proves to you that  
22 Mr Ntaganda blithely accepted anyone of any age into the ranks of the FPLC is, we  
23 suggest, unsustainable. It's certainly not proven beyond a reasonable doubt. It's  
24 not even a reasonable inference based upon the information that they have given you.

25 And more generally, certainly Mr Ntaganda admittedly had something to do with

1 training in the FPLC, but that doesn't mean that he had comprehensive knowledge of  
2 every last recruit in every training centre or even necessarily in every unit of the FPLC.  
3 And we say that that's a further important consideration for your Honours.  
4 Last point on child soldiers: What is the status of the Lubanga judgment in this case?  
5 Well, Mr President, you know that under Article 21 of course it's of no relevance. Its  
6 findings are not in any way binding or even a matter for your Honours' guidance.  
7 Of course none of us in this courtroom, not a single participant or neither party has  
8 been able to resist the temptation to delve into the Lubanga judgment in various ways.  
9 But I will say only this about the Lubanga proceedings: And that is that I suggest for  
10 anyone who reads the trial judgment or the appeals judgment, you will see that the  
11 evidence came out in a very different way than it has in this case and that that is what  
12 primarily calls for your Honours' entirely independent and unaffected judgment and  
13 assessment of the evidence in this case without regard to the findings in the Lubanga  
14 Trial Chamber.  
15 And the Lubanga Appeals Chamber made very clear that it was applying the  
16 traditional appellate standard of deference in assessing the correctness of the trial  
17 judgment. That means that the Appeals Chamber could just as easily have upheld  
18 an acquittal as a conviction in that case. And the notion that the Appeals Chamber  
19 has resolved all aspects of the correctness of the trial judgment in terms of factual  
20 findings is incorrect.  
21 Just a few words on the second attack, Mr President, the fact -- the factual foundation  
22 of the crime, so-called crime base in respect of the second attack. Under normal  
23 circumstances, there is no doubt that the testimony of a dozen or so witnesses at  
24 a large-scale event, such as the massacre at Wadza, would be sufficient to prove those  
25 events beyond a reasonable doubt. But that evidence was, nevertheless, tainted by

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1 a host of anomalies; including, the forensic evidence that showed that there was no  
2 sharp-force trauma on any of the bodies that were exhumed at the site, contrary to the  
3 preponderance of the evidence of the witnesses who said that, in fact, individuals had  
4 been killed with machetes or with bayonets; the inconsistent, and, I must say,  
5 puzzling stories about the origin of the photos; the discrepancies as to the number of  
6 victims cited by witnesses and the numbers of remains found at the Wadza site; the  
7 close contact of many of the witnesses whom you heard with one another.

8 And even though it is true there is one item of clothing from the photograph that does  
9 bear a striking resemblance to one of the items of clothing that was exhumed at KOB1,  
10 it must also be said that there is no other item of clothing, and some of them are quite  
11 distinctive, visible in the banana field photograph that were found in the exhumed  
12 graves.

13 But even assuming that you find that there was indeed a massacre, a series of killings  
14 of some extent at Wadza, it is important to recall that that occurred on the last day of  
15 the KBL operation. It was not part of a pattern of mass killings or massacres. And,  
16 the Prosecution implicitly tried to suggest otherwise by relying on the testimony of  
17 P-863 about the alleged massacre of six individuals in the hospital at Bambu, and we  
18 say that that testimony must be rejected entirely.

19 The Prosecution provided no explanation as to why 863 would not have described  
20 such a gruesome event in his first statements to the Prosecution, nor why no forensic  
21 evidence was adduced, even though 863 identified the exact location in relation to the  
22 Bambu hospital where he said those victims were buried.

23 The available video and satellite imagery shows your Honours that the testimony of  
24 many witnesses about a scorched-earth policy being adopted by the soldiers of the  
25 FPLC is simply not true. Lipri appears virtually untouched despite the testimonies

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1 of P-127 and P-317 and, in fact, even the reference to P-317's report that Lipri had been  
2 destroyed. And we say that the photographs of many other locations show the same  
3 inconsistency with other testimonial evidence.

4 Mr President, on Tuesday, the Prosecution offered some clarity as to the events for  
5 which it seeks convictions in respect of sexual enslavement. We say that providing  
6 this information on Tuesday raises serious questions about adequate notice. I also  
7 can't help but refrain from observing that the three individuals whom P-790  
8 overheard, and for whom the Prosecution apparently seeks separate convictions for  
9 this crime, might well be P-18, P-19 and P-113, which means that the Prosecution is  
10 asking for a conviction for the same event twice.

11 In conclusion, your Honours, the evidence of the second attack does not show that it  
12 was a scorched-earth operation. On the contrary, the evidence shows that, in general,  
13 it was an operation that was pursued lawfully and against lawful objects of attack.  
14 And even assuming that that crime at Wadza occurred on the last day of the attack,  
15 that doesn't change that general picture.

16 Your Honours, I thank you for your attention; that concludes my remarks and I now  
17 pass the baton back to Maître Bourgon. Thank you.

18 PRESIDING JUDGE FREMR: [10:01:20] Thank you, Mr Gosnell. And now we can  
19 move to Mr Bourgon.

20 Mr Bourgon, you have the floor.

21 MR BOURGON: [10:01:25] Thank you, Mr President. For the next 60 minutes  
22 remaining in our time, I will address witness credibility issues, the responsibility or  
23 alleged responsibility of Mr Ntaganda pursuant to Article 25 and I will say a few  
24 words with respect to Article 28.

25 I am reminded to call for the control to be passed over to this side of the Defence

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1 bench so that we can operate the PowerPoint presentation, please.

2 PRESIDING JUDGE FREMR: [10:01:57] Court officer, please assist.

3 MR BOURGON: [10:02:05] Three issues related to witness credibility. The first one  
4 is applicable factors; the second one has to do with insider witnesses and, of course,  
5 other OTP witnesses.

6 Demeanour in court, of course, is an important consideration for the Chamber in  
7 assessing credibility, but there are a number of other factors which need to be  
8 assessed by the trier of fact in determining the reliability of evidence provided by  
9 a witness.

10 All of these factors have been set out in our Defence closing brief as well as in our  
11 reply.

12 I will take only a few minutes to address some of the criteria address. The first one is  
13 the role of the witness. The role of the witness is very important and I said so before.  
14 Depending on his or her position and seniority, it can be expected or not expected on  
15 the part of a witness to have certain information. For example, a junior witness or  
16 a low-rank individual is not expected to be privy to conversations, decisions, plans  
17 involving senior officers.

18 Does that mean that it is not possible? No, it is possible, but it is a consideration.

19 Let's take, for example, Witness P-907. Very little, if any, military background. He is  
20 a bodyguard. Now, if a witness like P-907 testifies about issues that a normal  
21 bodyguard would not have, then it should attract the attention of the trier of fact to at  
22 least ask, how was that information obtained? Is it normal for such a witness to have  
23 such information?

24 Now, in the case of P-907, it is quite different from the issue of D-17, also a bodyguard,  
25 but a very close bodyguard working very close, first, with an individual called Safari,



1 and, secondly, with an individual called Bosco Ntaganda.

2 Second factor, corroboration. The Prosecution points out in their closing brief that  
3 corroboration is not a requirement. They are right. It is not a legal requirement  
4 per se. But when the testimony of a witness raises doubt, when it is questionable  
5 and we can't understand that testimony, then corroboration becomes the key. And,  
6 in the absence of corroboration, very often the trier of fact will be led to the conclusion  
7 that the evidence is not reliable.

8 A witness is the only one to provide evidence on a specific issue. That in and of  
9 itself, should attract the attention of the trier of fact at least to be cautious about his  
10 evidence. For example, P-17, was the only witness who testified about orders  
11 allegedly given by Bosco Ntaganda to fire on civilians from Sayo. When we look at  
12 the context in which this evidence is provided and the fact that he is the only witness  
13 to provide this evidence, this, in itself, raises serious doubt.

14 P-894 is another one. The only witness who testified that he is present amongst  
15 a group of individuals, during which Mr Ntaganda would have committed not one,  
16 not two, not three, but four murders in front of his eyes, that he would have pierced  
17 the eyes of someone before him, that he would have continued the conversation with  
18 the man who had his eyes pierced, who said, "Why do you do this to me?" And this  
19 individual would have seen all of that at a time which does not match the evidence,  
20 and he would have simply left without no one asking him any questions about what  
21 he had seen. That kind of information, Mr President, requires corroboration.

22 And it brings the issue even more important in assessing credibility, which is that of  
23 plausibility. What is plausibility? Well, there is a test that we suggest to you,  
24 Mr President, is accepted. This comes from a British Columbia Court of Appeal  
25 decision, where there is a test suggested to look as to what is possible and not possible,

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1 and I need to read that test.

2 In short, "... the real test of the truth of the story of a witness in such a case must be its  
3 harmony with the preponderance of the probabilities which a practical and informed  
4 person would readily recognize as reasonable in that place and in those conditions."  
5 Applying this test to the evidence of many of the insiders, leads to the conclusion that  
6 their evidence is simply not plausible and not reliable. What is important and what  
7 is the main issue, Mr President, is, what do we do with a witness who provides some  
8 evidence that is reliable and some evidence that is not reliable?

9 Is it possible? Yes. Is it accepted? Yes. But how do we determine? Well, we  
10 say that when a witness is caught lying, one lie suffices in raising and requiring the  
11 very careful attention of the trier of fact in assessing his testimony.

12 Now, in cases such as this one, where witnesses do not testify about a single event,  
13 they testify about a number of events over a long period of time, it is possible,  
14 sometimes, for a witness to lie or to give false evidence on one single issue and then  
15 give the truth on other issues. That can happen. And it is the duty of the trier of  
16 fact to try and determine which part is correct and which part is not correct.

