International Criminal Court

Appeals Chamber

Situation: Democratic Republic of the Congo

In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06

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

Appeals Hearing - Courtroom 2/Interactio

Tuesday, 13 October 2020

(The hearing starts in open session at 10.02 a.m.)

THE COURT USHER: [10:02:03] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE MORRISON: [10:02:27] Good morning.

Court officer, will you please call the case.

THE COURT OFFICER: [10:02:33] Thank you, Mr President.

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

For the record, we are in open session.

PRESIDING JUDGE MORRISON: [10:02:49] Thank you.

We're not taking new appearances unless there's any changes in appearance. If that's the case, can anybody raise their hands to inform us so that that can be placed on the record.

Mr Bourgon.

MR BOURGON: [10:03:04] Thank you, Mr President. A quick change this

morning. Ms Clémence Volle-Marvaldi is present in the courtroom this morning, replacing Ms Marie-Sophie Domont, who was there yesterday.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [10:03:21] Thank you.

Any others?

No. Thank you.

Mr Bourgon, I would now like to invite you to continue with your submissions. And you have 50 minutes, beginning now.

MS GIBSON: [10:03:38] Good morning, Mr President, your Honours. With your leave, I will first address you on the evidentiary errors raised in grounds 7 and 8 of our appeal before handing the floor back to Mr Bourgon.

PRESIDING JUDGE MORRISON: [10:03:53] Thank you.

MS GIBSON: [10:03:54] What's really interesting in this appeal, or one of the very interesting aspects, is that here we are decades into the development of international criminal law and procedure and the parties in this case are arguing about the bounds of such basic evidential principles: Who is an accomplice? What is corroboration? How should a Trial Chamber address evidence? And the reason that we're doing this is that Mr Ntaganda's judgment really stands alone in terms of the number of factual findings and central factual findings that rest on the testimony of one person.

The UPC attacks in Nzebi, the killing of the Abbé, the shooting of the grenade on the column, the landmines in Mongbwalu, the killing of the prisoners at the *Appartements*, Mr Ntaganda's *kupiga na kuchaji* order, all these of central factual findings that were held against Mr Ntaganda are each based on the testimony of one person, and that's why this case is different and that's why these

questions are in issue.

And of course a Trial Chamber can rely on uncorroborated evidence to make a finding of fact beyond a reasonable doubt, but this Appeals Chamber has held that corroboration is a factor to which a reasonable Trial Chamber may have regard. And corroboration was particularly relevant in this case because the witnesses that we're talking about were accomplices, about whom there was significant credibility challenges, and who were talking about these significant events that were alleged to have happened out in the open and about which more than one person could normally attest. And in that context the Trial Chamber was required, at a minimum, to look for corroboration and, if wasn't there, to explain why nonetheless it could still rely on the evidence of this one witness.

And it failed to do that, and so we have this judgment that's been pieced together from stories that came only from P-10, or only from P-17, or only from P-768 and, on many occasions, without any indication that the Trial Chamber even turned its mind to the fact that this was uncorroborated evidence.

Add to this, this testimony was not unchallenged testimony. Mr Ntaganda took the stand in his own defence. He testified over 33 days, he addressed all aspects of his case methodically and exhaustively.

The trial Judges could have found that he was an unreliable witness, but they didn't because he wasn't. He was candid and open and thorough in his testimony and the Trial Chamber found that his evidence was internally consistent with a small number of discrepancies.

The problems arise when Mr Ntaganda's evidence and the evidence of another Prosecution witness conflicted, and indeed when the evidence of any Defence

witness and a Prosecution witness conflicted. Systematically in the judgment, the Trial Chamber looked at these two pieces of evidence and picked one. Defence witness says X, Prosecution witness says Y, we pick the Prosecution witness.

And the error isn't that on every occasion the Trial Chamber picked the Prosecution witness, even though it did, the error we've identified is that this either/or approach to fact-finding doesn't comport with the burden of proof applicable in a criminal trial. The burden of proof requires a trial chamber to assess, to turn its mind to the question of whether the Prosecution evidence is capable of establishing the facts alleged beyond reasonable doubt notwithstanding what the Defence witnesses said, and not we have these two conflicting stories, we're going to choose this one.

It's a different process that the finder of fact has to engage in. It's a more difficult process, it's a more nuanced process, it's a more time-consuming process, but it's what has to happen before you can convict someone and effectively deprive them of the remainder of their life.

In response, in paragraph 123 of its response brief, the Prosecution argues that the Trial Chamber did assess the evidence correctly and the Defence has just passed out the Trial Chamber's findings.

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)
(Redacted)
(Redacted)
(Redacted) And that's an incorrect approach to fact finding because it shifts the burden of proof back on to the accused to provide a more credible version of events in order to be acquitted.
And the Trial Chamber in this case was emboldened in its approach by its process of, at the start of the judgment, taking the most problematic or the most challenged Prosecution witnesses, discussing the credibility challenges, and then giving these witnesses a ranking of credible. So P-10 is a credible witness, P-17 credible witness, P-768 credible witness, and then using the fact that these witnesses were credible to throw out the Defence evidence.
Some examples:
P-55 testified that Mr Ntaganda knew about the Kobu massacre around the time that it occurred. Mr Ntaganda testified that he didn't. Here is the Chamber's reasoning:
"The Chamber, in line with its general assessment of P-55 as a credible witness, accepts as truthful P-55's detailed description ... and consequently does not accept Mr Ntaganda's denial."
On the issue of whether Mr Ntaganda ordered the three nuns be locked in a room and killed, here is the Chamber's reasoning: Firstly, the Chamber notes that P-768's testimony that Mr Ntaganda ordered that three nuns be locked in a room and killed is contradicted by Mr Ntaganda, and then says:
"However, recalling its finding on P-768's credibility, the Chamber considers Mr Ntaganda's version of events not credible and does not rely on it."

The problem with this approach, in addition to shifting the burden back on Mr Ntaganda to provide a more credible version or be convicted, is that there's a difference between a witness being credible and their evidence on a particular point being reliable.

This Appeals Chamber held in Lubanga that, while credibility generally refers to whether a witness is testifying truthfully, the reliability of facts testified to by that witness may be confirmed or put in doubt by other evidence.

So even if P-768 is a credible witness, is his testimony that Mr Ntaganda ordered that these nuns be locked in a room and killed reliable? Is it confirmed or put in doubt by other evidence?

The Trial Chamber never took this step. It never assessed the reliability of these witnesses' evidence. It just said: These are credible witnesses, they win over Mr Ntaganda every single time.

(Redacted)

(Redacted)

(Redacted)." These are soldiers on the ground purporting to mitigate or excuse their own criminal conduct on the basis of the accused's conduct, which again doesn't mean that their testimony is unreliable. But it does mean that the Trial Chamber was required, as a matter of law, to view their evidence with caution. And this never happens and this is an error.

And again, this is a difficult process but it's one that we see other Trial Chambers here at the ICC, and at the ICTY, and the ICTR being so careful about. Throughout those judgments you see the Trial Chamber saying, "Wait, this witness was part of this story, he was close to the accused, does he have

motives or incentives to implicate him?" That's entirely absent in this judgment.

One last point on the assessment of evidence. Unsurprisingly, we're going to talk about P-10. Before becoming a Prosecution witness, P-10 gave an interview saying that she had enlisted with the APC and gave a lot of detail about this experience. When she testified she said, not that she had enlisted with the APC, but that she had been abducted by the UPC at the age of 13 and had been a child soldier. The Trial Chamber found that it cannot exclude the possibility that P-10 misrepresented the truth when saying she was abducted and could not establish that she had been under 15.

P-10 was still given a ranking of credible. She was a credible witness. And the Chamber went on to sort of carve off the parts of her testimony that it couldn't rely on and rely on the rest, uncorroborated, with no reference to caution, even when drawing central factual findings against Mr Ntaganda, for example, that he gave the *kupiga na kuchaji* order.

In our written pleadings we explain why this is an error, but for today's purposes we raise P-10 in order to compare the Trial Chamber's approach with another witness, D-17, who was one Mr Ntaganda's bodyguards and was probably one of the most central Defence witnesses after Mr Ntaganda in terms of his direct evidence of the charges.

His testimony was dismissed in its entirety. The Trial Chamber's central concern was that D-17 considered Mr Ntaganda like an older brother and that he appeared to not want to incriminate him in his testimony. But actually, much of what D-17 testified about had nothing to do with Mr Ntaganda. It was sort of about the security situation in Mongbwalu, or about the

movements of the UPC troops, or the composition of the troops, or what happened during the operations. And significantly, in the Rwampara video, D-17 identified (Redacted) as Lotsove, making three witnesses to say this person was Lotsove (Redacted). But this was sort of neutral evidence that was unrelated to a concern that he was trying to minimise Mr Ntaganda's involvement in the crimes. But, unlike P-10, the Trial Chamber didn't separate out the parts of his evidence that was about Mr Ntaganda and just rely on the rest. It just threw the testimony out in its entirety. And this is problematic because, unlike P-10, much of what D-17 had said had been corroborated by Mr Ntaganda, which should have formed part of the Trial Chamber's reasoning in its assessment of its reliability. But it didn't and we submit that was an error.

With your leave, Mr President, I'll now hand the floor back to Mr Bourgon in the courtroom.

PRESIDING JUDGE MORRISON: [10:18:52] Thank you very much, Ms Gibson.

Mr Bourgon.

MR BOURGON: [10:18:56] Thank you, Mr President.

Mr President, Honourable Judges, the important errors explained by my colleagues were repeatedly committed by the Trial Chamber when assessing the evidence.

My initial plan this morning was to address many of these findings which must be reversed as a result thereof. It's best, however, that I focus just on a few which show the pattern of errors committed by the Trial Chamber.

I've not begun my submissions, I already hear the Prosecution, or anticipate,

saying the Defence is rehashing arguments that failed at trial.

Mr President, we are not rehashing arguments at trial. These findings, albeit manifestly unreasonable, this morning we are asking the Appeals Chamber and we are arguing that these findings should be set out on the basis of legal errors. We are not looking at the facts. We are looking at the legal errors. It is an entirely different exercise.

First finding I'd like to look at is the attack on Nzebi. This attack was found in paragraph 509 of the judgment. It is impacted by at least five legal errors. In this one, the Trial Chamber picked the testimony of P-768 over that of Mr Ntaganda.

That's the first error.

The second error, Trial Chamber failed to consider the status of *P-0768 as an accomplice. In this regard, I refer the Appeals Chamber to our pleadings regarding the grudge of P-768 towards Mr Ntaganda.

More importantly, third error, the Trial Chamber failed to properly consider relevant probative and exculpatory evidence. I need to address three categories. The first one is Mr Ntaganda's logbook.

The logbook, or the logbooks with an "s", was actually the central piece of evidence of the Defence case in respect of Mongbwalu. That, plus the testimony of Mr Ntaganda, which corroborated each other, and of course that of D-17, who was entirely rejected by the Trial Chamber. The logbook, we said it yesterday, highly reliable contemporaneous, all operations conducted by the UPC/FPLC.

Now, the Trial Chamber in this case found that it's not necessary to, for the purpose of the judgment, to resolve the question of the correct sequence of the

logbook. Now here's what happened, quickly. There are a series of loose pages and evidence in the vault. We pick up the pages, they happen to form a book. Mr Ntaganda puts the pages together in his testimony, uses the book with the consent of the Prosecution during his testimony, and then the Prosecution later says, "Well, no, we disagree with the order of pages." Both parties had plenty of, plenty of opportunity to argue the right order of the pages. The Chamber decides, well, for this judgment, we don't really care about the sequence of the logbook.

Mr President, the sequence of the logbook was of the ultimate importance. It was incumbent to find the correct chronology, based on the logbook, in order to be able to place a date on specific events.