17 But there is one overlying consideration, and that is when a witness will lie or  
18 fabricate incriminating evidence; that's the difference. When a witness fabricates  
19 incriminating evidence, then all of the incriminating evidence he provides thereafter  
20 cannot be said to be reliable. Why? Because if I lie about one issue that I put on  
21 Mr Ntaganda's back that is not true and then I also say -- I testify about five other  
22 issues, it is simply not possible to determine which of these issues is true or not and it  
23 has to be disregarded and set aside. Because filing or fabricating incriminating  
24 evidence is the worse-case scenario for a witness. And that, Mr President, we say,  
25 should guide the Trial Chamber's attitude in looking at the evidence.

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1 Moving on to insider witnesses. We mention in our brief a number of them who are  
2 unreliable. For example, I have a list here, 907, 768, 17, 963, 901, 190, 55, 16 and 10.  
3 The Prosecution mentions 16 insider witnesses. There is a list of more than half of  
4 them, we say, did not provide reliable incriminating evidence. The list, I could add  
5 and increase this list. These are just the main ones which, we say, the Trial Chamber  
6 must pay particular attention.

7 And, Mr President, I must add, two unreliable witnesses together don't make  
8 a reliable witness. This is not mathematics where you've got two negatives that  
9 make a positive. It doesn't work this way. All of these witnesses, Mr President, we  
10 say, provided false incriminating evidence and, in that respect, their testimony should  
11 be disregarded.

12 I would like to look at a few examples with the Chamber this morning beginning with  
13 P-907. We identify the manner in which P-907 moved from being a potential  
14 Defence witness to a Prosecution witness; I am not going to say more about this.  
15 But, in the sense of the manner and the testimony of 907 as to how he would have  
16 participated in the FPLC's first attempt to go to Mongbwalu and the FPLC's second  
17 attempt to go to Mongbwalu, his testimony in this regard, when you look at the  
18 cross-examination, is simply not credible, not possible, and cannot be given any  
19 weight.

20 I just recall the witness testified that he was with Mr Ntaganda fighting in Mwanga,  
21 just before the second FPLC attempt to go to Mongbwalu. Well, at that time, the  
22 troops who fought in Mongbwalu, they were in Lalu; so he can't be at two places at  
23 the same time.

24 I also recall the witness saying that in order to go to these -- to the first FPLC attempt,  
25 he simply left his position as a bodyguard without being noticed by anyone, went to

1 participate in the attack, returned using a taxi. And then after using the taxi, he  
2 returned, he joins back the bodyguards and nobody asks him a single question.  
3 Mr President, when you read that evidence and you apply the test I referred to earlier,  
4 it is clear that this man was not participating in the two FPLC attempts to go to  
5 Mongbwalu.  
6 P-907, however, is a witness who was chased from Mongbwalu. He knows the  
7 situation in Mongbwalu and he has described it.  
8 So here is a case where you have non-incriminating evidence, which is reliable  
9 because he was there and we know he was there, and he described the conditions in  
10 which the people who were there, the -- I was going to use the word, the -- I was  
11 looking for the word. It is so horrible that I even forget the word. "Cannibalism"  
12 going on in Mongbwalu. He described that. He described who, in his own family,  
13 was eaten in Mongbwalu. So he knows about that and his evidence is reliable  
14 because that situation in Mongbwalu, that is why Thomas Lubanga requested FPLC  
15 to go there in the first place.  
16 I move to P-768. There are so many issues involving this witness I don't know where  
17 to begin. I will say, however, that significantly, when we look at the Defence closing  
18 brief as well as our reply to the Prosecution brief, you will see, Mr President, that  
19 many of the issues raised were not responded to by the Prosecution.  
20 This witness, a senior military insider, testified that he never saw an FPLC member  
21 punished for a crime committed against Lendus. (Redacted)  
22 (Redacted)  
23 (Redacted).  
24 One of the issues that is very important with respect to P-768 is the evidence he  
25 provided about anti-personnel landmines. Here is a witness who testifies, "I am in

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1 Mongbwalu. Mr Ntaganda I hear on the radio is going to place some mines. The  
2 mines are placed. The mines are placed all around Mongbwalu in every single exit.  
3 The mines kill many, many civilians, women and children. Those who are hit by  
4 mines, they call me and I go and I pick them up with my car because I am the only  
5 one to have a car. I pick up the victims. I bring them to the hospital. This is an  
6 horrible situation. I ask Mr Ntaganda to take away the mines, but he refuses."  
7 Now that is very, very incriminating evidence.  
8 Now, this witness, well, he forgot about all of that until the eve of trial. He said, "I  
9 had other things on my mind."  
10 This is a witness, Mr President, who had many dealings; who volunteered to be  
11 a witness. His purpose in life was to come forward with incriminating evidence.  
12 He forgot about all of that. He remembered that on the eve before trial. And we  
13 did in our brief say the Prosecution couldn't resist. "Now we have him, so we will  
14 get that evidence on the record."  
15 Mr President, is there any doubt in anyone's mind that this is not an issue that anyone  
16 could forget and not bring in a statement before the eve of trial? I don't think so,  
17 Mr President. Especially that he is the only one. Nobody else talks about  
18 anti-personnel mines in Mongbwalu. No record of any victims being killed or being  
19 injured by anti-personnel mines in Mongbwalu. No other witnesses talking about  
20 mines being placed at every exit or entry point in Mongbwalu.  
21 So where does that come from? Mr President, it is a clear fabrication, and a witness  
22 who fabricates this type of evidence cannot be true -- cannot say the truth in terms of  
23 incriminating evidence.  
24 I could go on and on with P-768, I will simply say one more, which is, of course, I  
25 mentioned it yesterday, the evidence about Nzebi. We have an FPLC operation and

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1 the FPLC operation did not envisage any action being taken in Nzebi. He is the only  
2 witness who talks about Nzebi. Where does that come from? Even those reports  
3 which are not reliable and bring all the rumours do not say there were attacks in  
4 Nzebi or do not say that anti-personnel landmines were used in Mongbwalu.

5 P-17. Well, P-17, of course, appeared to be a very, on the face, his demeanour was  
6 not bad in court. He looked like a serious individual. He responded to questions of  
7 a technical nature regarding the use (Redacted), and he did so and provided  
8 answers which looked to provide the Chamber with reliable evidence.

9 But then he goes on to testify about issues which simply are contradicted and show  
10 that are not true. The use of (Redacted)  
11 and the Chamber will look at all of the evidence as to how he ended up being at the  
12 usines, along with a commander named Seyi and about to participate in the operation  
13 in Sayo.

14 For military reasons by themselves, you don't take a kangaroo up the hill to Sayo.  
15 For reasons that he himself mentioned on the use of this type of weapon, you don't  
16 take such a weapon to Sayo. Any other witnesses say that this weapon was brought  
17 to Sayo? No. He is the only one. Did Mr Ntaganda testify about the presence of  
18 heavy weapons? No. He said -- he did, and he did say you don't bring a heavy  
19 weapon.

20 This witness, P-17, knows that (Redacted) up to Sayo required bringing  
21 (Redacted), but when he was asked about the names of the five people,  
22 "Ah ..." He couldn't remember.

23 Once in Sayo, this witness P-17 says that Mr Ntaganda ordered him to fire on civilians.  
24 We discussed that evidence in the Defence closing brief. He would have been 200  
25 metres from a fleeing column of civilians. First, Mr President, at that point in time, it

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1 is clear from the evidence there could not have been a column of civilians fleeing from  
2 Sayo at that location. And we have used maps and we have used the Prosecution's  
3 all-around picture set to demonstrate this. Then, this only witness testifies that  
4 (Redacted) to fire at civilians 200 metres away from where he was, and  
5 yet didn't touch anyone with (Redacted). He didn't say whether  
6 Mr Ntaganda said, "Well, fire again, stupid." No. He didn't say anything like that,  
7 simply because that did not exist. This event did not take place. Why did he say so?  
8 Not for me to say. Simply completely implausible.

9 Then, the same witness moves to the Sayo church and he described that in the Sayo  
10 church, some events about people being in the church. Again, the only witness to  
11 say that. Where has that come from? He says he could look in the church and that  
12 he could see the people. But when the Chamber will read the cross-examination I  
13 conducted of the witness, it is clear at the end. He says, "Well, really, I don't  
14 remember anymore." Because he did not see anyone in the church. And again, the  
15 only witness.

16 Now, if we look in those reports that we have mentioned as having no probative  
17 value, the Ituri, "The Curse of Gold" or the "Ituri: 'Covered in Blood' or those reports,  
18 they do cover this incident about the church, not with any kind of detail provided by  
19 P-17, but the issue of the church is mentioned and it is mentioned in a circular fashion.  
20 It is taken in one report and then circulated in the other reports, and, we say,  
21 Mr President, that must be where P-17 got his information because he is the only one.  
22 Simply not plausible based on his testimony.

23 Now, P-17 also says that he was at the apartment where he saw prisoners being killed.  
24 Well, we explained in the Defence closing brief that he could not have been at the  
25 apartment with Mr Ntaganda based on his evidence.

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1 Mr Ntaganda left Mongbwalu. We know when Mr Ntaganda left Mongbwalu, and  
2 P-17 was not there with him. And we have explained why, in our Defence closing  
3 brief, and it is not only related to the appointment of the commander of the southeast  
4 operational sector. It is a major event, but it is much more. The evidence is much  
5 more than that to show that they were not together at that point in time and that that  
6 he fabricated, Mr President.

7 Now, he also said that he participated in the second FPLC operation or the second  
8 attack as charged. Now in the second attack as charged, if we look at P-17, I have  
9 mentioned yesterday, P-17 saying something about radio conversation, VHF, between  
10 Kisembo and Salumu.

11 Well, we say that, in and of itself, was not possible from a technical point of view.  
12 But there is also another issue, and I tried to ask questions of the witness but I was  
13 stopped from doing so. Is it really plausible that a witness would every night go and  
14 spy on his commander? What were his reasons to go up the hill every night and spy  
15 on his commander with other people?

16 Both the technical aspect and the reasons why he provided his testimony show that  
17 this is simply not true.

18 I move to P-963. Well, I want to limit my observation simply due to time available  
19 this morning, but P-963, (Redacted)  
20 (Redacted). And that is incorrect and not true,  
21 Mr President, as revealed by the evidence.

22 P-963 talked about a long delay between the operation in Mongbwalu per se and the  
23 operation in Sayo, which we know from all of the evidence that is incorrect.  
24 And then he goes on to describe the operation in Sayo (Redacted)  
25 (Redacted)



1 (Redacted)

2 Well, Mr President, I think we do have on the evidence the use of such a weapon on  
3 the back of a vehicle on 6 March, but we don't have any evidence of the sort related to  
4 Sayo. This man, Mr President, was not in Sayo and he fabricated this evidence.

5 Now, P-963, of course, we highlighted the fact that he never trained in Sayo.

6 Prosecution responded to our arguments. The Chamber will be able to determine  
7 whether he did or not. We say he did not train -- in Mandro, sorry, he did not train  
8 in Mandro. And he did not work for (Redacted) as he purportedly said.

9 And P-963 also testified about the second attack as charged. Amazingly he said that  
10 he witnessed interviews of people about to be killed conducted by a man who had  
11 been jailed earlier. That was my first question to him in cross-examination that  
12 the Chamber will recall. How can he see people being interviewed by a man who  
13 has been jailed? Not true. He was not there, Mr President. How would anyone  
14 allow an uninvolved witness to attend such an interview? I put questions to him in  
15 this regard. P-936 is also the only witness who said that Salumu went and  
16 participated in the peace negotiation. Only witness. All of the evidence provided  
17 by 963 that is of an incriminating nature, Mr President, must set aside.

18 P-901, P-901 is a close associate of Bosco Ntaganda for a long time. P-901 said that  
19 Bosco Ntaganda was the most respected officer in the FPLC. P-901 remained with  
20 Bosco Ntaganda when many others decided to join the national army. He remained  
21 with Bosco Ntaganda because he was a close associate of Bosco Ntaganda. P-901  
22 corroborates Bosco Ntaganda's in many respects and the Chamber should keep those  
23 aspects of his testimony.

24 However, when it came to the use of VHF radio communications, he did not provide  
25 accurate or simply false evidence. What he said about communicating through VHF

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1 from Bunia to the outside without even mentioning Witness D-243, who explained  
2 that use of the base was necessary, he did not tell the truth, Mr President.  
3 The Prosecution would like you to believe that P-901 is a soldier and (Redacted)  
4 (Redacted) as opposed to P-243, the civilian. I invite the Trial Chamber to look at  
5 both testimony and to see which of the two witnesses is saying the truth.  
6 Now, P-901, he said that he could hear the KBL audio recording. Mr President, he  
7 could not hear the recording, not only technically, but on the basis of his own  
8 testimony regarding the dates. He said he returned to Bunia on 2 March. He could  
9 not, having returned to Bunia on 2 March, heard or hear that audio recording. And  
10 then of course his testimony is very important because it does support the theory of  
11 the Defence that knowledge regarding the so-called or the alleged crimes committed  
12 in Kobu were not distributed or were not known by many people.  
13 P-901 I mentioned yesterday, so I am just going to recall his testimony concerning  
14 looting of Mr Ntaganda in Mongbwalu. Simply incredible.  
15 P-190. My colleague addressed P-190 with respect to certain issues. I will limit  
16 myself to one main issue and that is the issue of his testimony related to an incident in  
17 2004 which is not charged, incident where he says that Mr Ntaganda would have  
18 murdered a MONUC observer. Mr President, I on purpose on cross-examination,  
19 and the Chamber will be able to see, I gave him all the rope I could give him, give us  
20 some details, and he gave us some gruesome details about Mr Ntaganda's  
21 involvement into an incident which is clear cut because that MONUC observer he  
22 was referring to did not die anywhere close to an incident described by P-190.  
23 Mr President, a witness who is willing to come and to describe before the Chamber  
24 how Mr Ntaganda would have killed, murdered, cold-blooded, with a gun, coming  
25 out of his truck and shoot between the eyes a MONUC observer, and it is entirely

1 false. Well, Mr President, issues like that show that this witness should be  
2 investigated for Rule 70. We did request that to the Chamber already.  
3 The Chamber said it was premature. We hope that the Prosecution will see to it that  
4 this witness is investigated.  
5 P-55.  
6 PRESIDING JUDGE FREMR: [10:32:38] Sorry, just one remark. Maybe you  
7 monitor that I had to sign two, two orders for a redaction because you twice  
8 mentioned some details which could reveal identity of witnesses. Please be careful  
9 about that.  
10 MR BOURGON: [10:32:56] I see what is going on, Mr President, and I apologise  
11 because I did really prepare my notes to avoid and I will even be even more careful to  
12 avoid identifying anyone.  
13 P-55. I will simply again reiterate that his evidence regarding his telephone  
14 conversation with Bosco Ntaganda by Thuraya simply deconstructs his testimony  
15 and that the testimony he provided regarding the fact that he would have obtained  
16 information by MONUC persons and that he would have, on this basis, spoke to  
17 Mr Ntaganda, all of that, Mr President, we say is not true. And I will limit myself at  
18 this to avoid mentioning any details which could identify him.  
19 With respect to P-16, I mentioned already that he had a family relationship with the  
20 person who was executed as a punishment. Now, P-16, it is important to know that  
21 he was not in Mongbwalu. He left Bunia and his job that he was occupying at the  
22 time before Mongbwalu. He was not involved in the second operation to open the  
23 road and all of his testimony is hearsay. We said that before.  
24 P-10. Well, we provided many details about P-10. We simply say that P-10 was not  
25 abducted by the FPLC. The evidence reveals she was a former member of the APC.

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1 We know she lied about her age. The Prosecution at some point during the pretrial  
2 proceedings said that the Prosecution did not intend to rely on P-10 as someone aged  
3 below 15 but yet now is taking a different approach. She did not participate in the  
4 second Mongbwalu operation, second meaning the one that took place in November.  
5 And the Prosecution, referring to the witness of -- to the testimony D-17, which by  
6 lapsus made a mistake is incorrect, Mr President. P-10 was not raped. Where she  
7 said that she was raped is a time and place where Mr Ntaganda could not have been.  
8 That was raised in cross-examination. She has been contradicted by many witnesses,  
9 including in respect of her presence in Rwampara.

10 Third issue is other Prosecution witnesses. And I will move straight to two  
11 witnesses very quickly because they were mentioned by the Prosecution.

12 P-886 is a witness where the evidence he provided in chief was very different once  
13 cross-examination had terminated, in terms that he was no longer in Sayo when FPLC  
14 troops entered Sayo. That's a major difference. That's between his chief and  
15 cross-examination. He had left before.

16 The timing of his return to Sayo is also very important. Now, Witness P-886 is the  
17 caretaker. He is the guy who finds body all over the place and he buries them.

18 I am not sure what I said that was wrong this time.

19 PRESIDING JUDGE FREMR: [10:36:41] I think I don't want to focus attention of the  
20 public to those issue, but it's a minor fact, but still --

21 MR BOURGON: [10:36:50] So the caretaker, well, the caretaker, Mr President, I  
22 invite you to look at one incident which is revealing and that is the incident of  
23 a number of persons allegedly found in the health centre, which he found and which  
24 he buried himself. Just looking at this evidence is revealing.

25 As for P-894, well, other than the fact that Mr Ntaganda is not charged with the

1 murder of an individual called Lusala, I mentioned earlier why his testimony is not  
2 reliable.

3 A quick word on dual witnesses. We describe in our closing brief, as well as in our  
4 reply, why the victim application form is relevant and important and why it must be  
5 assessed.

6 Now, we have the utmost of respect for all victims. There have been many victims  
7 in all the events which took place in Ituri over the years. Mr Ntaganda referred to  
8 that when he spoke at the beginning of the case.

9 But when a witness, victim or not, is going to file an application to be a participating  
10 victim and say, A, and then will show up and testify to B, then the A and the B must  
11 be assessed by the Chamber. I am not going to say more about this issue.

12 Mr Ntaganda's responsibility for the first and second attack. So I start with the first  
13 attack. And what is significant is that at the moment the first attack as charged  
14 began, it is the Defence submission, as explained yesterday, there was no policy  
15 within UPC/RP or FPLC to commit attacks against any civilian population. There  
16 was no ongoing Article 7 attack against a civilian population and there was no  
17 common plan to commit the crimes alleged therein.

18 The factual issues related to the first attack, if I need to recall a few is that  
19 Mr Ntaganda was appointed commander of the FPLC second operation. His  
20 involvement in that operation, we had two brigades. One commanded by Salumu  
21 coming from Mandro, and the other commanded by Seyi coming from Aru.

22 Mr Ntaganda travelled to the area where the operation took place, along with P-290,  
23 arriving when the fighting had ceased. Mr Ntaganda personally commended the  
24 operation in Sayo.

25 Again, it has to be recalled, he did not try to move away or to evade from this. He

1 said: Not only did I command the operation, I took personal control, personal  
2 command of Sayo.

3 In Sayo there was no destruction and there was no destruction either of the church or  
4 any other building. Mr Ntaganda described how the B-10 was used, what the B-10  
5 produced for result, and when he went up there, what he saw and what other  
6 witnesses saw.

7 When Sayo operation was over, the population started to return to Mongbwalu at the  
8 request of the FPLC. Then Kisembo arrived with his delegation and they visited the  
9 area and Bosco Ntaganda returned to Bunia two days after the arrival of Kisembo.

10 The Prosecution said in its submissions that it is unbelievable that there was no one  
11 left in Mongbwalu by the time the attack was conducted.

12 Well, we did not say that there was no one left in Mongbwalu. What the evidence  
13 reveals is that as soon as the first shots were fired, those who wanted to protect  
14 themselves, they left Mongbwalu.

15 Now, the persons remaining in Mongbwalu at that time, they fall in two categories:  
16 People who are fighting or people who are hiding in their houses and seeking  
17 protection and they were not hurt.

18 So the status of the persons, whatever persons was remaining in Mongbwalu, their  
19 status makes it that there was no attack against, directed at civilians or civilians not  
20 taking part in hostilities, which had a different status.