When was the order -- when was the operation in Mongbwalu ordered? When does the operation begin? When does Mr Ntaganda arrive in Mongbwalu? When is the operation launched on Sayo? When are the medical evacuation plane arrives? When does the officer meeting with Mr Ntaganda takes place? When does the chief of the general staff arrive in Mongbwalu? When do the chief of the general staff and Mr Ntaganda walk around Mongbwalu? And when does Mr Ntaganda depart from Mongbwalu? All of this was or could be established on the basis of the logbook, especially with Mr Ntaganda's testimony.

The Chamber said not important for this judgment.

Not only does it show that it failed to attribute any importance to the logbook, in many cases it simply did not address it at all.

Now, with respect to Nzebi, the Trial Chamber stated: The fact that Nzebi is not mentioned in the logbook, it doesn't mean that it did not take place.

Mr President, this is the wrong legal inquiry. It's legally incorrect. It's not the fact that the operation is not mentioned. Rather, it's, along with the rest of the evidence, does the logbook entry raise a doubt that this operation on Nzebi took place?

Trial Chamber also failed to consider messages in the logbook which are a clear indication that the witness, the uncorroborated witness P-768 was not present in Mongbwalu when the operation on Sayo took place and, therefore, that he doesn't know anything about an operation in Nzebi.

There are logbook entries dated 21 November which says that P-768 had not departed yet from Aru on 21 November, which makes it impossible for him to be there. There's another, another entry in the logbook where it says that P-768, while the brigade is on its way -- I mean, there was two brigades in this attack, I know I'm getting a bit factual, there were two brigades, one was coming from Aru. On its way to Aru, the logbook says "We have been attacked. We have suffered casualties. We have trucks burning. Please help."

We showed this entry to P-768, he doesn't recognise the event. He says it must be a forgery. Doesn't recognise the event. And yet (Redacted) (Redacted). He wasn't,

Mr President.

The second category is the Mongbwalu video. This video, again highly reliable contemporaneous evidence, and there's an event in the video where the chief of the general staff has arrived in Mongbwalu. All of the senior officers, but not 768, are looking towards Nzebi and towards Sayo. They are discussing what went on. He's getting his operational briefing from

Ntaganda, who is handing command back over to him. Not a word is mentioned about Nzebi. As they look and they can see Nzebi, not a word. Trial Chamber says, "Well, the fact that they don't mention the word Nzebi, that doesn't mean anything." Again, Mr President, we say it's the wrong inquiry.

The next category of course is that in the -- the witness evidence that was disregarded by the Chamber. P-17, the witness, reliable according to the Chamber, said that P-768 was not in Mongbwalu during the operation in Sayo. He had not arrived. He confirmed that. The Chamber did not look at that. When P-17 also said that, "When I came back from Sayo, all the (Redacted) were brought back to the centre of Mongbwalu." Well, if the weapons were brought back to the centre of Mongbwalu, then they could not have been used from the *Appartements* to fire on Nzebi which is further down the road. The Chamber failed to consider these highly relevant evidence.

Of course, the Chamber again erred because it, instead of doing that, it relied solely on the uncorroborated testimony of P-768. But there was -- it did not of course look for any corroborating evidence.

The Trial Chamber also erred by giving weight to P-768 in the absence of anything else.

Now, why is it that, if the Chamber had looked about Nzebi, they would have found nothing in the, all of the documents that are MONUC documents, nothing about this attack. All of the human rights documents on the record, nothing about this attack. All of the evidence of every other single witness, not a word about this on the record. Well, the Chamber had to at least say "What's going on?" It's like my mother looking at me when I was first

marching with my first 500 men battalion, "Look at my son, he's the only one in step." That's can't be correct, Mr President.

The numerous entries in the logbook make it clear that not only 768 was not (Redacted), but it was another individual who (Redacted) (Redacted). I go back to the logbooks because the logbooks show clearly, (Redacted) (Redacted), other from the entry when we say he's not left yet. And yet, (Redacted) (Redacted).

Now, the Trial Chamber said, "Well, actually we considered what the Defence is telling us that (Redacted) (Redacted) Well that's incorrect. Not only factually, but legally incorrect, because the foundation of P-768's evidence is that (Redacted).

For the Trial Chamber to suddenly say, "Well, he wasn't (Redacted) (Redacted) simply doesn't work.

All of these errors, Mr President, lead to the conclusion that this finding must be reversed.

That's all the time I have this morning. I wish I could have addressed the Abbé. I wish I could have addressed the shooting of the column, where the Chamber speculated. The shooting of the -- the firing of the grenade at the column when the Chamber, in its preliminary assessment, rejected part of the testimony of P-17 that happens minutes after the shooting of the grenade, saying that was unreliable. But it relied on the same testimony and speculated that there are no casualties when (Redacted)when (Redacted)fired at the column because (Redacted) must have missed the target. Pure

speculation from an experienced and trained (Redacted) as the evidence revealed. I stop here, Mr President. This is an example, but this example can be addressed in many ways.

There are inconsistencies in the Trial Chamber's own finding. Maybe one, one of them to end. Where the Trial Chamber said that there's -- a lot of evidence relies on P-17 being with Mr Ntaganda at the *Appartements* together, and P-17 says Ntaganda came back drunk from Mongbwalu every night and he used to wake us up and then he woke me up and he had me to take a prisoner.

Mr President, the evidence reveals that they were not together in Mongbwalu and could not have been. That's argued before.

But the Trial Chamber's mistake here, it recognises that P-17 went to the *Appartements* one week after the fall of Mongbwalu and that Mr Ntaganda was in Mongbwalu for at least a week. The two don't match. If only for that reason, all of these findings must we reversed. In addition to all the errors, which my colleague referred to, which were committed systematically with all of these witnesses.

Mr President, the errors of the Trial Chamber are such that the only possible remedy is a full acquittal for all of the charges laid in respect of Mongbwalu. And if it's a matter simply of because of these errors, well, maybe a new trial is what we are looking at, because with a new trial we can maybe assess the evidence correctly and get to the bottom of things. But, as it stands, only a full acquittal is warranted.

Thank you, Mr President.

I hand the floor back to Ms Gibson for ground 14. Thank you.

PRESIDING JUDGE MORRISON: [10:32:34] Thank you, Mr Bourgon.

Ms Gibson.

MS GIBSON: [10:32:36] Thank you, Mr President.

I'll address you now on whether the Trial Chamber was correct to find that Mr Ntaganda had intent for these first operation crimes.

The intent of an accused should be determined, above all, from his words and deeds. The best evidence of what an accused intended is what he did and said at the time of the charges.

In this case, there's a video of Mr Ntaganda in Mongbwalu in the days after the first operation that records his words and deeds, and there's a logbook which sets down and records his words at the time.

In this video, which is in evidence, we see Mr Ntaganda in Mongbwalu in the days after the first operation, in a town where life is returning to normal, and Mr Ntaganda describes being welcomed by the civilian population and then there's an exchange between him and an older Lendu woman and she invites him to her house for a drink, and he says, "When should I come?" And she says, "Next Wednesday." And then he says to her, he assures her that she and all the civilians in Mongbwalu can now live calmly and he says, "You will have no more problems. Rest easy. Go about your work."

The Trial Chamber found that Mr Ntaganda intended the destruction and disintegration of the community this woman is a part of.

And at paragraph 267 of its response, the Prosecution says that this exchange, this video, is no more than mere propaganda filmed by journalists at the invitation of the UPC. But what does that mean?

That this exchange is somehow fake or that the people are acting, Mr Ntaganda is acting, or the children you see in the background, all the people involved in

this scene have somehow been forced to be a part of it. This is a spontaneous exchange. These are natural unprompted emotions being expressed. This is a record of Mr Ntaganda's words and deeds at the time.

And, in fact, this video is part of a large bundle of evidence pointing to Mr Ntaganda striving to direct a disciplined force that protected civilians without distinction.

The UPC logbook that records all the messages sent from and received by Mr Ntaganda during the charges shows messages from him imposing sanctions on soldiers who did anyone wrong. These messages are nowhere in the judgment, but they're cited in paragraph 936 of our appeal brief, and they record his concern that any misconduct should be reprimanded, which fits with the person that we see in the Mongbwalu video and which fits with the corroborated evidence of Mr Ntaganda, in February 2002, in Mandro camp welcoming Lendu civilians who had fled to the camp and giving them assistance, and giving them protection, and giving them shelter, which fits with the evidence of Mr Ntaganda forming an alliance with Lendu combatants in February 2003, working together with this group who had fought against him. None of this evidence fits with this idea of Mr Ntaganda being someone who intended the Lendu community to be wiped out.

As is clear from this evidence, Mr Ntaganda's intent was a battlefield during the trial. The closing briefs of the parties, the closing arguments dedicated a lot of time and pages to it.

And the Prosecution was required to prove three mens rea elements for co-perpetration, they're set out fully in our brief at paragraph 319, but, in summary, the Prosecution was required to prove that the co-perpetrators

meant to participate in the plan and they were mutually aware that the plan would result in the charged crimes. The co-perpetrators had the purposeful will for the crimes or that they are aware that they would occur as a virtually certain consequence. And thirdly, that Mr Ntaganda was aware of the factual circumstances that allowed him to exert control over the crimes.

And these elements were required to be proven for each of the 13 counts that were charged in relation to the first operation, really different counts ranging from persecution, to indiscriminate attacks on property, to rape and sexual slavery. And because there was no direct evidence of intent, the Trial Chamber again inferred it from the evidence, which it was entitled to do, but in order to infer the existence of a fact on which a conviction relies, the inference must be the only reasonable one available. And the Prosecution accepts this as at paragraph 264 of its brief.

And this was a huge task for the Trial Chamber, assessing all the evidence that the Prosecution said was demonstrative of criminal intent for these 13 counts, and considering it in light of the Defence evidence showing Mr Ntaganda's emphasis on discipline, on nondiscrimination, his acts of protection towards Lendu civilians and collaboration with Lendu combatants.

The Trial Chamber's analysis is 12 paragraphs. In a judgment of 539 pages, 12 paragraphs discuss Mr Ntaganda's intent for these 13 counts in the first operation.

How many of these 12 discuss the Defence evidence? None. All the Trial Chamber does is cite the evidence that it says supports a finding of guilt and then enters a finding. The Trial Chamber took no steps to eliminate any other reasonable conclusions, it doesn't make reference to the criminal standards of

drawing an inference, the Defence evidence is just ignored.

And the Prosecution responds in paragraph 265 of its response, the Trial Chamber did not ignore the evidence Mr Ntaganda refers to but correctly assessed it in light of the evidence on the record.

And the footnote contra the Defence brief. The Prosecution can't point to any assessment of the Defence evidence in the Trial Chamber's reasoning on intent because there is none.

And then the Prosecution goes on to say why, in its opinion, the Defence evidence would not have given rise to another reasonable conclusion because the logbook only has a few vague references to discipline and Mr Ntaganda only showed an occasional peaceful gesture towards the Lendu. But the Trial Chamber needed to do this exercise and look to whether there was another reasonable conclusion other than Mr Ntaganda intending that these 13 crimes be carried out against the Lendu.

And that's it. And that's the error and it's unsalvageable. A Trial Chamber isn't entitled to draw an inference of this magnitude, or at all, without making sure that it was the only reasonable one available on the evidence.

Nor is the Trial Chamber entitled to draw a blanket ruling on each of the 13 -- Mr Ntaganda's intent for each of the 13 counts and just conclude that he had intent for them all. Obviously, an accused can intend to attack civilian structures and not intend persecution. And, in fact, the 12 paragraphs just list all the conduct and then say the Trial Chamber concludes beyond reasonable doubt that Mr Ntaganda meant the killings to happen, or meant for forcible transfer, or meant for rapes to occur.

What's missing is any kind of individualised assessment for each of these

crimes as is required by the legal standards.

Of course, there are other problems in the intent finding, P-768's allegation that Mr Ntaganda ordered an attack on the Lendu could not have happened. The Trial Chamber accepted at paragraph 485 of the judgment that on 19 November, when giving this final order for the troops to advance towards Mongbwalu, Mr Ntaganda wasn't with the troops, he wasn't there. He would be joining them soon. And we see from the logbook that on the 19th he's still in Bunia, waiting for a vehicle to be repaired. He doesn't leave from Bunia until 21 November, so he wasn't in Mongbwalu on the night of the 20th, when P-768 says he said attack the Lendu.

At its highest, P-768's evidence amounts to Mr Ntaganda saying attack the Lendu. The significance that is given to the fact that Mr Ntaganda said Lendu and not Lendu combatants is inflated beyond anything that is reasonable, and at footnote 918 of our appeal brief, our examples of the Trial Chamber itself calling Lendu combatants Lendu, calling Lendu fighters Lendu, using the exact same shorthand for which it convicted Mr Ntaganda.

Footnote 774 shows where Prosecution witnesses themselves referred to Lendu fighters as Lendu. To give you one example, P-10, a credible witness, testified about the UPC arriving in Mongbwalu, she said: There were no civilians. You see, when there is an attack, civilians flee.

So all who were in the city were the Lendu. Lendu meaning not civilians, but combatants.

Intent was a battlefield. The Defence dedicated so much of its evidence to showing Mr Ntaganda's actual intent and his approach to civilians in Ituri and his hopes for peace. The Trial Chamber was entitled to assess all that

evidence and nonetheless decide that his criminal intent was the only reasonable one, but it wasn't entitled to ignore it. The first operation convictions must be reversed.

With your leave, Mr President, I'll turn back to Mr Bourgon in the courtroom to conclude our submissions.

PRESIDING JUDGE MORRISON: [10:44:04] Thank you, Ms Gibson.

Mr Bourgon.

MR BOURGON: [10:44:07] Thank you, Mr President.

Mr President, it is our submission that the Trial Chamber erred and committed errors of law and fact by convicting Mr Ntaganda for the second operation crimes.

I note in this regard that Mr Ntaganda, according to the evidence, was not present when these crimes were committed. That there is no evidence showing that he contributed to these crimes. And, more importantly, that the Trial Chamber did not determine where Mr Ntaganda was or what he was doing when these crimes were committed.

Strikingly, Mr President, there was plenty of evidence on Mr Ntaganda's whereabouts during the second operation. Mr Ntaganda testified in detail about this. The Trial Chamber, however, failed to consider most of this highly relevant evidence.

And despite failing to do so, the Trial Chamber found that Mr Ntaganda exercised control over the crimes committed during the second operation, and also said that he possessed the required mens rea for the second operation.

First, Mr President, the Trial Chamber erred in its application on the law of co-perpetration. My colleague referred to the applicable test for the mens rea,

which is that whether the accused was aware of the factual circumstances which allowed him to exert control over the crimes such that he had the power to frustrate their commission.

Significantly, the Trial Chamber failed to expressly make such a finding regarding Mr Ntaganda, which is something that is acknowledged in the Prosecution brief.

Now, one mistake about the Prosecution's submissions, the Prosecution argues that showing that the accused was aware of his or her critical role in the implementation of the common plan is -- would be sufficient to meet the applicable criteria, we say that is legally incorrect. It is insufficient. It's awareness of the factual circumstances which allowed him to exert control.

This -- in order to prove or to meet the criteria, it is our submission that this requires, at a minimum, that to establish that the accused had knowledge about the crimes about to be or being committed.

This can only be achieved by a fact-intensive analysis of the whereabouts and the activities of the accused at the relevant time and, more importantly, did the accused gain such information?

The issue, Mr President, is that the Prosecution, and of course the Chamber in its judgment, appears to confuse the second operation with the crimes committed in the second operation. Whether Mr Ntaganda obtained information about an ongoing second operation, the inquiry as to whether he knew that crimes were part of this operation is a different inquiry. And in this case there is no finding of the Trial Chamber that Mr Ntaganda even knew about the crimes about to be committed or being committed in the second operation.

What the evidence does reveal, despite the absence of such a finding, it reveals that the second operation was a legitimate military operation. It reveals that during the so-called planning meeting which was attended by Mr Ntaganda, discussing some preliminary details of this operation, no crimes were discussed as being part of the operation.

There's no indication that the failed Lipri assault Mr Ntaganda apparently learned about was anything else than legitimate military combat.

And there is evidence that Mr Ntaganda departed Bunia on 21 February, only to return on the evening of 3 March, long after the second operation had ended.

The evidence also reveals that Mr Ntaganda was not heard on the UPC/FPLC radio network during the second operation. So it's very tough to make an inquiry as to what a person knows in all of these conditions.

On one point, at one time the Trial Chamber uses one message in a logbook where it says that this message sent by Mr Ntaganda saying that officers have to attack and I have not seen one officer in my life refusing to attend the battle, and the Chamber says this, this is evidence that Mr Ntaganda was overseeing. And then the Chamber uses, out of nowhere, that the forces were "carrying out the project as planned."

THE COURT OFFICER: [10:50:00] Mr Bourgon, you have five minutes left.

MR BOURGON: [10:50:03] Thank you very much.

That the forces are "carrying out the project as planned." But there's no evidence, no reference. This is entirely speculative. And most of all, more importantly, unexplained by the Chamber.

Now, the Chamber analysed then various entries, some of the entries in the logbook, as well as in the hearsay conversation on a satellite phone called

Thuraya, based on hearsay. And on this basis it says, "Well, Mr Ntaganda was overseeing the operation."

But what is very important, and that's what the Trial Chamber missed, the Trial Chamber was unable to point to a single communication involving Mr Ntaganda concerning the second operation. None.

Now, consequently, it cannot only be its finding that he exerted control over the operation and that he had the mens rea as an abuse of discretion.

Mr Ntaganda provided evidence and which is supported by the logbooks: 19 February, he left Bunia in the evening to achieve a secret mission and to give weapons to Lendu combatants as part of a plan to make -- to team up with the Lendu combatants to ensure the UPDF would leave Ituri. 20 February, he returns to Bunia.

And then he leaves again on the 21st to escort a Ugandan rebel back to Libi.

He returns to Bunia on 3 March. On 4 March he fights all day in Mandro, and then on the 5th there's a meeting off all officers preparing for the famous battle of 6 March, during which none of the events in the second operation are discussed.

That's the evidentiary basis that the Trial Chamber failed to consider.

I refer of course the Appeals Chamber to our Defence -- trial Defence brief to see to what extent our arguments were not considered.

A quick word, Mr President, concerning P-55. I said earlier that there was not one -- a single communication involving Mr Ntaganda during the second operation, well, that's not entirely correct. There is one. And it's a famous and very important conversation between P-55 and Mr Ntaganda.

This conversation is dated and corroborated. It happens on 2 March; 2 March,

Mr Ntaganda is still in Mahagi when he has this conversation. This conversation takes place when Kisembo is in Bunia with P-55.

When you -- had the Chamber considered all these facts, it could not arrive at the conclusion that Mr Ntaganda (Redacted) before 2 March to say "Salu was my man. I agree with the second operation." Simply did not take place.

Mr President, I do not address this morning in detail the Trial Chamber's legal error in relying on its mens rea finding related to the first operation to find that Mr Ntaganda possessed the mens rea committing during the -- committed during the second operation.

Clearly, the Chamber had no choice in order to find the mens rea because of this absence of evidence, because it could not find that he was even aware, say, "Well, let's look at the first operation and say it must have been the follow-up. And because it's a follow-up, then we'll say that the mens rea for the first applies to Ntaganda, for the mens rea for the second." Mr President, our arguments are found in our appeal brief. This is a legally incorrect exercise. If we are to find the mens rea of an individual, we have to look at the facts that concern the events and the time and the activities of the individual.

Mr President, the second operation, Mr Ntaganda had nothing to do with that operation in terms of the crimes committed there. And that's what the evidence shows. And the Trial Chamber's error must lead to the conclusion that he has to be acquitted for all crimes that were committed during the second operation.

This ends my submission, Mr President. I just want to add one quick comment, that yesterday I went back to dictionary to look at the word

"appalling", and I do wish to apologise once again. Because it really -- that's really not what I meant to say yesterday, Mr President.

This ends Mr Ntaganda's submissions on his appeal. Thank you, Mr President.

PRESIDING JUDGE MORRISON: [10:55:10] Thank you, Mr Bourgon.

As to the last thing you mentioned, simply regard that as history.

We are now going to take the first break of today for 45 minutes. After that break, the Office of the Prosecutor will have 1 hour and 5 minutes to address the Court.

So we will rise now, please, until -- we make it 20 to 12. Thank you.

THE COURT USHER: [10:55:51] All rise.

(Recess taken at 10.55 a.m.)

(Upon resuming in open session at 11.43 a.m.)

THE COURT USHER: [11:43:18] All rise.

Please be seated.

PRESIDING JUDGE MORRISON: [11:43:49] I now invite the Office of the Prosecutor to make submissions. They have one hour and five minutes.

MS BRADY: [11:44:15] Good morning, your Honours. Mr Bosco Ntaganda was convicted of crimes against humanity and war crimes, committed himself and through his forces, that unleashed a litany of serious crimes against civilians, mainly Lendu, in *over a dozen localities in the charged period: killings, rapes, sexual slavery, forcible displacement, destruction of property, pillaging, attacking civilians and protected objects, and persecution on ethnic grounds. Multiple, brutal and devastating crimes.

As deputy chief of operations and organisation of the UPC/FPLC and one of its

highest ranking members, Mr Ntaganda was found to have been a member of a group of co-perpetrators whose purpose it was to drive out the Lendu from the targeted localities by such crimes. He played a key role, both directly and by his broader essential contributions to the common criminal plan.

Mr Ntaganda was also convicted for recruiting children under 15 years old and using them to participate in hostilities, including as personal escorts for both himself and other senior commanders.

The Chamber found that child soldiers were raped and sexually enslaved while in the UPC and that Mr Ntaganda himself raped many of his female bodyguards.

In his appeal, Mr Ntaganda now challenges the Chamber's findings and the fairness of his trial on multiple fronts. The oral submissions that we've heard today and yesterday by Ms Gibson and Mr Bourgon essentially repeat his written appellate submissions, and we've addressed all of them in detail in our written briefs. In short, none of his arguments show that Mr Ntaganda had an unfair trial or that there was any error in the Chamber's sound conclusions.

Today in light of the time, we'll only be addressing some of these challenges and we'll be grouping our arguments on thematic lines rather than responding ground by ground or point by point as we've already done. And of course for those that we don't address today, we rely on our written submissions.

Firstly, I'd like to give you a brief road map as to how we intend to respond today. I'll begin by addressing Mr Ntaganda's challenges to the Trial Chamber's approach to assessing evidence and fact-finding, including how to approach Mr Ntaganda's own testimony. These mainly arise in grounds 7 and 8, and were addressed by Ms Gibson today, but they're also interspersed

throughout his appeal.

Next, Ms Samson, who was the senior trial lawyer in the case, will address his challenges to the Chamber's assessment and reliance on certain Prosecution witnesses - these are mainly the Prosecution insider witnesses, or some of them - including his arguments on accomplice witnesses and corroboration. These are in ground 8 but again are interspersed throughout his other grounds.

After her, Mr Costi will address the contextual elements of the crimes -- of crimes against humanity - this is grounds 4 and 5 - in particular, showing that the finding that there was an attack directed toward the civilian population was both legally correct and reasonable on the facts.

And finally, Ms Regué will first show that the Chamber's findings on common plan and his mens rea and his contributions to the crime which led to his liability as *an indirect co-perpetrator were well-reasoned and reasonable. This

is grounds 12 to 15.

And at the end, she will make some remarks on the Chamber's correct approach to the scope of the charges in this case. That's ground 3.

Turning now to the focus of my submissions: The Chamber's correct approach to assessing evidence and fact-finding.

Mr Ntaganda's convictions are premised on properly reasoned factual findings which the Chamber made after thoroughly analysing and assessing all the evidence admitted in the three-year trial and correctly applying the standard of proof. The judgment shows that the Chamber carefully and reasonably considered both Prosecution and Defence evidence, as well as that of the Legal Representative for the Victims, to reach their conclusions.