21 The responsibility pursuant to Article 25, when we look at Bosco Ntaganda, our  
22 submission is that he did not commit any crimes personally. The manner in which  
23 the attack was conducted, both in Mongbwalu and Sayo, is not an attack directed at  
24 civilians.

25 There was no destruction either in Mongbwalu or Sayo, including the church. There

1 is no discrimination issue. FPLC wanted everyone to return. There was no murder  
2 of the Abbé. Even though this is not even part of the conduct of hostilities, it is  
3 a charge. But there is only the evidence of P-768, which is absolutely not reliable.  
4 And there was no pillage by Mr Ntaganda in Mongbwalu, contrary to the testimony  
5 of P-901 and Witness P-768.

6 Was there a common plan, 25(3)(a) common plan? Well, no common plan to commit  
7 any of the crimes charged. And I refer the Chamber to my colleague's, the argument  
8 and submissions regarding what must be in the common plan, what is the legal, law  
9 applicable to common plan. In any event there, was no mens rea on the part of  
10 Mr Ntaganda regarding Mongbwalu, either in the first or the second degree.

11 Was there any order issued by Mr Ntaganda? Yes, there were. He did order issue  
12 in respect of Mongbwalu. He was in command. He did issue orders in respect of  
13 Sayo, but there was no crime committed. No crimes were ordered, he did not order  
14 the commission of a crime. And even if the Trial Chamber would find that a crime  
15 resulted from his order, there is no mens rea of the second degree. There is no  
16 dolus directus of the second degree.

17 And as for the 25(3)(d), of course, it's different from 25(3)(c), aiding and abetting,  
18 which is not charged, but there was no common plan and no dolus directus of the  
19 second degree.

20 I move to the second attack as charged. Well, what was the situation in early  
21 February 2003? It was described in detail yesterday. There was no policy, either  
22 within UPC/RP or within FPLC, to commit attacks directed at any civilian population.  
23 There was no ongoing Article 7 crime against humanity attack and there was no  
24 common plan to commit any of the crimes charged or included in the common plan.  
25 Of course Mr Ntaganda is not charged as a direct perpetrator for the second attack,

1 because he is not there. So there was no charges for his personal involvement.

2 What about under 25(3)(a) for indirect co-perpetration? Well, first, there was no  
3 common plan, as we mentioned. And secondly, even if there had been a common  
4 plan, there was no contribution. We submit, Mr President, regarding contribution  
5 that the Chamber could look at contribution from three different aspects: Before  
6 a second attack, during the second attack, or after the second attack.

7 Mr President, we say that in all three points of view there was no contribution on the  
8 part of Mr Ntaganda.

9 The Prosecution in its closing brief focussed on planning because Mr Ntaganda would  
10 have participated in a meeting long before the second attack.

11 Well, what's the evidence on his contribution or participation? It is kind of limited to  
12 the testimony of P-55, which we say is unreliable, and to two messages in the logbook  
13 which have been explained in detail, not only in the testimony of Mr Ntaganda, but  
14 also in our argument.

15 It is significant in this regard that the Prosecution had the witness on the stand and  
16 that is P-290. They could have asked 290 to compare the two messages of  
17 19 February, but they did not. They focus only on one message. They could have  
18 asked 290 to comment because (Redacted), so they could  
19 have asked him, "What about the other mistakes?" right in the same period of the  
20 same nature. They did not.

21 Mr President, Mr Ntaganda explained what these messages were, what they meant  
22 and why they are there, and they are not a contribution to the second attack as  
23 charged.

24 In terms of ordering with respect to the second attack and looking at the three points  
25 of view, before, during and after, Mr Ntaganda did not order the commission of any



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1 crimes and did not order any issue which led to the commission of a crime.

2 And should the Trial Chamber find that some crimes were committed, they are not

3 the result of Mr Ntaganda's order; and if there is a link, for sure, Mr Ntaganda did not

4 have the *dolus directus* of the second degree, which necessitates that when issuing an

5 order that is not criminal, he knows the crime will be committed. Certainly that was

6 not the case, Mr President.

7 And the same applies to 25(3)(d), which is of course contributing in any other way.

8 Once again, no common plan, then there should be no responsibility. But also, there

9 was no *mens rea*.

10 Let's assume for the sake of argument that the Chamber finds that there was some

11 kind of a meeting as described by P-55. That's the evidence which we say is

12 absolutely incorrect. But let's assume that we find that there was such a meeting, the

13 *mens rea* requirement of knowing either the intention of that group to commit the

14 crimes, or to further the criminal activity of a group, or the intention of the group to

15 commit the crime, the crime in Article 25(3)(d)(ii) refers to a specific crime, just not

16 there. And that is based on the worst possible evidence which we say is unreliable.

17 Mr President, accordingly, there is no responsibility, in our submission, regarding the

18 second attack as charged.

19 A few words on command responsibility, Article 28. I will begin by the nature of

20 Article 28, liability, and address one of the arguments spelled out by my colleague

21 yesterday or the day before.

22 Mr President, the nature of command responsibility is liability for failure to exercise

23 command. Every time command responsibility, or most of the time command

24 responsibility was used as a charge, it was because the commander did not have the

25 applicable *mens rea* of the crime and was not involved in the *actus reus* of the crimes.

1 I took part in many cases, Hadžihasanovic. There are other examples of persons  
2 charged with only command responsibility. I was before the ICTY. And these  
3 cases, because the Prosecution made a choice, he is not involved, he is not  
4 a perpetrator, but he is a bad commander, so we will charge him, according to 7(3)  
5 ICTY or Article 6(3) ICTR.

6 Now, in this case, the Prosecution, they want to charge him for a perpetrator, for an  
7 indirect perpetrator, for a direct perpetrator, for all kinds of perpetration and also for  
8 being a bad commander. They just throw everything at the Chamber and they say  
9 let's find something, let's find a way to establish some kind of conviction. Are they  
10 allowed to do that? Yes, they are. The Pre-Trial Chamber said so.

11 Pre-Trial Chamber said if there is prima facie evidence, they can charge everything  
12 that they want. And they did. They did. But in assessing the evidence it does  
13 show that the Prosecution does not really know what Mr Ntaganda is responsible for.  
14 All they know is that the internet says he is a bad guy and he should be convicted of  
15 something.

16 A vertical chain of command. My colleague said yesterday you go from the platoon  
17 commander to the company commander to the battalion commander and to the  
18 brigade commander, all of which can be found guilty pursuant to Article 28,  
19 command responsibility. My colleague is absolutely correct, that's the vertical chain  
20 of command. But what if you are outside the vertical chain of command? That was  
21 Mr Ntaganda's situation, either de facto and de jure.

22 Let's take a look at the organigrams that were submitted in evidence. In early  
23 November, let's focus on the position of Mr Ntaganda where he is not in that vertical  
24 chain of command. He is not a commander, he is a chef d'état-major général adjoint,  
25 opération et organisation.

1 Let's look now at the Mongbwalu operation, where here we see a difference. Here  
2 we see that the overall commander is Kisémbó and in that vertical line you have  
3 Bosco Ntaganda. That's a difference.

4 We move to December, after Mongbwalu. Well, Mr Ntaganda rejoined the position  
5 he had before, which is not in the vertical chain of command. Mr Ntaganda did  
6 issue orders, yes. Mr Ntaganda did take measures to prevent, yes. Mr Ntaganda  
7 did take measures to punish, yes. But all of these measures were taken pursuant to  
8 the authority of Floribert Kisémbó, chef d'état-major général. And that is the same  
9 situation whether we look at it from a de jure point of view, the official appointment  
10 of Kisémbó, Ntaganda and the chef d'état-major général adjoint logistics Dilengu.

11 And it's the same from a de facto point of view, and Mr Ntaganda explained that in  
12 his testimony.

13 Knowledge requirement: The only thing we say about this knowledge requirement  
14 is that what is the exact words in Article 28 must be interpreted as the test was for  
15 ICTY, because any other interpretation would be inconsistent with customary  
16 international law. We are not seeking to change the words. "Should have known"  
17 in Yamashita, everyone knows this is not customary international law and this was  
18 rejected. That was "should have known". At ICTY, they said: No, no, we can't do  
19 like Yamashita, so we will change that and we will say, "should have known", we will  
20 say this really means the commander had reason to know in the sense that he was put  
21 on notice of the need to investigate.

22 At the ICC we have "should have known", but we added these words "owing to the  
23 circumstances at the time". We simply say that these words are simply another way  
24 to say the same test that was developed before the ICTY.

25 Causal link is very important. My colleague mentioned yesterday or the day before

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1 that causal link does not exist and that causal link would be simply reading  
2 something into Article 28 that is not there.

3 Well, first we say that is incorrect. You have before on the screen the reading of  
4 Article 28, and this reading clearly says that, as "a military commander or person  
5 effectively acting as a military commander shall be criminally responsible for  
6 crimes ... as the case may be, as a result of his or her failure to exercise control  
7 properly ..."

8 If that is not a causal link requirement, I don't know what that is, Mr President. We  
9 are not reading anything new into the Statute of the ICC. The drafter of the Statute  
10 included the words, if crimes are committed as a result of lack of control, of failure to  
11 control, then Article 28 kicks in.

12 When we look at the evidence in this case and we look at the Prosecution conceding  
13 two days ago that Mr Ntaganda took all measures to prevent or repress other than for  
14 the crimes charged, then we say that the manner in which he exercised command in  
15 the evidence, if any crimes should be found to have been committed, they certainly do  
16 not result from his lack of control or from the manner in which he exercised control.

17 So quickly we say that whether for the first attack or the second attack we say that  
18 Mr Ntaganda cannot incur liability pursuant to Article 28 in the first case because of  
19 the absence of knowledge and the measures taken, in the second case because he did  
20 not have effective control.

21 You have seen this one before, Mr President, that's the end. You have seen that  
22 before. People know me for using this in every case I argue because I think it is very  
23 relevant.

24 Mr President, you see, after three years of trial, we are able to make a difference.

25 There are two ladies in this picture. The Prosecution's case is the old lady. But if

1 you look at the eye of the old lady, which is actually the ear of the young lady, and if  
2 you look at the chin and mouth of the old lady, which is actually the neck and the  
3 necklace of the young lady, that's the one that we have revealed and that we are  
4 confident the Trial Chamber will see once it analyses all of the evidence on the record.  
5 There are two cases, I started by saying two visions based on the same evidence, but  
6 once we analyse the evidence there will be only one conclusion, Mr President:  
7 Mr Ntaganda must be acquitted on all counts in the updated documents containing the  
8 charges.  
9 I end, Mr President, I have one or two minutes left, I believe, simply to say that, as my  
10 colleague said yesterday, I think it applies probably more so to me, Mr President,  
11 with all due respect. We have had a good match, maybe it's the colour of our hair in  
12 the Trial Chamber. Mr President, you won, and so should you, but there has been  
13 no knockdowns, came close. When my colleague had to go to the hospital and I also  
14 had to go for medical checkups, it came close, but there were no knockdowns. It was  
15 tough, but we say that this is what trials should be about.  
16 Mr President, I wish to say that if at times I, like my colleague said, if at times I  
17 appeared to be a bit argumentative, I apologise, it had never been the intention. The  
18 intention was always to fight for my client at all times and that's what I think my  
19 team and I did. And I wish to acknowledge the work of my former co-counsel,  
20 Mr Luc Boutin, who had to leave his duty because for medical. I was very lucky to  
21 have him replaced by a very experienced counsel, Chris Gosnell. I wish to say thank  
22 you to all members of my team and especially to all the interns, there have been  
23 a number of interns rotating around. It is not easy. They come, they learn and once  
24 they know, they go. But they all work very, very hard and I wish to thank everyone  
25 on my team at the end of this case.

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1 Mr President, thank you very much.

2 PRESIDING JUDGE FREMR: [11:01:53] I also thank you very much, Mr Bourgon.

3 So now we completed the closing statements, but according our second order on

4 closing statements, Prosecution, if wishes so, may ask for opportunity to reply.

5 Ms Samson, what is your position?

6 MS SAMSON: [11:02:14] Yes, Mr President, the Prosecution does make a request to

7 reply to the Defence's submissions.

8 PRESIDING JUDGE FREMR: [11:02:21] So, as we decided, we will have 30 minutes.

9 And we will then now break for 30 minutes as well and I guess you will be then ready

10 to reply. Fine. Okay. So we -- Mr Bourgon.

11 MR BOURGON: [11:02:39] Maybe I should not say, it's my understanding that

12 Mr Ntaganda wants to make his own sworn statement, and pursuant to the decision, I

13 think that Mr Ntaganda will speak before the Prosecution.

14 PRESIDING JUDGE FREMR: [11:02:51] It depends because, you know, it was a little

15 bit unclear. It's up to you, in fact, because what we said, and be careful about that,

16 Mr Bourgon, that we can't prohibit Prosecution to reply to Mr Ntaganda's you call it

17 unsworn statement. So if you want to avoid that, then Mr Ntaganda should wait

18 until the very end of today's hearing. Am I clear enough? Because normally if he

19 would now take his right to make unsworn statement, then Prosecution could even

20 comment not only your closing statement, but also his unsworn statement. It was

21 my understanding that you would like to avoid that. We can't prohibit Prosecution

22 to make it. So if you want to avoid Prosecution to react on his on unsworn statement,

23 he still have a right to take it as the very last person. So reply from Prosecution,

24 potential reply from Defence team and then as a last point Mr Ntaganda's unsworn

25 statement. So what is your option?

1 MR BOURGON: [11:03:57] Well, we will hear the Prosecution reply and then  
2 Mr Ntaganda will do his unsworn statement with the 30 minutes, then if Mr  
3 Ntaganda does not use his full 30 minutes, I will use the rest to make sure that his one  
4 defence --

5 PRESIDING JUDGE FREMR: [11:04:10] It's not about time limits. Today we are, at  
6 this stage of closing statements it's the most important submissions for the case, so  
7 don't worry about the time.

8 MR BOURGON: [11:04:21] Thank you, Mr President.

9 PRESIDING JUDGE FREMR: [11:04:22] So now, as we decided, we will now break  
10 for 30 minutes and at 11.35 we will resume and Prosecution will present their reply.

11 THE COURT USHER: [11:04:35] All rise.

12 (Recess taken at 11.04 a.m.)

13 (Upon resuming in open session at 11.37 a.m.)

14 THE COURT USHER: [11:37:47] All rise.

15 Please be seated.

16 PRESIDING JUDGE FREMR: [11:38:30] So, as I indicated before the break, now we  
17 will move to Prosecution and, Ms Samson, as main counsel, will have a chance for  
18 30 minutes to reply to the closing statements of the Defence.

19 Ms Samson, you have the floor.

20 MS SAMSON: [11:38:50] Thank you, Mr President.

21 The Defence stated necessary outset of its presentation yesterday that  
22 the Prosecution's closing address was nearly identical to its opening statement.  
23 Your Honours, that shows the strength and the consistency of the Prosecution's case.  
24 It shows that the case that we presented remained constant and unchanged. And it  
25 shows that the evidence that we anticipated three years ago would be adduced

1 during the course of this trial was in fact adduced.

2 The Defence also submitted yesterday that there was no organisational policy to  
3 commit crimes by referring to several UPC political documents or speeches about  
4 peace. However, the accused himself testify been the truth of the facts contained in  
5 certain UPC documents as follows, and I quote: "We are dealing here with the  
6 language of politicians and this is how politicians speak when they are speaking  
7 politics, which is not always reality." That, your Honour, was the accused's  
8 testimony at transcript T-213, page 82, lines 8 to 9.

9 The Defence yesterday attempted to describe the video recorded military parade at  
10 Mandro as a briefing to the troops who participated in the first attack.

11 The only credible evidence in the case record about the date of this event is that of  
12 Prosecution Witness P-898 who testified that the Mandro parade took place just one  
13 day after the UPC troops in Mandro received their uniforms. And yesterday,  
14 the Defence confirmed that the soldiers in the video were, quote, "Proudly wearing  
15 their new uniforms." End quote. A reference to page 74 of the transcript,  
16 lines 6 to 7.

17 Bosco Ntaganda himself testified that uniforms were distributed to the troops in  
18 Mandro in mid-September or towards the end of September. Accordingly, the only  
19 evidence on the record reveals that the event took place in September 2002, several  
20 months before the Mongbwalu attack.

21 If this briefing had taken place shortly before the first attack, as claimed by  
22 the Defence, why is there not a single reference or mention of an imminent attack on  
23 Mongbwalu in the video?

24 Now, while the speech made by Chef Kahwa at Mandro should be considered as part  
25 of UPC's propaganda efforts, it does nonetheless reveal the criminal conduct by the



1 UPC army when Chef Kahwa references to the troops not to continue to pillage and  
2 rape women. And I'm referring, your Honours, to the transcript of the video at  
3 DRC-OTP-0164-0710, page 723, lines 394 to 396.

4 I turn now, your Honours, to Defence arguments regarding the relevant mens rea  
5 standard under Articles 25 and 30.

6 First, the Defence adopts the notion of dolus directus in the second degree as the  
7 meaning of Article 30(2)(b) as described in the CAR Article 70 judgment. However,  
8 the Prosecution reiterates that your Honours should apply the plain language and  
9 meaning of Article 30(2)(b) without relying upon abstract concepts such as  
10 dolus directus or dolus eventualis, which have the potential to cause confusion.

11 And we see the confusion even in the Defence's own submissions; as today, they  
12 submitted that what is required is an awareness that the events will occur, which has  
13 been described as meaning a virtual certainty. In fact, your Honour, that was  
14 a submission from yesterday.

15 But the Defence omits the vital words, "in the ordinary course of events" when it  
16 describes an event that will occur. Article 30(2)(b) does not require foresight that the  
17 events will occur, but, crucially, that they will occur "in the ordinary course of  
18 events".

19 The Defence is not correct to state that liability, quote, "does not arise when the crime  
20 is foreseeable or highly likely to the accused," end quote, because there is a degree of  
21 foreseeability in the words "ordinary course of events".

22 The part of the Defence submissions that illustrate further confusion that were  
23 referenced today were when the Defence stated that the accused, quote, "did not have  
24 the dolus directus of the second degree, which necessitates that when issuing an order  
25 that is not criminal, he knows the crime will be committed." End quote. By that,

1 the Defence appears to be now suggesting that *dolus directus* of the second degree  
2 means actual knowledge. This is clearly wrong.

3 Secondly, the Defence's reference to the jurisprudence of the ECCC is incorrect. The  
4 ECCC has not rejected the notion of *dolus eventualis* as a means of establishing intent  
5 for international crimes. Rather, it is clear that the ECCC case law supports  
6 the Prosecution's arguments.

7 While it is true that in the case 002/01 appeal judgment of 23 November 2016  
8 confirmed the Extraordinary Chambers' decision not to apply the mode of liability  
9 known at the ICTY as JCE III, this was because it was not known to customary  
10 international law at the material time in the 1970s, the time frame relevant to the  
11 jurisdiction of that tribunal, and I refer to paragraph 807 as well as paragraphs 774  
12 and 806 of that decision.

13 It is clear that the Extraordinary Chambers was not rejecting JCE III because of any  
14 concern with the notion of *dolus eventualis* because of its own conclusions, which I  
15 will now quote from paragraph 808:

16 "... what is of note is that the common purpose may encompass crimes in which the  
17 commission is neither desired nor certain, just as it is sufficient for the commission  
18 of certain crimes that the perpetrator acted with *dolus eventualis*." End quote.

19 In the same judgment in another context, the Extraordinary Chambers also held that  
20 the *mens rea* of murder as a crime against humanity as it stood in 1975, defined as an  
21 international killing, quote, "must be defined *largo sensu* so as to encompass *dolus*  
22 *eventualis*." End quote. And that's a reference to paragraphs 409 and 410 of the  
23 decision.