Now, he argues that the Chamber took an erroneous approach to witness assessment, shifted the burden of proof and made findings without excluding other reasonable inferences available on the evidence.* In particular, that it failed to consider whether the accused's evidence, considered in light of the Prosecution evidence, raised a reasonable doubt. These arguments are simply incorrect. They misrepresent what the Chamber actually did, as a proper review of the judgment shows And I'd like to take you briefly to this.

Firstly, your Honours, at the start of the judgment, the Chamber endorsed several correct principles on evidence evaluation, the onus and the standard of proof and relating to fact-finding. For example, in paragraph 44, it stated that, and I quote: "... all factual findings, to the extent that they are underlying the Chamber's legal findings, are established beyond reasonable doubt." End of quote.

Then in paragraph 50 *it set out that it had assessed the credibility and reliability of evidence in light of all relevant evidence in the record and had decided, quote, "... whether incriminatory evidence should be accorded any weight and whether it established any of the alleged facts and circumstances beyond reasonable doubt, having considered the exculpatory evidence submitted." End of quote.

Next in paragraph 51 it repeated that it had considered the totality of relevant evidence when examining whether a fact was proved, taking account of the Defence's position. And it underscored this in paragraph 52, saying it had assessed and weighed all evidence in the trial record and considered contradictory -- contradictory evidence.

As for setting out its reasons, it explained that while in some cases it had

explicitly set out its considerations underlying its assessment of the evidence, in others it said, quote, "... despite having ... scrutinised the evidence to ascertain that it is credible and reliable to form the basis of a specific finding, it has not explained every detail of its assessment."

End of quote.

And finally, in paragraphs 77 to 83 it carefully explained the factors it had considered in assessing the credibility of the witnesses and the reliability of their testimony.

So after setting out this exhaustive and correct enunciation of legal principles, and this is my second point, the Chamber engaged in a detailed credibility analysis in over 70 pages, and they looked at over 14 Prosecution witnesses, the Defence witness D-17, and at that point made some initial remarks on the accused's testimony.

This is a critical part of its fact-finding process because it is here where the Chamber explains why it would or would not accept each witness as credible and reliable and on what points, or that it would require further corroboration before accepting their evidence on certain matters.

And you'll see the Chamber's careful approach in pages 42 to 114 evaluating carefully each witness in light of all relevant evidence in the record and, importantly, the Defence's challenges. And Ms Samson, who will argue after me, in her submissions she will develop this point further in relation to several witnesses, including some which have been mentioned today in our oral submissions.

Thirdly, your Honours, the Chamber's approach to the accused's *own testimony shows no error. According to him, and this is more in his brief than

he made in his oral submissions today, but in his submission the Chamber assumed that he would lie and then, for no apparent reason, chose to believe Prosecution witnesses over his account, thereby shifting the burden of proof. And that it failed to consider whether his testimony raised a reasonable doubt in the context of the Prosecution evidence. But the judgment doesn't support that.

And I take you, firstly, to paragraph 262 of the judgment.

There the Chamber clearly stated that it had considered his testimony on all relevant aspects and assessed its probative value in the context of the totality of the evidence. It then went on to say that where his evidence was contradicted by other evidence it had also considered, quote, "on a case-by-case basis and where appropriate, the possibility that [he] had an incentive to provide exculpatory evidence", and said it was going to later set that out in its findings

Now first, your Honours, there's no merit in his claim that the Chamber was wrong to consider, as it did, that he may have had a possible motive to exculpate himself in his answers. What a Chamber cannot do is assume that an accused will lie in order to be acquitted, and dismiss his evidence on that basis alone. That would, clearly, violate the presumption of innocence and improperly shift the burden of proof. But the judgment shows that the Chamber did no such thing. In assessing and weighing the evidence of any witness - including an accused person - a Chamber may consider, as this one did, and in light of all the relevant evidence, that an accused's contradictory version of events was implausible, and thus possibly motivated by such an incentive. This shows no error.

Secondly, your Honours, his claim that the Chamber erred in assessing

Prosecution evidence against his own also fails. So, if I understand his claim or his submission, it is that, firstly, the Chamber in effect assumed he would *lie to secure his acquittal. And then, having accepted a Prosecution witness or witnesses as credible on a particular fact, it turned around and simply found the fact proven. I think the words used today were it chose a side or just picked a side.

Now, your Honours, he, in his brief, he has pointed to some footnotes in isolation and he says that the Chamber simply ended up retaining the version of a Prosecution witness and rejecting his or other Defence witness -- other Defence evidence without more. In this way, taking what some domestic systems criticise as an either/or approach to witnesses, and skipping the vital step of fact-finding, of deciding whether it was satisfied beyond reasonable doubt about a particular fact notwithstanding Defence evidence. And in a nutshell, if I understand, his complaint appears to be that the Chamber didn't adequately explain why it had preferred incriminatory evidence over his testimony to reach its factual findings.

But the Chamber did just that. And this brings me to my fourth point, the Chamber's proper approach to fact-finding. For each factual finding it made -- and, your Honours, there are hundreds of these throughout section 4 of the judgment, section 4 is the main section on the factual findings. In these findings, the Chamber explains its reasoning on the competing evidence in detail. Much of their reasoning is set out in lengthy footnotes, which I remind your Honours forms an integral part of the judgment. The Trial Chamber said that in paragraph 44. What this shows, or what these show, is that the Chamber thoroughly assessed the relevant evidence for each fact: it assessed

the incriminatory evidence; it considered any challenges, inconsistencies, any contradictions with other evidence, including the accused's; and explained its reliance on certain evidence over other evidence to reach its findings.

And from this careful analysis, the Chamber found it could rely on Mr Ntaganda's testimony for certain findings and, indeed, for some facts it accepted his version of events over competing evidence. But the Chamber was also entitled to reject his version of events, as it did on more than 50 occasions, based on its considered and reasoned acceptance of credible and reliable evidence of Prosecution witnesses and/or other evidence in the record. And, on the basis of such evidence, to make its factual findings.

Far from what was called this morning as a systematic dismissal of his testimony whenever it contradicted Prosecution evidence, the Chamber carefully assessed all the relevant evidence and rejected his version as not credible and reliable when it found it implausible. And I'll mention just a few examples:

Starting first with the order, the *kupiga na kuchaji*, which he and his commanders gave in two operations. You recall, your Honours, that the Chamber found this meant attack all the Lendu, including civilians, and loot their property. This was based on multiple witnesses. And Ms Samson will go into this evidence in a bit more detail. But in a nutshell, the Chamber explained why, given all the evidence on this matter, including how the assaults unfolded on the ground and other orders given by him and the other commanders, it did not consider Mr Ntaganda's version of it, which was that it was an expression restricted to military personnel and their equipment, it did not find that credible. And what he asks you to do, in essence, is to look at

evidence in isolation. But I point your Honours to the Chamber's findings and extensive discussion of the evidence in paragraph 415 and footnotes 1186 to 1191. And in relation to the other related orders, in paragraphs 484, 488, 493, and 558 to 561 *and the footnotes.

Another example, it was mentioned today: When finding that Mr Ntaganda ordered his troops to launch a grenade launcher at civilians after the Sayo assault, the Chamber thoroughly explained why it had accepted P-17, in light of all the evidence, and rejected Ntaganda's denial and gave detailed reasons for rejecting the Defence's challenges. I refer your Honours to paragraph 508 and footnotes 1489 to 1498. And its further reasoning, for example, in its legal findings, in paragraphs 671 and 743.

As another example: Relying on several Prosecution witnesses whom it carefully assessed and believed, the Chamber found that Lendu prisoners had been detained at the *Appartements* camp, interrogated and killed there, two upon his orders, and rejected his contradictory testimony as not credible. The evidence and the Chamber's ample reasons are contained in paragraph 528 and footnotes 1572 to 1579.

Likewise, for the finding that he personally shot and killed the Abbé, the Chamber set out its careful assessment of all the evidence, detailing P-768's evidence, other supporting evidence, comparing it to Ntaganda's testimony, and explaining why it had believed Witness P-768 and rejected his denial. And its detailed reasoning is exhaustively set out in paragraphs 532 to 533 and footnotes 1589 to 1597.

Finally, your Honours, the final example I'll give: For the Chamber's findings that female soldiers and escorts suffered rape and sexual violence by

Mr Ntaganda and other commanders and soldiers, the Chamber gave a detailed assessment of the evidence of all the relevant witnesses in paragraphs 103 and 407 to 412 and footnotes. It gave solid reasons for rejecting Mr Ntaganda's evidence and that of Defence witnesses who, essentially, denied or downplayed its occurrence. That's at paragraph 407 and footnotes 1156 to 1158; paragraph 412 and footnote 1177; and paragraph 103 and footnotes. Now, your Honours, this is, of course, just a sample of the numerous facts found by the Trial Chamber which show its proper approach. And my brief summary cannot possibly do justice to the Chamber's detailed consideration of the evidence and elaboration of reasons. In their submissions, my colleagues, later in our submissions, Mr Costi and Ms Regué will likewise show that the Chamber made sound factual findings, beyond reasonable doubt, on all other aspects such as the attack directed against the civilian population, the common criminal plan, and his essential contributions and mens rea, properly applying the standard of proof and reaching the only reasonable conclusions available on the evidence.

Before I turn over to Ms Samson, I'll just conclude with a few words on the appellate standard of review for factual findings, a standard set out in international jurisprudence and at this Court as one of reasonableness. This means, of course, that the Appeals Chamber, applying an appropriate margin of deference, must determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question.

This doesn't mean a simple acceptance or deferral to the Trial Chamber's findings. Rather, to perform its proper review function, the Appeals Chambers will consider the impugned finding, the underlying evidence and

the Trial Chamber's reasoning. This Chamber doesn't assess the evidence *de novo* to determine whether it would have reached the same factual conclusion as the Trial Chamber. But, rather, to overturn a factual finding, the Appeals Chamber must be convinced that no reasonable Trial Chamber, having heard the evidence, could have come to that conclusion beyond reasonable doubt. And, of course, if this Chamber were to find an error or errors, it would then also need to be satisfied that it or they materially affected the decision in the sense of causing a miscarriage of justice.

Mr Ntaganda hasn't suggested any other standard -- any other standard of review, but he has urged you to approach the Trial Chamber's factual findings in this case with extreme caution. He has asked you to overturn them, for unreasonableness basically. But his arguments sustain no such need.

Having *spent three years hearing the evidence, and a further year deliberating and writing the judgment, the Chamber was supremely qualified to evaluate the witnesses and all other evidence in the case and to make its factual findings to the requisite standard, as the judgment well demonstrates. His challenges should give you no reason to disturb the Trial Chamber's careful, reasoned and ultimately reasonable findings, and should be dismissed.

Your Honours, I'll now turn over to Ms Samson, who will continue with the Prosecution's submissions.

Thank you.

PRESIDING JUDGE MORRISON: [12:06:47] Thank you, Ms Brady.

Ms Samson.

MS SAMSON: [12:06:55] Your Honours, I will address two recurring arguments in Mr Ntaganda's appeal as we heard from the Defence today.

First, on the Trial Chamber's assessment, and a careful one, of the evidence from three witnesses who Mr Ntaganda has now labelled his accomplices. This arises in grounds 5, 8 and 14.

Second, on the Trial Chamber's proper approach to corroboration. This arises in grounds 5, 7 to 9, 11 and 13 to 15.

Turning to the first argument on accomplice evidence.

Mr Ntaganda now claims that Prosecution witnesses 768, 963 and 17 were his accomplices and that the Trial Chamber erred in relying on them.

The Chamber correctly found that these witnesses were credible and their evidence was reliable. It devoted more than 40 paragraphs and 85 footnotes to this assessment. It carefully considered their position and role in the UPC/FPLC, the detail of their testimony, its internal consistency and its consistency with other evidence, the basis of those witnesses' knowledge of events, and their candour. It considered whether they had any biases toward Mr Ntaganda, or any reasons to lie, and the impact of Rule 74 assurances and protective measures on their credibility.