24 And I invite your Honours to also consider paragraphs 390 to 391.

25 The Extraordinary Chambers further introduced some important relevant

1 clarifications in the law of JCE I, and the Prosecution refers to paragraph 808 of that  
2 decision. The clarifications included that members of a common purpose need not  
3 desire the crimes in question provided that they are at least, quote, "foreseen as  
4 a means to achieve a given common purpose, even if their commission is not certain."  
5 End quote.

6 Amongst the relevant circumstances to be taken into account are, and I will quote  
7 again, "the overall objective of the common purpose and the likelihood that it may be  
8 attained only at the cost of the commission of crimes." End quote.

9 Third, regarding Article 25(3)(d), the Prosecution agrees that Article 30 can apply to  
10 Article 25(3)(d)(i), which requires proof of both intent and knowledge.

11 For Article 25(3)(d)(ii), which only requires proof of the accused's knowledge, then  
12 only Article 30(3) is applicable. Finally, the Defence misunderstands  
13 the Prosecution's closing brief because its detailed evidence of intent and knowledge  
14 are found at paragraphs 993 to 1048, whilst the paragraphs cited by the Defence in  
15 oral argument, in addition to being relevant to the objective elements of  
16 Article 25(3)(a), also address discriminatory intent and propaganda.

17 I will now respond to the Defence's submissions on issues relevant to the scope of the  
18 charges.

19 First, sexual slavery is a continuous crime. In the Taylor trial judgment at the Special  
20 Court for Sierra Leone, the Chamber held that due to the continuous nature of sexual  
21 slavery, pleading specific locations is impractical. It also noted the fact that the  
22 perpetrators were often on the move between villages and districts over a significant  
23 period of time. I refer your Honours to paragraphs 119 and 1,018 of the  
24 trial judgment.

25 The same rationale applies to the sexual slavery of child soldiers and to their rape.

1 Although rape is not a continuous crime, the perpetrators and victims were on the  
2 move between villages over a significant period of time.

3 In contrast, the victims of rape in the Bemba case were not child soldiers who were on  
4 the move. Thus, the Defence comparison of these charges with charges of rape in the  
5 Bemba case and its reference to the Bemba appeals judgment are misplaced.

6 Second, contrary to the Defence submissions, Article 74(2), which reads, quote, "the  
7 decision shall not exceed the facts and circumstances described in the charges and any  
8 amendments to the charges," end quote, is not concerned with the pleading

9 requirements. The relevant provisions regarding the charges are, as the Lubanga  
10 Appeals Chamber rightly found in paragraphs 119 and 121, Article 67(1)(a) as well as  
11 Article 61(3)(a), Rule 121(3) and Regulation 52(b).

12 Article 74(2) only seeks to ensure congruence between the charges as pleaded by  
13 the Prosecutor and confirmed by the Pre-Trial Chamber and the final decision. It  
14 does not dictate the required degree of specificity of the charges, which is the issue  
15 that Mr Ntaganda disputes with respect to counts 6 and 9.

16 Also contrary to what the Defence argues, the Lubanga appeal judgment dealt with  
17 both the required degree of specificity of the charges and notice to the accused. It  
18 did not only deal with notice as the Defence submitted yesterday.

19 I refer your Honours to paragraphs 118 to 137 of the Lubanga appeals judgment. In  
20 particular, I note that paragraph 121 refers to, quote, "the level of detail required of  
21 the charges", end quote.

22 Paragraph 122 specifically refers to the specificity of the charges and it quotes the  
23 Blaškić appeals judgment on the issue. Paragraph 123 states that the required degree  
24 of specificity is a case-by-case assessment, and paragraph 124 explains where and  
25 how the detailed information about the charges is to be provided to the accused.

1 And contrary to the Defence submission yesterday, the Prosecution referred to  
2 auxiliary documents, not only to cure deficient charges, but also to provide further  
3 detail of the charges. This is what the Lubanga appeals judgment found. In  
4 particular, paragraphs 123, 124 and 129 where the Appeals Chamber found, firstly,  
5 that although the Prosecution must provide the greatest degree of specificity in the  
6 charges, this depends on the circumstances of each case. And secondly, that further  
7 detail of the charges can be contained in auxiliary documents provided before the  
8 start of trial.

9 In Katanga, the Pre-Trial Chamber rejected a Defence request to amend the updated  
10 document containing the charges because it did not provide sufficient detail as to the  
11 identity of victims.

12 And the Pre-Trial Chamber did so by finding that the updated document containing  
13 the charges and the list of evidence, and I quote, "was sufficient to satisfy the  
14 requirements of Article 61 (3) and 67(1)(a) and (b) of the Statute, Rule 121(3) and  
15 Regulation 52."

16 That's a reference, your Honours, to the Katanga decision number 648, paragraph 28,  
17 which is also cited in the Lubanga appeals judgment at paragraph 126. This, we  
18 submit, is consistent with the Bemba majority Appeals Chamber finding at  
19 paragraph 115.

20 Your Honours, today the Defence spent significant time reviewing all of  
21 the Prosecution evidence of the recruitment and use of children under the age of 15 by  
22 reference to four categories of the evidence. It referred to the evidence of former  
23 child soldiers; it referred to the evidence of the UPC's own videos; it referred to the  
24 evidence of the United Nations and non-governmental organisation witnesses who  
25 testified about what they saw, what they experienced and the children with whom

1 they met. The Defence referred to the numerous admitted contemporaneous  
2 documents recording the direct observations of these representative witnesses, and it  
3 also referred to the UPC's own documentary evidence on the recruitment and use of  
4 children under the age of 15 within its ranks.

5 Your Honours, the Prosecution's submission is that the Defence submissions also  
6 reveal the sheer volume and weight of evidence that has been adduced in this case  
7 proving counts related to the use and recruitment of children under 15 in the UPC.  
8 The wealth of diverse sources alone is significant. But even this was not all of the  
9 evidence that the Prosecution tendered in this case on these counts. We also called  
10 more than a dozen military or political insiders who told the Chamber in detail of  
11 their participation in, their observations of and their personal commission of these  
12 crimes.

13 The Defence today also made note of the Lubanga case. The evidence in the  
14 Lubanga case is not in relation to the children themselves who testified the same  
15 evidence in this case. But I do make one correction, your Honour. The Prosecution  
16 in the Lubanga case called nine alleged former child soldier witnesses and not 12.  
17 The Defence would have your Honours believe that the evidence in this case is  
18 somewhat less, or of somewhat less weight than the evidence that was adduced in the  
19 Lubanga case. But the Defence fails to note that the Prosecution called eight  
20 additional insider witnesses in this case who gave evidence of the practice and the  
21 facts surrounding the recruitment and use of children in the UPC.

22 The Defence also seeks to discredit the evidence of P-46, an experienced  
23 United Nations child protection officer who spent years meeting with children under  
24 the age of 18, including children under the age of 15, who were in several armed  
25 groups in Ituri, most notably in the UPC. She was in Bunia, she met with

1 Thomas Lubanga to discuss this very issue, and she was not alone.

2 The Defence wishes to have your Honours isolate each individual item of evidence  
3 adduced in this trial in relation to children, while ignoring the volume of credible,  
4 consistent evidence that has been adduced during the course of this trial on these  
5 crimes.

6 In relation to the Rwampara video, as the Prosecution mentioned in its closing brief,  
7 Defence witness 17 himself confirmed that a child visible in the video was 13.

8 Yesterday, your Honours, the Defence played an excerpt of a video showing  
9 a pacification meeting in Ngongo between UPC and Lendu representatives. In that  
10 excerpt your Honours could see Tinanzabo effectively confirming that the UPC was  
11 perceived as anti-Lendu. Other parts of the video put to Bosco Ntaganda during his  
12 testimony showed Lendu representatives complaining to the UPC delegation about  
13 the UPC having torched homes in Nyangarai the previous day, and about the  
14 multiple commission of crimes by the UPC during the Mongbwalu operation where  
15 UPC soldiers chanted hateful songs against the Lendu.

16 On yet another excerpt of the same video your Honours saw a Lendu representative  
17 saying that UPC Commander Salongo had called on public radio to "chase the Lendu  
18 wherever they were". Far from proving, as the Defence would have it, that there  
19 was no UPC policy to commit crimes against civilians, the video exposes such  
20 a policy.

21 On another point, your Honours, the Defence submitted that two messages in the  
22 accused's radio communication logbook show an order to execute an FPLC soldier for  
23 killing a Lendu civilian.

24 But the logbook messages themselves say nothing about the ethnicity of the  
25 individual who was killed. Nor do they indicate whether the individual was

1 a civilian or a combatant. Nor was P-768 asked a single question about the ethnicity  
2 or the status of the person.

3 I will briefly respond now, your Honours, to the Defence submissions related to  
4 conversations that Mr Ntaganda had from the detention centre with his associates  
5 regarding his activities in February 2003.

6 What is relevant in the Prosecution's submission, your Honours, is that at no time  
7 during these discussions in 2013 did either Mr Ntaganda or the people with whom he  
8 was speaking refer to him having been in Rwanda at that very time.

9 The Defence also made submissions on the Prosecution's point that Mr Ntaganda's  
10 late disclosure of an alibi defence can be considered a recent fabrication. On that  
11 point, your Honours, I refer you to the Nahimana judgment of 2013 at paragraph 113,  
12 and I quote, "The Appeals Chamber recalls that the manner in which an alibi  
13 presented may impact its credibility." End quote.

14 And at paragraph 114, where the Chamber stated, and I quote, "The  
15 Appeals Chamber has previously upheld the inference drawn by a trial chamber that  
16 failure to raise an alibi in a timely manner suggested fabrication of the alibi in order to  
17 respond to the Prosecution case." End quote.

18 Your Honour, that concludes the Prosecution's response to the Defence submissions.

19 We continue to rely and ask your chambers to rely on the Prosecution's fuller  
20 submissions as contained in its closing brief, for we were unable to address every  
21 instance or reply to every position put forward by the Defence. I thank you.

22 PRESIDING JUDGE FREMR: [12:06:54] Fully understandable. Thank you very  
23 much, Ms Samson.

24 Now Defence, it is your turn, so how your turn will be organised, it is up to you,  
25 Mr Bourgon, whether you want to speak first, then Mr Ntaganda or the reverse. It is



1 up to you.