The Chamber also treated their evidence with appropriate caution. It declined to rely on their evidence where it lacked detail or explanation or, at times, where it was contradicted by other evidence. I refer you, for example, to paragraph 115 of the judgment and to footnotes 1109, 1129, 1144, 1261, 1394, 1400, 1401, 1473, 1492, 1566 and 1821. And when it accepted the witness's evidence as sufficient, the Chamber explained that clearly. And I'm referring in particular to sufficiency of their evidence without corroboration. I refer you to paragraph 103 and footnotes 247 and 248, and to footnote 413.

Now, Mr Ntaganda cross-examined these three witnesses extensively and

strenuously challenged their credibility, including that they had fabricated all or significant parts of their testimony out of a motivation to incriminate him for other reasons. The witness withstood that scrutiny.

Although these three witnesses were involved in the events, they were not Mr Ntaganda's accomplices, on any definition. They were not arrested, charged, prosecuted or convicted for crimes related to the events to which they testified. They were not named as co-perpetrators, and Mr Ntaganda never described them as such. They had no tangible motive to give false evidence in order to avoid prosecution, or to implicate Mr Ntaganda wrongly.

Witnesses 963 and 17 were junior soldiers. They were never in planning meetings, they were not commanding operations. They were carrying out Mr Ntaganda's orders. Recall that the Trial Chamber found at paragraph 819, and I quote, that "The UPC/FPLC as a whole functioned as a tool in the hands of the co-perpetrators". End quote.

In any event, the label that we may give to these witnesses does not matter. Nor was the Trial Chamber required to refer explicitly to them as "accomplices". What matters is that the Trial Chamber properly, reasonably and with appropriate caution considered their evidence. I refer your Honours to the ICTR Nchamihigo appeals judgment at paragraph 262.

One point of clarification on P-768's evidence from Defence submissions today. The Chamber fully considered Mr Ntaganda's claim that Witness 768 was not even present during the attacks on Mongbwalu, Sayo, and Nzebi. But it rejected those claims. I refer you to paragraphs 168, 169, 509 and 510, and related footnotes in the judgment, where the Chamber considered the level of detail in Witness 768's description of this attack and his participation in it, his

consistency in cross-examination, and the Chamber's finding that his participation in the Mongbwalu operation was corroborated by other evidence. The Chamber also gave clear reasons for accepting Witness 768's evidence over Mr Ntaganda's on the Nzebi attack. I refer you to footnotes 1499 and 1507. The Chamber considered relevant passages from the UPC logbook of radio communications and the sequence of several separate loose pages at paragraphs 59 to 66, and 565, and in multiple footnotes, providing more detailed reasons for its factual findings, such as footnotes 1719, 1721 to 1725 In conclusion on this point, your Honours, the Trial Chamber assessed the evidence from these witnesses cautiously. And Mr Ntaganda has not shown otherwise.

This takes me to my second point, on corroboration.

In repeatedly arguing that the Trial Chamber relied on uncorroborated evidence to convict him, Mr Ntaganda incorrectly introduces a requirement of corroboration when there is none.

This is somewhat surprising since Mr Ntaganda relied on the approach to corroboration at the ICTR that the Prosecution put forward. I refer to the Defence reply, filing 2534, at paragraph 6 and footnote 10. Yet, he continues to misapply that same standard to the facts, insisting on an inflexible and incorrect interpretation.

There are no technical or rigid definitions for what constitutes corroboration, it's been held simply to mean "evidentiary support". There are also no rules specifying the form or substance that such support must take. It's one of the many potential factors in the Trial Chamber's assessment of a witness's credibility.

Once a Chamber comes to the conclusion that a witness is credible, and his evidence is reliable, it can rely on it solely to enter a conviction. There is no bar to the Chamber relying on even a single witness, provided it considered all the evidence on record. I refer you to the Taylor appeal judgment at paragraphs 73 to 78, and the Simba appeal judgment at paragraph 24.

The Trial Chamber was correct in its approach to corroboration at paragraphs 75 and 76 of the judgment, with references to established jurisprudence. It rightly stated that whether one single piece of evidence will be sufficient to prove a fact depends on the question at issue and the strength of the evidence. And that it has the discretion to consider whether or not corroboration is needed. A Trial Chamber may rely on uncorroborated, but otherwise credible, testimony from any witness, including from alleged accomplices. I refer you to the Bemba et al. appeals judgment at paragraphs 1531 to 1532.

This Trial Chamber adopted a case-by-case approach to corroboration. Its reasons for accepting or rejecting evidence are detailed and extensive. It assessed each witness's credibility in light of the trial record as a whole, as the Chamber put it, and I quote, "the overall evidence presented in this case". End quote.

I refer you, for example, to paragraphs 229 and 253 and to footnotes 289, 1202 and 1206.

The Chamber also clearly reasoned why it accepted evidence without corroboration, as it has the discretion to do. See, for example, paragraphs 248, 247, and footnotes 413 and 502.

Mr Ntaganda's arguments take this necessary holistic evaluation of evidence right out of the equation. He isolates parts of a witness's testimony from the

overall record in the case and seeks to impose, in effect, a rigid requirement that evidence be corroborated. A requirement that simply doesn't exist in law. Mr Ntaganda disagrees with the Trial Chamber's conclusions, but fails to show that it could not have reasonably reached those conclusions on the available evidence.

I will now review the Trial Chamber's careful evaluations in relation to two witnesses who testified at trial, and to whom the Defence made reference today, Witnesses P-10 and 55, and I will also refer to the statements of two deceased witnesses whose testimony was admitted under Rule 68. I'm referring to Witnesses P-22 and 27.

First, in relation to Witnesses 10 and 55: The Chamber properly considered their evidence in totality and not in isolation in the ways the Defence is urging. P-10 was one of Ntaganda's bodyguards who testified to sexual violence in the UPC and to the unfolding of UPC operations.

After a thorough review of her evidence as a whole, and after reviewing Defence challenges, the Trial Chamber concluded that she was a credible witnesses, notably regarding her experiences in the UPC. It did not rely on all of her testimony. It did not rely on her account of her age, her abduction or her training. But it concluded, rightly, that it could rely on other parts of her evidence. Mr Ntaganda also agrees that a Chamber can rely on a part of a witness's testimony and not rely on other parts. The Chamber described the areas of Witness P-10's testimony that were detailed, coherent, generally in line with, and corroborated by, other evidence. It identified which parts of her testimony it could rely upon with or without corroboration.

For example, it did not rely on her testimony alone to support a finding that

Mr Ntaganda's bodyguard included individuals under the age of 15. I refer to paragraph 386 of the judgment.

In relying on P-10's evidence that she heard Mr Ntaganda give the order *kupiga na kuchaji* before the Mongbwalu attack, the Chamber took into account that it was a speech that she had personally witnessed, and that she testified on the issue spontaneously. Other credible evidence supported her account because it confirmed that Mr Ntaganda travelled to Mongbwalu with his soldiers and bodyguards, and that he gave orders before this and other operations. Three witnesses, P-10, P-768 and 901, confirmed that the *kupiga na kuchaji* order was commonly given in UPC operations. So although not legally required, P-10's evidence was in fact corroborated.

On the meaning of the order *kupiga na kuchaji*, the Trial Chamber found that no less than 10 members of the UPC's military wing, including one Defence witness, confirmed that this was an order to loot civilian possessions or to attack civilians. I refer to footnotes 1186 and 1187 of the judgment.

The Trial Chamber did not need to infer this meaning, as the Defence argued yesterday, it heard direct evidence about it. And to correct one point in Defence arguments related to Witness 55's evidence, Witness 55's description of what the *kupiga na kuchaji* order meant in the UPC was clear. He said it referred to pillaging items from the local civilian inhabitants after a victory. This is not legitimate military language. I refer you to footnote 1187 again of the judgment and to P-55's testimony cited there.

Just as the Trial Chamber was reasonable to rely on P-10, it concluded that P-55 was a credible witness, whose account was clear, rich in detail, and consistent throughout direct and cross-examination. It provided reasons for accepting

his evidence over other evidence. I refer you, for example, to footnotes 1373, 1378 and 1379, 1679, 2029 and 2035.

In any event, there was evidence on the record that supported 55's evidence that Mr Ntaganda planned, monitored and supervised the second operation, and knew of UPC crimes at the time they were committed. I refer your Honours to the evidence from Witness 901, that Mr Ntaganda was supervising the second operation. I refer you to the logbook of UPC radio communications showing messages to and from Mr Ntaganda before and during the attack. I refer you to the evidence of Mr Ntaganda's active role as a military leader who devised military tactics for his group and who was in charge of its troops deployment and operations. I refer you to military soldiers who confirmed that the UPC crimes in this operation were known and were discussed within the UPC at the time.

A video dated 24 February 2003 shows Mr Lubanga meeting with UNMONUC personnel to discuss fighting in the Kobu and Lipri area, including allegations that UPC troops were chasing fleeing people in the forest. The Chamber discusses all of this evidence, and I refer your Honours to footnote 2035 of the judgment.

The Defence does not show error in the Chamber's reasonable assessment of the totality of the evidence.

Lastly, your Honours, I will address the Chamber's reliance on Rule 68 statements from two witnesses who died before the start of trial.

The written statements of Witnesses P-22 and 27 did not form the sole basis for Mr Ntaganda's convictions for murder and attempted murder, rape, persecution and intentionally attacking civilians. Not when you consider the

scope of those convictions, nor when you consider the individual criminal acts to which these two witnesses testified.

The Chamber correctly accepted Witness 22's evidence of her own rape and attempted murder by UPC troops in a village called Kilo, and of the murder of two persons detained with her. It accepted Witness 27's evidence of a UPC attack on another village called Buli. But recall that Mr Ntaganda was convicted for at least 74 murders and attempted murders, for at least 21 rapes, for attacks against five locations, and for persecution based on crimes that took place in 13 locations. In no way were these convictions based solely or in a decisive manner on these two statements.

Nor were the Chamber's findings on the individual criminal acts described by these two witnesses either unreasonable or unsupported by other evidence.

I will take P-22's evidence as an example.

Five other trial witnesses testified about the UPC attack in Kilo. Five witnesses also confirmed P-22's evidence that the attack was carried out with assault and heavy weapons and that members of the population fled. Two witnesses corroborate her evidence that UPC members prompted civilians to return to Kilo claiming they would not be harmed. P-22 and two other witnesses were consistent that the UPC made men and boys from Kilo dig trenches, then they went after the Lendu, killing some of them and throwing their bodies into mass graves. Two witnesses testified that a UPC soldier killed a Nyali man in Kilo, corroborating P-22's account of UPC murders in Kilo. Witness P-17 testified that UPC soldiers sexually abused women in Kilo, corroborating P-22's account of rape at that location. The Trial Chamber also found that P-22's evidence was consistent with multiple other witnesses on

other points.

It was in this overall context that the Chamber carefully assessed P-22's direct evidence of the crimes she personally suffered. The Chamber acknowledged fully that no other witnesses testified to those specific criminal acts of rape and murder and attempted murder in relation to her evidence. And I refer to footnotes 1637 and 1647.

This is not unusual, in particular in relation to accounts of sexual violence. It does not mean that a witness lacks credibility or that it cannot be relied upon. The evidence must be viewed against the overall evidence on record. The Chamber carefully considered the internal consistency of P-22's account that these were crimes she had personally experienced and that the events she described, and I quote, "fit into the narrative concerning the First Operation as established by the Chamber on the basis of the evidence of numerous witnesses". End quote.

That's in footnote 1637 of the judgment.

This approach is correct. The Appeals Chamber in Đorđević upheld the Trial Chamber's reliance on written evidence that was supported by other evidence demonstrating a consistent pattern of conduct, at paragraphs 808 and 809. I refer you also to the Popović and Karadžić appeals judgment at paragraphs 104 and 457, respectively

All these findings, taken together, demonstrate that the Chamber's convictions on these specific individual criminal acts was not based solely on P-22 or 27's statements. They were supported by other evidence.