2 MR BOURGON: [12:07:09] Thank you, Mr President, we would like to quickly  
3 answer those points raised by the Prosecution. Mr Gosnell and I, five minutes each,  
4 and then Mr Ntaganda, Mr President.

5 PRESIDING JUDGE FREMR: [12:07:19] Very well.

6 MR GOSNELL: [12:07:23] Mr President, we take issue with -- well, I can say for the  
7 remarks in respect of my own submissions take issue with pretty much everything  
8 the Prosecution just said, but I will just limit myself to three of the points that were  
9 raised.

10 The first concerns the terminology or meaning of the expression "direct intent in the  
11 second degree" and how that may or may not correspond to the language of 30(2)(b).  
12 Mr President, we suggest that this is essentially a storm in a teacup, except to the  
13 extent that the Prosecution previously did accept that the language of Article 30(2)(b)  
14 was intended to refer to that concept of dolus directus in the second degree. Whose  
15 only purpose, we say, and whose only utility is to remind ourselves that the standard  
16 is referring to something very close to conscious will, but only when there is that level  
17 of cognitive awareness that is so high that it is almost like that conscious will. And  
18 we say that is what is embodied in the excerpt that we showed to you from the Bemba  
19 et al proceedings, which we suggest is a correct statement of the law and also useful  
20 for your Honours in deciding how to apply those words in practice.

21 The second point was in respect of the purported distinction between rape in the  
22 Bemba case and rape in this case on the basis that, in this case the rape victims were  
23 on the move; whereas, in the Bemba case they were not on the move.

24 I suggest this is not a distinction that has any significance. Either way, the  
25 requirement is that your Honours may not enter a conviction on the basis of facts and

1 circumstances that are not set out in the charges. That is the case whether or not the  
2 victims are moving about from time to time or at a specific location, and I imagine,  
3 Mr President, that the Prosecution is not suggesting that the mobility of the victims  
4 also excuses the notice requirements under 67(1). I understand they would accept  
5 they still need to give that information about where the victims are, where did the  
6 crimes take place.

7 So the only issue that we are discussing here is not that the specificity needs to be  
8 provided at a certain time, but at what stage it needs to be provided, at least at the  
9 minimal level, the threshold level required at the stage of confirmation, which then  
10 allows you, under Article 74(2) to enter a conviction. That's the only issue.

11 The third point, and it may have arisen indeed from my own sloppy use of  
12 terminology in using the language of specificity of the charges in respect of  
13 Article 74(2). And it is true, Mr President, that strictly speaking, using that language  
14 is not really relevant to, directly relevant to Article 74(2). It is indeed, strictly  
15 speaking, only relevant to Article 67(1).

16 But the fact remains, and I invite your Honours to have a close look at the Lubanga  
17 appeals judgment, to look at the pleadings in the Lubanga appeals case, Article 74(2)  
18 was not at issue and the Appeals Chamber did not take up the issue of the  
19 requirements in Article 74(2) in that judgment. So we reaffirm our previous  
20 submissions that the issue has not been litigated in the Lubanga case, it certainly has  
21 not been litigated in respect of counts 6 and 9 and in respect of every other charge,  
22 except for counts 14, 15 and 16, that you will find in this UDCC which have nothing  
23 to do with that in the Lubanga case.

24 Thank you, Mr President.

25 PRESIDING JUDGE FREMR: [12:11:55] Thank you, Mr Gosnell.

1 Now floor goes to Mr Bourgon, please.

2 MR BOURGON: [12:11:59] Thank you, Mr President.

3 Very quickly I will begin by addressing Prosecution's argument regarding the

4 Mandro video; we take issue, of course, with the Prosecution's position.

5 The Prosecution suggest that the timing of the video was much earlier than what

6 the Defence says. We say that this is incorrect and there is plenty of evidence on the

7 record, including on the testimony of Mr Ntaganda who testified that this meeting

8 took place shortly before he travelled to Aru; and there are other witnesses involved,

9 such as D-17, who testified that, during Mr Ntaganda's absence, he saw the meeting

10 in Mandro about going to Mongbwalu. The fact that P-898 would say that this

11 meeting was held one day after receiving the uniforms is simply not plausible, plus

12 the fact that 898 himself is not a credible witness.

13 But the issue, Mr President, is not that the Prosecution suggest that Mongbwalu was

14 not mentioned during this meeting. The Defence did not say that the meeting was

15 organised for Mongbwalu. No. Because when Mr Ntaganda was there he did not

16 know about Mongbwalu, so Mongbwalu could not have been mentioned during that

17 meeting. The purpose of that meeting happened before it was organised, the troops

18 were organised into a brigade - I said that yesterday - and before Salumu arrived and

19 took command of that brigade. But the determining issue, Mr President, is that the

20 troops you see on that video are the troops that went to Mongbwalu and they did

21 receive the speech from the politics, UPC, to the army, FPLC, and it was not

22 propaganda.

23 Second issue has to do with the issue of the Ngongo video. How UPC might have

24 been perceived by some people in Ngongo is unrelated as to whether a policy existed

25 within the UPC/RP.

1 During that, the result of that, of those negotiations is the road was opened, it's that  
2 secondary road. That's a concrete result. That shows policy. That shows absence  
3 of policy to commit attacks against any civilian population. And the comment that  
4 was made by Salongo in the video, "What did the people say?" Well, the UPC  
5 delegation clearly say in that video, if Salongo did say this he will answer for his  
6 words because that was UPC/RP and FPLC policy. They would not let such  
7 a comment go by without taking measures against Salongo.

8 As for Nyangarai, that recently before those negotiations there were -- houses were  
9 burnt in Nyangarai. Well, I recall the message that was sent by P-55 immediately  
10 following these negotiation, with the -- coordinated with Mr Ntaganda, where he was  
11 able to send a message for the troops to stop the fighting so that negotiations can take  
12 place.

13 Regarding the logbook messages and the execution of Liripa, Prosecution alleges or  
14 suggests that the ethnicity of the victim is not in the logbook. I think they are correct  
15 that in the logbook it doesn't say that a Lendu civilian was murdered. But the  
16 ethnicity has been established by Witness P-850. It was a Lendu civilian,  
17 Mr President.

18 Telephone conversations of Mr Ntaganda, the fact that Rwanda was not mentioned.  
19 What is important is the issues mentioned in those conversations corroborate  
20 Mr Ntaganda's testimony. They show that at that point in time what they are  
21 discussing is they are discussing issues which corroborate the fact that he travelled to  
22 Mongbwalu and that he did take the plane. And those issues corroborate the fact  
23 that he went to -- that he flew to Rwanda.

24 But also, Rwanda is not an alibi. Rwanda is a very short little part of the story of the  
25 accused as to where he was and what he did at the time. It is not an alibi. What

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1 would be -- because then Libi would be an alibi, he did not mention Libi before;  
2 Mahagi would be an alibi, he did not mention Mahagi before. What Mr Ntaganda  
3 said is, "I had nothing to do with those attacks. I never set foot." That's what he  
4 said from the beginning in his telephone conversation, as well as in his opening  
5 statement.

6 And that's it, Mr President, thank you.

7 PRESIDING JUDGE FREMR: [12:17:23] Thank you, Mr Bourgon. It completes  
8 closing statements.

9 Before I give floor to Mr Ntaganda I would like to declare that I don't have further  
10 additional questions.

11 Do my colleagues have any question? I don't see that it is the case.

12 So now, Mr Ntaganda, can you hear me? Now it is your turn, so you may  
13 present - it doesn't matter how we will call it - either your final unsworn statement or  
14 last word. And, Mr Ntaganda, Mr Ntaganda, yes, it is my guidance, you will have to  
15 stand because now you are not testifying, you are making submissions.

16 And I thank court officer for her assistance.

17 So, Mr Ntaganda, you have the floor.

18 MR NTAGANDA: [12:18:32] (Interpretation) Your Honours, this is the third  
19 opportunity that I have had to speak to you directly and I am very grateful for this  
20 opportunity.

21 I will be speaking in Kinyarwanda for reasons of interpretation, but I could have just  
22 as easily spoken in Swahili, as I did when I gave my testimony.

23 The first opportunity that I had to address the Bench was at the beginning of the trial,  
24 and at that time you knew me only barely. What I told you on that day I maintain.

25 I stand by what I said: I am a revolutionary, but I am not a criminal.

1 The second time that I spoke to the Bench was during my testimony, which lasted  
2 several weeks. When I began my testimony you knew me somewhat more, but  
3 unfortunately you had a rather negative impression of me. That was due to the  
4 unfounded allegations that the Prosecutor made against me, and also on the basis of  
5 the telephone conversations I had with a number of people.  
6 Of course that's not the only reason, but certainly it was one of the main reasons for  
7 my desire to testify before the Chamber, so that you could hear me directly, ask me  
8 questions directly and come to know me better.  
9 My testimony before this Court has been an enriching experience that I will never  
10 forget. Obviously it was not an easy thing, but I truly needed to tell you my story,  
11 speak publicly about my military career: I became a soldier at 18 and I continued my  
12 career until I was appointed acting chief of general staff late in 2003.  
13 Today, at the end of this long trial, and after giving my testimony over several weeks,  
14 the situation is different. I hope that you now know me better and you now realise  
15 that "The Terminator" described by the Prosecutor is not me.  
16 It has been exactly five years, five months, and seven days since the time I came  
17 forward and appeared before the Court to respond to the accusations against me.  
18 Of course, the decision I made to go to the American embassy and then be transferred  
19 to The Hague changed my life profoundly. Only a few years before that day I was  
20 a general in the Congolese national army. And, as such, I worked even with  
21 MONUC officials during operations led against the FDLR in North Kivu and in  
22 South Kivu. But I truly felt the need to surrender voluntarily and face the charges  
23 against me. Even though I was not familiar with all the details of these charges,  
24 setting the record straight publicly and helping to establish the truth, these were  
25 fundamental tasks for me.

1 In 2013, when I surrendered voluntarily, I was convinced and I am still convinced  
2 today that I had no reason to reproach myself. That is another one of the reasons  
3 why it was so important for me to be on trial before this Court publicly so that the  
4 truth should emerge and so that people would understand me and know me and  
5 realise who the real Bosco Ntaganda was.

6 Your Honours, by coming before the Court voluntary I knew it would be a great  
7 tribulation. I am a man and a father.

8 I realise that this time spent in detention has been a difficult tribulation because I am  
9 being detained far away from my family. Indeed, I don't even know some of my  
10 seven children and some of them do not even know their father, even though they are  
11 already grown up.

12 Listening to all these allegations against me from the Prosecution, and hearing these  
13 allegations day in, day out, that has not been easy, but I have understood that this is  
14 part of the judicial process and I am at peace with myself, because I know that these  
15 allegations are nothing more than lies.

16 I will not hark back to the restrictions that were placed on my contacts with family  
17 members for nearly three years, owing to allegations from the Prosecutor, even  
18 though such allegations are not to be found in the Document Containing the Charges.

19 All the same, I will say that I am extremely grateful that my communications with my  
20 family and my friends have been re-established ever since the end of the case.

21 And I have understood, your Honours, that you are my last recourse. I am confident  
22 that you will be in a position to review the testimony and the documents relied upon  
23 and you will be able to distinguish between lies and truth.

24 All the places I have gone to over the years since my earliest days, I have always been  
25 a disciplined person and it is thanks to that discipline that I became a general at

1 a very young age. Even now at the detention unit, my fellow detained persons have  
2 chosen me several times to represent them because of my discipline which I was  
3 always shown.

4 When I was taught military leadership I learned that a good leader sets an example.  
5 That lesson has shaped the person that I am today. I have done my best to pass on  
6 this message and these values to those who were under my command so that these  
7 men would become exemplary military leaders, leaders who would respect the  
8 population and protect their property.

9 Your Honours, I shall refrain from commenting on the conduct of my trial as such,  
10 but I would nevertheless wish to make some observations relating to my own  
11 testimony. I took the decision to testify of my own volition and without coercion.  
12 Over the period of months I answered the questions that were put to me by you, the  
13 Judges, the Prosecutor, the victims representatives and by my own counsel. I  
14 provided information on every subject. I never made any attempt to shirk my  
15 responsibilities. And although I was a general staff officer, I did not hesitate to  
16 acknowledge my responsibility as commander of certain operations such as the one in  
17 Mongbwalu.

18 I described the manner in which I arrived Bunia, a region that I did not even know,  
19 and I also explained how I came to be a member of the FPLC. I elaborated on my  
20 role as the deputy chief of staff in charge of operations and organisation, as well as on  
21 my relationships with my superiors, Kisembo and Lubanga. I equally made it clear  
22 that I was not a politician.

23 In answer to every question put to me I systematically tried to provide maximum  
24 information, except of course in the cases of documents or events of which I had no  
25 knowledge at the time.



1 I testified at great length on the ideology that we adopted and did our utmost to instil  
2 in the members of the FPLC, that is because we wanted to take positive actions that  
3 would distinguish us from other groups. In that regard, everything that I said and  
4 elaborated upon relating to the FPLC operations can be found in my logbooks.  
5 Although the messages in my logbooks constitute only a part of what I did to  
6 accomplish the missions assigned to me by my superiors and to enforce discipline  
7 amongst the members of the FPLC, I reiterate that those messages are representative  
8 of the ideology and sense of discipline with which I was imbued during that period.  
9 The fact of the matter is that I am immensely proud of what we were able to achieve  
10 in such a short time and with extremely limited resources.  
11 We successfully set up a well-structured and disciplined group with the objective of  
12 protecting the civilian population, irrespective of ethnic or regional origin. My  
13 logbooks clearly showed that I ordered all elements suspected of having committed  
14 offences to be remanded in custody pending investigations so as to prevent those  
15 elements from tarnishing the ideology of the FPLC.  
16 For example, between 2002 and 2003 and with the agreement of my superiors I never  
17 hesitated in meting out punishment against both soldiers and senior officers alike  
18 who were found guilty of committing offences. Such actions were aimed at  
19 protecting the population and their property. Your Honours, that was the ideology  
20 of the UPC and the FPLC.  
21 Your Honours, in line with examples set by the UPC leadership, the FPLC has as its  
22 objective to protect all members of the population. The operations of the FPLC were  
23 defensive in strategy. The national secretaries and members of the UPC/RP were  
24 drawn from various ethnic groups, including the Lendu. Similarly, the commanders  
25 and soldiers of the FPLC came from different military groups.

1 PRESIDING JUDGE FREMR: [12:30:09] Mr Ntaganda, Mr Ntaganda. Sorry to  
2 interrupt you. Could you kindly slow down a bit. Thank you.

3 MR NTAGANDA: [12:30:17] (Interpretation) Your Honours, the national secretaries  
4 and members of the UPC/RP were drawn from various ethnic groups, including the  
5 Lendu. Similarly, the commanders and soldiers of the FPLC came from different  
6 military groups. I was not aware of their ethnic origins because they were not  
7 required to disclose their ethnicity. Contrary to the submissions of the Prosecutor,  
8 the FPLC was not made up of members of a single ethnic group.

9 Your Honours, we ensured protection for the Lendu civilians who had sought refuge  
10 with us in Mandro as a result of the threats posed by Lendu combatants because they  
11 had refused to take part in the attacks against the Hema. This is a telling example of  
12 our policy to protect all members of the population without discrimination. Even to  
13 this day the people that we protected are still living in the same locality.

14 Your Honours, prior to the commencement of my trial I had hoped that the  
15 preliminary hearings would take place in our home territory of Ituri where I am  
16 accused of having perpetrated crimes by the Prosecutor. I believe you would have  
17 benefited from seeing with your own eyes the locations of the events from which  
18 the Prosecutor's charges against me were drawn. Nonetheless, even though my  
19 wish did not materialise, I have every confidence that you can fully understand the  
20 situation prevailing at the time of the events, make your determination as to what  
21 actually happened and make the distinction between the charges and reality.

22 Honourable Judges, Ituri has suffered a great deal and many of its inhabitants from  
23 all ethnic groups have been subjected to severe harm as a result of the ethnic conflict  
24 that wreaked havoc in that territory as from 1999. As I have already mentioned  
25 earlier, that ethnic conflict was ignited by politicians who plunged Congo into

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1 a bloodbath with their incendiary statements such as "kill all the Tutsi and those who  
2 look like them" in a bid to gratify their thirst for power.

3 I am a Congolese national whose objective has always been to make it possible for all  
4 Congolese to live in peace and harmony, irrespective of their ethnicity. As such, and  
5 having observed the situation from the inside, I feel great compassion as a result of all  
6 the suffering and harm visited upon the civilian populations of all the ethnic groups.  
7 The objective of the UPC/RP was to resolve the problems plaguing Congo and to  
8 protect the civilian population by putting an end to all acts of ethnically motivated  
9 violence.

10 In spite of the accusations that have been made against me, I can take comfort in the  
11 knowledge that the UPC/RP, the FPLC and myself made every effort possible to  
12 achieve that effort, that goal.

13 Today, the UPC is a legally constituted political party established in the political  
14 landscape of the Democratic Republic of the Congo. The party continues to advocate  
15 the same values and ideology as the UPC/RP of 2002-2003. It has representatives in  
16 the national assembly and in other institutions of the country. It may be cold  
17 comfort in the context of the unrest that continues to afflict the DRC, but I venture to  
18 suggest that the prevailing situation also is quite revealing of the essence and  
19 objective of the UPC/RP in its time.

20 I thank you very much.

21 PRESIDING JUDGE FREMR: [12:34:48] Thank you, Mr Ntaganda.

22 So, at this moment we completed closing statements fully. We will now adjourn and  
23 the Chamber will deliberate on judgment.

24 I believe I can afford to say that it will not be easy process, since during the last three  
25 years we heard numerous testimonies, hundreds, hundreds of documents had been

1 admitted into evidence, parties in their closing briefs and closing statements  
2 challenged many complex factual and legal issues, which we will have to take  
3 carefully into account. It will certainly take some time, but we will do our best to  
4 render our judgment in due course.

5 Before we adjourn, I would like to take this opportunity to thank on behalf of the  
6 whole Chamber everyone who has been involved in these proceedings for their  
7 dedication and hard work.

8 First of all, I want to thank the parties and participants who, on the one hand, kept  
9 character of the proceedings adversary, which I personally really enjoyed. On the  
10 other hand, they, at the same time, promoted collegial spirit in the courtroom and  
11 contributed to the dignity of the proceedings, which I very much appreciated.

12 In this regard I would particularly like to appreciate positive role of both lead  
13 counsels, Ms Samson and Mr Bourgon. Certainly my thanks go also to Legal  
14 Representatives, Ms Pellet and Mr Suprun.

15 I also thank the service providers of the Registry, this includes the court officers,  
16 Ms Bossette particularly, and all security officers who significantly assisted us in the  
17 courtroom.

18 The Chamber thanks also go to the interpreters and the transcribers. I note that they  
19 were many times under strong pressure, especially I can image that I myself prepare  
20 many tough moments for them, but I have to say that they a did very good job.

21 I cannot omit to mention also those who were not directly visible, but their work was  
22 also very important to us. I mean the Court's Victims and Witnesses Unit and the  
23 field offices in the DRC.

24 I would also like to appreciate support of the Chamber's staff, or administrative  
25 assistants and our legal officers who have assisted us throughout the whole trial.

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1 At the end I would also like to send message to all witnesses and victims who either  
2 have travelled to The Hague or testified via video link from the DRC. We are very  
3 well aware that testifying before the Court about those sad events can be a very  
4 difficult and even traumatising experience, but we firmly believe that your  
5 testimonies, witnesses and victims, will help us to meet our goal, which is to find the  
6 truth about the case. So we thank all of you for assisting us in this regard.  
7 This is end of my speech, it concludes the hearing, and court is adjourned.  
8 THE COURT USHER: [12:39:10] All rise.  
9 (The hearing ends in open session at 12.39 p.m.)