To conclude, your Honours, none of Mr Ntaganda's arguments show any error in the Trial Chamber's cautious assessment of witnesses who were members of

the UPC/FPLC, or its approach to corroboration. For these reasons, and for those in our brief, his arguments should be dismissed.

I will now hand over to my colleague, Mr Costi.

PRESIDING JUDGE MORRISON: [12:30:12] Thank you, Ms Samson.

Mr Costi.

Ms Gibson.

MR COSTI: [12:30:16] Good afternoon, your Honours.

I will now address you on ground 4 and 5 on crimes against humanity.

The Trial Chamber correctly found that the UPC conducted an attack against a civilian population pursuant to a policy to attack and chase away the Lendu civilians as well as those perceived as non-Iturians.

The Defence argues that the civilian population was not the primary object of the attack and that the UPC policy was one of peace and reconciliation.

Today in my submission I will try to make three points:

First, based on the evidence, the Chamber's conclusion was the only reasonable one.

Second, the Chamber rightly focused on specific operations. UPC military operation elsewhere are immaterial.

And third, even considering military activity elsewhere, the UPC attack was primarily directed against a civil population.

First, the evidence demonstrates beyond reasonable doubt that there was an attack against a civilian population. You already heard from my colleagues discussions about orders that UPC commanders gave to attack all Lendu, including civilians, and more evidence is addressed in the judgment and our submissions.

I will now only try to recall some of the key findings regarding the operations on the ground.

In Songolo, after the enemy left, UPC soldiers killed men, women, elderly and children, including babies.

In Zumbe, UPC soldiers entered the village and killed everyone, including elderly people and women.

After taking over Komanda, UPC soldiers captured, killed and raped civilians.

After taking over Mongbwalu, UPC soldiers searched from house to house abducting, intimidating and killing people. They raped multiple women and girls as young as 13 and 14 years old.

At the *Appartements*, Mr Ntaganda's base in Mongbwalu, UPC soldiers detained and killed civilians. Mr Ntaganda in person shot dead one of them, a priest. At the base, women were forced to have sexual intercourse with soldiers.

After taking over Kilo, soldiers chased, detained, mistreated and killed Lendu men and women, including a pregnant woman. Girls were forced to have sexual intercourse with soldiers and commanders.

After taking over Kobu, UPC detained and raped several women and girls, including an 11-year-old. At least two persons were captured and killed.

In Bambu, soldiers killed nine hospital patients who were too weak to escape.

A Lendu woman was raped, killed and mutilated.

In Sangi, UPC invited the Lendu civilian community for a pacification meeting.

It was a trap, not a military operation. Lendu civilians were captured, beaten and raped.

In the following days UPC soldiers continued chasing, capturing, killing and

raping civilian Lendu in the surrounding forests and villages of Buli, Gola, Jitchu.

At least 50 of those captured in Sangi, Buli and Gola, including women, young boys and girls, were brought to Kobu. There some women were raped. At night prisoners were executed in groups. At least 49 dead bodies were found in the following days in a nearby banana field.

After taking over Bunia, UPC fired whenever they met someone, including deliberately killing fleeing civilians.

The Defence is asking you to accept that these operations were not against a civilian population. That the UPC's policy was to promote reconciliation, establish peace and protect all civilians without discrimination. These, your Honours, are not reasonable inferences.

Contrary to the Defence submission, the policy can coexist with evidence of a parallel legitimate goal such as making attempts to achieve a favourable peace. But based on the totality of the evidence, the only reasonable conclusion was that the attack was against a civilian population and pursuant to an organisational policy.

Second, the Defence argues that the Chamber ignored evidence of other UPC operations elsewhere which would show that the civilian population was not the primary object of the UPC military activities.

As we explain in our written submissions, the Chamber did not ignore any evidence. The Chamber simply didn't assess the evidence the way the Defence hoped. One example, the Chamber didn't throw away Chief Kahwa's speech, as Mr Bourgon emphatically submitted yesterday. As we explained in our detailed response at paragraph 107, the Chamber was entitled to weigh

that evidence against other relevant testimony, which it did.

In any event, and this is the point I would like to stress today, whether the UPC conducted other legitimate military activities elsewhere has no bearing on the finding that the operations I just described already demonstrate the existence of a course of conduct directed against a civilian population.

As the Defence acknowledges, the notion of attack has a different meaning in the context of war crimes or crimes against humanity. For crimes against humanity an attack means a course of conduct involving the multiple commission of acts under Article 7(1) against a civilian population.

The Trial Chamber recognised this distinction when it found that the attack may be, but need not be, part of a military operation, trial judgment 662.

Now, when assessing whether an attack under Article 7 took place, the question before the Trial Chamber was not whether the UPC operation as a whole were legitimate or directed against a civilian population. The question was whether the identified acts under Article 7(1) formed part of a course of conduct directed against a civilian population.

Minded of this distinction, the Trial Chamber conducted the right analysis and observed that any UPC legitimate military operation elsewhere, and I quote, "has no bearing on ... the factual findings ... that during several specific assaults, ..., civilians were deliberately attacked." Trial judgment 665.

And this finding is fully consistent with the definition of attack given at the confirmation decision, filing 309, paragraph 22.

Third, and this is my last point. Even if *arguendo* the Chamber was required to make findings on the totality of the UPC operations in DRC at the relevant time, the conclusion would have been the same: the attack was primarily directed

against a civilian population.

This is because whether an attack is primarily directed against a civilian population is not just a question of numbers or proportions, it is also a question of manner in which the attack it carried out.

Let me expand on this. The modifier primary does not appear in the Statute or the Elements of the Crimes. It was used for the first time by the ICTY trial judgment -- Trial Chamber in the Kunarac case without providing any specific analysis, trial judgment 421. The Appeals Chamber in that case clarified that primary means that the civilian population is not an incidental target of the attack. This is the Kunarac appeals judgment at paragraph 92.

Now, this Court has followed the same approach, considering primary in contrast with incidental. It is in Katanga trial judgment 1104, Bemba trial judgment 154, and this judgment, a trial judgment, 668.

In Katanga the Trial Chamber found, and I quote:

"The civilian population must be the primary target and not the incidental victim of the attack. In order to determine whether the attack may be said to have been so directed, [one must] consider, inter alia, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed ..."

The paragraph continues with other factors relevant to this determination and other international courts adopted precisely the same approach, and we have referred to them in our book of authority under B3.

In other words, your Honour, the manner in which the attack is conducted may show, depending on the circumstances, that the population is not just an incidental target of the attack.

In this case, even considering the totality of the operations of the UPC in DRC at the relevant time, a reasonable Chamber would have found that the number and the manner in which the Article 7(1) crimes were perpetrated during the said operations - the one I described at the beginning of my submission - show that the civilian population was not incidentally targeted, it was the primary target.

Just one last point to clarify. The Prosecution did not propose to replace the primary object test with an intentionally target test. In our written submission, we said that the civilian population must be the primary target as opposed to the primary purpose or motive of the attack. For this reason, whether the operations constituting the attack had a simultaneous legitimate military purpose is irrelevant.

In conclusion, your Honour, both ground 4 and 5 should be dismissed.

And, with your permission, I will now -- you will now be addressed by Ms Regué.

PRESIDING JUDGE MORRISON: [12:41:47] Thank you.

MS REGUÉ: [12:41:54] Good afternoon, your Honours.

I will be taking the rest of the time allocated to the Prosecution. And, being mindful that there are five minutes for the break, I was wondering whether you want me to start now or whether it will suit you that I start after the break so I don't interrupt my presentation.

PRESIDING JUDGE MORRISON: [12:42:09] Well, we're taking a break of one hour rather than 45 minutes, so it might be more convenient if you are ready to do the whole of your presentation now, even if that means extending your time by five minutes.

MS REGUÉ: [12:42:28] Yes, your Honour, so I will start now.

Your Honours, I will address two topics in my submissions:

First, grounds 12 to 15, regarding the common plan and Mr Ntaganda's criminal responsibility as a co-perpetrator.

And second, ground 3, regarding the scope of the charges.

Starting with the common plan, the three errors that Mr Ntaganda argued yesterday are a total mischaracterisation of the evidence and the judgment.

Mr Ntaganda was not convicted of a common plan that exceeded the scope of the charges. Counsel yesterday selectively read the trial judgment. Both the confirmation decision and the trial judgment identify a military and a criminal component of the common plan, that is a --

PRESIDING JUDGE MORRISON: [12:43:30] Ms Regué, I hesitate to interrupt you, but I understand that Ms Brady has requested the floor for a moment, so I need to find out what she wants to address the Court for.

MS BRADY: [12:43:40] Yes. Very briefly, your Honours, Ms Regué's video does not seem to be streaming into the court, at least it's not streaming for the remote participants.

PRESIDING JUDGE MORRISON: [12:43:50] Thank you.

She can continue. We can hear her plainly.

Ms Regué, can you make sure your microphone is on -- you are with us now.

MS REGUÉ: [12:44:19] Yes. Sorry, were you able to follow me before or no, your Honours?

PRESIDING JUDGE MORRISON: [12:44:23] We could hear you but not see you, but now we can do both.

MS REGUÉ: [12:44:29] Okay, so I will -- I shall continue.

PRESIDING JUDGE MORRISON: [12:44:31] Yes. If you can aim to break at -- in about another six or seven minutes, bearing in mind that the Office of the Prosecutor has 25 minutes again after the break.

MS REGUÉ: [12:44:43] Okay.

So, your Honours, both the confirmation decision and the trial judgment identify a military and a criminal component of the common plan, that is a military campaign to assume control over Ituri, and to expel and attack the Lendu. The Chamber's remark in the judgment that the co-perpetrators meant to destroy and disintegrate the Lendu community reflects the criminal component and it is established by the evidence. I will take your Honours to paragraphs 805, 806, and 809 of the trial judgment.

Mr Ntaganda is wrong in saying that the Chamber inferred the common plan from the commission of the crimes only. The Chamber relied on both direct and circumstantial evidence, including the concerted actions of the co-perpetrators. We have already addressed this argument in paragraphs 220 to 221 of our response brief. The Chamber's careful analysis on the common plan can be found in paragraphs 781 to 807 of the judgment.

I would only like to emphasise that the common plan was not an extemporaneous event. Mr Ntaganda and Mr Kisembo already set up a group back in 2000 to protect the interests of the Hema community. They already recruited children. They joined Mr Lubanga in early 2002 and split from the RCD-K/ML because, they said, the Hema were discriminated. They decided to set up a military group to expel the RCD from Ituri but also to expel the non-Hema population perceived as being non-Iturian. Meetings were held, and documents stating the group's objectives were issued. A document

referred to rape of the enemy women as a means of waging war. The co-perpetrators carefully planned the first and second operations. They recruited children. They set up military camps where they trained these children. They secured weapons. They held meetings and briefings. They issued orders to attack the Lendu, including direct orders to kill them, and they themselves killed.

The manner in which the military operations unfolded and how the crimes were committed was consistent with the trainings, with the meetings, with the briefings and the orders. The crimes had an ethnic and sexual component. Non-Lendu victims were spared while Lendus were killed. The cruelty of the methods used to rape the victims was striking. Sexual violence was a tool utilised by the UPC to destroy their perceived enemy, the Lendu.

Based on the above, the Chamber correctly found that the co-perpetrators agreed to a common plan to expel the Lendu from the localities targeted during the course of the UPC military campaign. There was no other reasonable alternative on the evidence.

Finally, the Chamber correctly attributed the crimes committed by Hema civilians during ratissage operations in Mongbwalu to the co-perpetrators. As we explain in our brief, the civilians were tools in the hands of the co-perpetrators even if they were not part of the UPC. The evidence establishes that civilians were mobilised and participated in some UPC operations following UPC orders, including Mr Ntaganda's. You can find, your Honours, this reference at paragraph 333 of the trial judgment.

Even during the Mongbwalu operation, Mr Ntaganda met with one of the civilian leaders. You can find the evidence in footnote 1513 of the trial

judgment. He knew that the civilians would murder and loot in Mongbwalu. Mr Ntaganda's arguments challenging this attribution must be dismissed.

And, your Honours, if that suits you, perhaps we could break now because I finish a thematic area of my submissions. But I'm also happy to continue if you prefer.

PRESIDING JUDGE MORRISON: [12:49:59] This is a suitable moment to break, and we will now break for one hour. And I just give advance notice that the second break tomorrow will also be for one hour.

So we will resume again, please, at 10 minutes to 2.

THE COURT USHER: [12:50:18] All rise.

(Recess taken at 12.50 p.m.)

(Upon resuming in open session at 1.53 p.m.)

THE COURT USHER: [13:53:55] All rise.

Please be seated.

PRESIDING JUDGE MORRISON: [13:54:19] Good afternoon, everybody.

I now call upon the Office of the Prosecutor.

You have another 25 minutes.

MS REGUÉ: [13:54:30] Good afternoon, your Honours. I hope that you can hear me and see me well.

I will now address Mr Ntaganda's submissions on his contributions and mens rea as an indirect co-perpetrator. His submissions misunderstand the law and do not reflect the evidence nor the judgment.

I will make four remarks in response.

First, Mr Ntaganda argues that the Chamber should have assessed his contributions and mens rea separately per operation and that his participation

in the second operation was *de minimis*. This is incorrect.

The Chamber correctly considered that the crimes committed during both operations resulted from the implementation of the same common plan, which was to expel the Lendu during the UPC military campaign. The UPC sought to control strategic locations, such as Mongbwalu, and the main road that connected Mongbwalu with Bunia and that passed through Kobu and Bambu. This required taking control of the villages that were targeted in the first and second operations. The two operations were, therefore, part of the same plan and all the crimes resulted from its implementation.

Second, Mr Ntaganda's role and actions taken cumulatively were an essential contribution to the common plan in the sense that he had control over all the crimes and the power to frustrate them. Mr Ntaganda was in charge of military planning and operations and devised the UPC's military tactics. He recruited and deployed the recruits. He had disciplinary power; although, he chose not to exercise it with Lendu civilians. He was in charge of military training and taught recruits himself.

Your Honours will recall that he set up the Mandro training camp, designed its training programme and was even based there.

But the conditions in the training camps were inhuman. Recruits were subject to a strict disciplinary regime. They lived under fear and violence. They were taught to hate the Lendu and were told to kill them. Female recruits were raped and sexually assaulted, including by their co-perpetrators.

Throughout the period of the charges, and, I want to emphasise this, throughout the period of the charges, Mr Ntaganda decided on the UPC's military structure. He planned military operations, issued operational orders,

secured weapons and ammunition, and monitored the troops.

A few days before the second operation, he went to the Rwampara training camp to check on his troops. When the second operation was launched, he ensured that the chain of command was followed. As the Defence explained yesterday, he was an experienced military man who liked to be on the ground. He personally participated in the Mongbwalu and Sayo assaults where he issued direct orders to attack the Lendu. He ordered the killing of four civilians and personally killed another. He led by example, encouraging and allowing his troops to do the same. His orders were implemented.

Based on his role and actions taken cumulatively, the Chamber correctly found a clear causal link between Mr Ntaganda's contributions and all the crimes.

The Chamber conducted a normative assessment of Mr Ntaganda's role and a factual analysis of his concrete actions during the entire period of the charges.

Mr Ntaganda is simply wrong to say that his actions during the second operation were *de minimis*. Although his degree and type of participation may have varied, his overall contribution to the criminal common plan was essential.

This Appeals Chamber, in your same composition, has already confirmed this obvious possibility in the second sentencing appeal judgment in the Bemba et al. case. Likewise, in the appeal judgment of the same case, the Appeals Chamber held that a co-perpetrator does not need to make an essential contribution to each of the criminal incidents, as long as he essentially contributes to the common criminal plan and the crimes occur in the framework of this plan.

A co-perpetrator need not contribute to the execution of the plan and can

contribute to its planning or preparation only. Nor does he need to be physically present at the scene of the crime. I will refer your Honours to authorities listed in C5 of our list of authorities filed this morning.

In any event, Mr Ntaganda contributed to the planning and execution of both operations and was present on the ground during the first operation.

Moving now to my third point, Mr Ntaganda misrepresents the Chamber's findings regarding his mens rea. For the crimes against civilians, the Chamber did not only rely on P-768 or P-10 and his orders -- and Ntaganda's orders to attack the Lendu. These orders were one important piece of a much wider pool of evidence. Mr Ntaganda personally participated in the assault of Mongbwalu and Sayo. He remained at the scene of the crimes at the *Appartements* for a week. There, UPC soldiers brought women clearly against their will. These women were raped and thrown out to be replaced by others.

Mr Ntaganda was obviously informed of the conditions in the camps, the violent trainings and the composition of the troops. Since he was in charge and set up the trainings and the structure, Mr Ntaganda knew that looting was not punishable and some of the goods looted were taken to his residence.

He monitored the operations and issued orders through different means of communication during the entire period of the charges. He congratulated his men after the operations and praised Mulenda's actions in the Kobu massacre.

The crimes for which Mr Ntaganda stands convicted were not a one-off event. His troops did the same over and over in the different charged locations. They assaulted the towns. Destroyed them. Killed and chased away their population. They set up a base and stayed for several days committing more crimes.

Based on this evidence, which was assessed throughout the judgment and not only in 12 paragraphs, the Chamber correctly concluded that Mr Ntaganda intended all the crimes against civilians throughout the charged period.

The Mongbwalu video or the one-off tactical alliance with Lendu fighters did not support a plausible alternative inference. His arguments to the contrary must be dismissed.

And the same with respect to the crimes against child soldiers. The Chamber did not only rely on the circumstances prevailing in Ituri. It relied on a wider pool of evidence that Mr Ntaganda chooses to disregard - including, his own recruitment actions; the fact that he had children under 15 in his escort; the fact that he lived in and visited the camps; that he trained the child soldiers and organised their training; that he participated in operations with them.

Mr Ntaganda himself abused his female escorts as did many of the UPC commanders and soldiers. Rape and sexual violence of UPC recruits was well known and left unpunished. The violent and coercive environment in the camps was conducive to these crimes. No meaningful measures were taken to prevent them. To the contrary.

Based on this, the Chamber correctly found that Mr Ntaganda knew that the UPC soldiers and commanders would in the ordinary course of events recruit, use and sexually abuse child soldiers. Again, his arguments challenging his mens rea for these crimes are untenable and must be dismissed.

Finally, the Trial Chamber entered all the required findings with respect to Mr Ntaganda's mens rea. I will take your Honours to paragraphs 1169 to 1198, including that Mr Ntaganda was aware of the factual circumstances that enabled him together with other co-perpetrators to exert control over the

crimes.

In paragraph 1175 of the judgment, the Chamber noted that Mr Ntaganda did not contest his position and participation in the UPC during and beyond the charges. He acknowledged his responsibilities in training, organisation and military operations and he indicated that he had no problems in exercising his functions. He also said that he instilled fear *on his troops.

These findings, along with others, demonstrate that Mr Ntaganda was fully aware of the factual circumstances that enabled him to exercise functional control over the crimes.

Moving now to ground 3. Mr Ntaganda has not addressed this ground today, but he has extensively dealt with it in his replies, which we wish to address.

Mr Ntaganda argues that he has been improperly convicted of 15 criminal acts which, he claims, fall outside the scope of the charges. This is incorrect. He also suggests that the Bemba appeals judgment shows that his charges are defective. This is also incorrect.

I will make three remarks in response. First, Mr Ntaganda misunderstands the scope of the charges set out in the confirmation decision. The charges were not framed and were not confirmed at the level of victims or, as he says, individual criminal acts. Rather, they were confirmed with respect to crimes committed in confined temporal, geographical and other relevant parameters.

The victims listed in the confirmation decision were not exhaustive and additional victims were identified in auxiliary documents before the start of the trial. Your Honours, I will use the term "auxiliary documents" as a shorthand to define documents which serve to provide further notice of the charges.

For the crimes against civilians, the charges listed an exhaustive list of locations

per crime and concrete dates detailing which crimes were committed when in each location.

Five locations for the first operation and 26 locations for the second operation, with crimes committed during two two-week periods. Some of these locations were very small, consisting of a few dwellings and very close, one -- to another. The scope of the charges for the crimes against child soldiers was broader: Ituri, and 10 months for the crime of use; and 17 months for recruitment, sexual slavery and rape. The confirmation decision and the updated DCC provided further specifics listing types of conduct, locations and time frames.

These confined parameters defined the scope of the charges for the purposes of the trial. They are markedly different from Mr Bemba's, which related to crimes against humanity, murder, rape and pillage, spanning -- excuse me, crimes against civilians, spanning five months across the Central African Republic.

In Bemba, the majority of the Appeals Chamber considered that these parameters were temporally and geographically too broad to comply with Regulation 52(b). This is why it held that the charges in that case should be limited to the individual criminal acts identified in the pre-confirmation decision and confirmation decision.

However, the majority underlined that its findings related to Mr Bemba's case only and whether the parameters of the charges are sufficiently specific, is a case-by-case determination and depends on the circumstances of each case.

The charges against Mr Ntaganda are sufficiently specific in light of the type and the scale of the criminality in this case and comply with the requirements

of Regulation 52(b).

The UPC brutally assaulted the villages on a specific date, took control of them and committed crimes on a large scale. The trauma and the lapse of time made it difficult for some witnesses to remember specific victims. The crimes against child soldiers are of a continuous nature and the UPC was often on the move.

Although rape is not usually considered a continuous crime, on these facts the rapes amounted to such, as the victims were moved and continuously abused during the period of their recruitment. These features permit broader parameters to define the scope of the charges for these crimes. The Lubanga Appeals Chamber, the Appeals Chamber in the Special Court of Sierra Leone and the Pre-Trial Chamber and Trial Chamber in Yekatom and Ngaïssona case have taken a similar approach.

Second, in this case the victims mentioned in the confirmation decision were not exhaustive. This is clear from its text, which lists victim incidents in a non-exhaustive manner. The Pre-Trial Chamber relied on these incidents to conclude that there were substantial grounds to believe that Mr Ntaganda had committed the crimes charged and that the Prosecution's case could proceed to trial. This accorded with the purpose of the confirmation decision.

The Trial Chamber confirmed this reading of its decision -- of the confirmation decision in its decision 450, in February 2015, well before the start of the trial in September 2015. The Chamber confirmed that the victims listed in the confirmation decision were not exhaustive, but that the locations and time frames were. I refer your Honours to the authorities cited in C1.

The exhaustive listing of victim incidents per location was provided through

auxiliary documents disclosed well before the start of the trial. The IDAC, the updated DCC, and, in particular, the trial brief and the witness summaries, all filed from January to March 2015, provided further details about the victims within the confined parameters of the charges.

The only exception relates to the killings of the nine patients in the Bambu hospital that a witness spontaneously testified about, yet this incident fell squarely within the scope of the charges, which mentioned murders and attempted murders in Bambu on or about 18 February 2003. Mr Ntaganda cross-examined the witness extensively. There was no prejudice to his rights.

The charges in this case are consistent with the Court's jurisprudence. Although, the criminal acts and victims are an integral part of the charges, the Lubanga Appeals Chamber has also held that the Prosecution must provide this information to the greatest degree of specificity possible in the circumstances. It held that although the confirmation decision defines the parameters of the charges, further detail may be provided - depending on the circumstances - in auxiliary documents before the start of the trial. All these documents must, in turn, be considered to determine whether the accused person has received adequate notice of the already specific charges. This is because, although the confirmation decision is the primary document that provides notice, it is not the only document.

The Appeals Chamber identified the start of the trial as the temporal benchmark so that the accused person can adequately prepare his defence. The Appeals Chamber also held that, if further detail is provided during the trial, this may still be considered to cure any prejudice.

The Trial Chamber in the Yekatom and Ngaïssona case has recently confirmed

this approach, citing the Lubanga appeals judgment and this, the Ntaganda trial judgment, with approval. I will refer to the authorities cited in C2.

That some of the victims were identified during post-confirmation investigations is consistent with this approach. This is because they fell squarely within the specific scope of the charges and were notified to Mr Ntaganda before the start of the trial.

The office aims at being trial ready at confirmation, but in some cases, post-confirmation investigations have been unavoidable. Mr Ntaganda's case was dormant before he was suddenly transferred to the court in March 2013, and the confirmation hearing took place less than one year later, in February 2014.

During this period, the Prosecution inevitably obtained new leads. Although these leads were quickly pursued, not all testimonies could be obtained before the confirmation, despite the short postponement granted. But Article 61(5) of the Rome Statute expressly allows the Prosecution not to submit all trial evidence at confirmation and the Appeals Chamber has confirmed that post-confirmation investigations are permitted. The Prosecution operated under those lawful parameters. I will refer to the authorities cited in C3.

Finally, as long as the charges are sufficiently clear and specific, the Prosecution has discretion on how to frame them. In this case, because the Prosecution framed the charges at the level of locations for crimes against civilians, it didn't have to amend them so as to include additional victims or victim incidents within those locations.

Conversely, in the Ngaïssona and Hassan * cases, the charges are framed at the level of concrete victim incidents within locations. This is why an

amendment was necessary if the Prosecution wanted to add other incidents within the same location.

But just because the charges in these recent ICC cases have been framed at this level, does not mean that the charges in this case must also have been framed in that way. They were not because the cases are different. Nor were the charges in the Kenya and Katanga cases framed at the level of victim incidents either, as we have explained in our brief. Like in Katanga -- like in Ntaganda, my apologies, they listed a non-exhaustive list of locations -- excuse me, they listed an exhaustive list of locations and did not identify all the victims.

In fact, the majority in Bemba did not exclude the possibility that in other cases, criminal acts could be added post-confirmation without amendment. This is one of them.

Your Honours, is it (sic) apparent that over the years, the charging practice in this Court has evolved, and so too the structure of confirmation decisions and the use of auxiliary documents. Maybe this is for the better. But this does not render previous lawful practice defective.

The Prosecution complied with the legal framework and Mr Ntaganda has not suffered any prejudice on his own admission. He has never argued - and, he does not argue now - that he did not receive adequate notice of the content, cause and nature of the charges under Article *67(1)(a).

PRESIDING JUDGE MORRISON: [14:20:50] Thank you. Ms Regué, your time is now expired.

MS REGUÉ: [14:20:53] I have --

PRESIDING JUDGE MORRISON: [14:20:53] Can you wind up --

MS REGUÉ: [14:20:54] -- I have

PRESIDING JUDGE MORRISON: [14:20:54] -- very quickly, please.

MS REGUÉ: [14:20:56] Sure. Yes.

Mr Ntaganda does not argue either that he has been impaired in his defence in violation of Article 67(1)(b). He was not. Mr Ntaganda was never in doubt of how his charges were framed. His submissions on the scope of the charges, which only came in his closing arguments one month after Bemba was issued, are another example of his moving defence strategy. They lack merit and should be dismissed.

That brings me to the end of my submissions. It also concludes the Prosecution's submissions in response to Mr Ntaganda's appeal against his conviction.

Your Honours, the convictions should be upheld and his appeal dismissed.

I thank you very much for your time.

PRESIDING JUDGE MORRISON: [14:21:56] Thank you, Ms Regué.

I now turn to the Legal Representatives of the two groups of victims and give you the floor for 15 minutes.

MS PELLET: [14:22:19] (Interpretation) Thank you very much, your Honour.

Your Honours, on behalf of 283 former child soldiers participating in these proceedings, I have submitted detailed written submissions responding to the Defence's appeal with respect to the judgment. That judgment set out that the Office of the Prosecutor had proved, based on overwhelming proof presented throughout the trial, that Mr Ntaganda is responsible as an indirect co-perpetrator for the crimes of conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities; and for the

crimes of rape and sexual slavery committed against them within the UPC/FPLC.

However, given the very brief speaking time allotted to me, I can only underline two issues raised by the Defence in its appeal.

First of all, the Defence impugns the Trial Chamber's finding that Bosco Ntaganda, and, I quote:

Necessarily knew that the UPC/FPLC would recruit, train and deploy children under 15 years of age and that the co-perpetrators were aware that the crimes against child soldiers would be a virtually certain consequence of implementing their common plan.

Your Honours, one should consider the actions taken by Mr Ntaganda over the period concerned by these proceedings in context. In particular, in 2002, 2003, the use of child soldiers was not a new problem in Ituri. From the end of the year 2000, the Chui mobile force - of which Mr Ntaganda was one of the founders and leaders - had been the subject of investigations by international organisations and non-governmental organisations of an international nature for its use of children under the age of 15 years.

Nonetheless, and despite this knowledge of the issues, at a meeting which took place in Kampala in June 2002, the leaders of the UPC decided that, and I quote:

Each person present at the meeting should mobilise the children in their community in order to join the UPC.

Large-scale campaigns to recruit young people, including children aged less than 15 years followed. Mr Ntaganda played a key role in those efforts. He asked Hema community chiefs to help recruit children to swell the ranks of the UPC/FPLC.

And during recruitment campaigns, he called indiscriminately, and, I quote: Young people, children and kadogos to join the UPC/FPLC. And he did so without distinguishing with respect to age, sex or size.

I request, your Honours, that you reject the absurd argument of the Defence that by using those words Mr Ntaganda was exclusively referring to individuals aged between 15 and 18 years and no younger. In this regard, I wish to remind you that that interpretation also contradicts Mr Ntanganda's testimony itself. He claimed, and I quote:

I have continually repeated that we didn't have any child soldiers below the age of 18. We insisted on this point. We explained to our commanders consistently that no recruitment of children under 18 should take place. That had to be avoided. End of quotation.

Now, of course that is entirely untrue. Mr Ntaganda knew perfectly well that further to his efforts, children, aged less than 15 years, would be recruited. He was always fully aware of their presence and of the crimes of which they were victim.

And I say this for the following reasons: First of all, Bosco Ntaganda was responsible for setting up a bodyguard company to protect him and -- which included children, who were manifestly aged less than 15 years. He was in daily contact and close contact with members of his escort, which lived at or near his residence and constantly accompanied him, including during combat. Aside from Bosco Ntaganda, Thomas Lubanga, Floribert Kisembo, and, at least eight other soldiers and commanders with whom Mr Ntaganda was frequently in contact, also had children aged under 15 years in their personal escort.

Secondly, once recruited, the child soldiers were trained in training camps,

which had been set up by Mr Ntaganda himself, given that amongst his responsibilities was the training of recruits. Bosco Ntaganda visited those training camps regularly. He personally trained some of the recruits and he presided over ceremonies held at the end of military training programmes. Furthermore, the Trial Chamber was of the view that the crimes against child soldiers were, and I quote:

Committed in the institutionalized coercive environment of the UPC/FPLC in similar circumstances, over a period of time, and not as isolated acts.

Thirdly, as deputy chief of staff for operations, Mr Ntaganda was also personally responsible for deciding how recruits would be deployed, including child soldiers, once their military training had been completed. He chose to deploy child soldiers on battlefields; notably, in the first operation, during which he personally fought alongside them.

Despite repeated appeals by international organisations condemning the presence of child soldiers in the ranks of the UPC/FPLC, Mr Ntaganda and his co-perpetrators refused to demobilise them, and continued to recruit and use children under the age of 15 years to participate actively in hostilities.

Your Honours, as regards rape and sexual slavery, I would remind you that the sexual violence against UPC/FPLC child soldiers was a common practice and generally known and discussed within the UPC/FPLC.

The soldiers and commanders of the armed group, including the head of Mr Ntaganda's escort, regularly committed sexual violence against female members of the UPC/FPLC; notably, children under the age of 15 years.

Like his co-perpetrators, Bosco Ntaganda left those crimes largely unpunished. He did not take measures to ban the practice. On the contrary, Mr Ntaganda

himself, and I quote the Trial Chamber:

Had forced sexual intercourses with many female members of his personal guard. End of quotation.

The Trial Chamber therefore, reasonably and correctly, found that Bosco Ntaganda had the criminal intent required with regard to crimes against child soldiers. It also found, quite reasonably and correctly, that the co-perpetrators were aware that the recruitment and utilization of child soldiers and their rape and sexual slavery was a virtually certain consequence of implementing their common plan.

Your Honours, the former child soldiers, therefore, request that you reject the Defence's appeal.

And my colleague, Mr Dmytro Suprun, will use the remaining moments.

Thank you.

THE COURT OFFICER: [14:31:59] (Interpretation) I'd just like to take this opportunity to tell you that you have five further minutes.

MR SUPRUN: [14:32:08] Thank you.

Mr President, in line with my written submissions, my present observations will be limited to addressing briefly the Defence appeal, part 2 only. Some of the topics I intended to address have been sufficiently covered by the Prosecution today and I will be not my repetitive. I will only address some limited topics in light of the Defence response to my written submissions.

In its response in paragraph 4, the Defence criticises the fact that its appeal has been scrutinised by, what it calls, three adverse parties. Mr President, your Honours, I take issue with this point. This is another attempt from the Defence, further to several similar attempts made at trial, to mischaracterise the

role of the victims in proceedings before the Court by, again, equating the role of the victims to that of the Prosecution.

This is unfortunate that this type of arguments are still being made in 2020, 22 years after the adoption of the Rome Statute that has placed victims at the very heart of the proceedings before the Court.

Therefore, I must recall again that the victims play a distinct and independent role in the proceedings before the Court, including vis-à-vis the Prosecution, and that the role played by the victims should not be compared or confused with that of the Prosecution.

In relation to ground 2 - and, in particular as regards the Defence contention in paragraph 6 and 8 of its response that Mr Ntaganda was forced to testify prior to the appeals decision being rendered - as submitted in my written observations, the question for the Appeals Chamber is the actual prejudice caused, not a hypothetical prejudice of what would have happened had the Appeals Chamber decided differently.

Moreover, to speak of the accused being forced or compelled to testify is a stark exaggeration. The accused has a right to remain silent and this right was not affected by the Chamber's decision not to grant suspensive effect.

In relation to ground 5 and, in particular, as regards the Defence assertion in paragraph 16 of its response that the Trial Chamber failed to provide reasons on the central or conflicting aspects of the evidence, the Defence fails to acknowledge that what it calls the central or conflicting aspects are largely - as regards evidence favourable to the Defence - the logbook and Mr Ntaganda's testimony. Since the logbook is essentially one piece of the evidence, on which the Trial Chamber made a general finding, there was no obligation to

rule on every single entry thereof.

Further, regarding the alleged lack of reasoning, it is reiterated that there is no requirement to articulate every particular step of the judicial reasoning. In addition, I refer to the constant jurisprudence as established by the European Court of Human Rights, that when a lack of reasons is alleged, a decision can be qualified as arbitrary to the point of prejudicing the fairness of proceedings, only if no reasons are provided for a decision, or if the reasons given are based on a manifest factual or legal error committed by the tribunal, resulting in a denial of justice. The reference is made to the Grand Chamber judgment in the case, Moreira Ferreira v. Portugal, dated 11 July 2017, paragraph 85.

In relation to ground 13, I would like to draw your Honours' attention to the fact that in paragraph 84, footnote 219 of its response, the Defence attributes a direct quote that does not exist in my written submissions and from which I distance myself. This is a serious misrepresentation of my submissions.

As to the argument raised - namely, that I contradict my own argument with reference to the Defence response in paragraph 84 - this is also not the case. And the Defence construes a contradiction that does not exist. I submitted that while it's not a requirement for the Trial Chamber to take into account subsequent events, it may draw inferences from relevant subsequent events. And I maintain my position in this regard.

And turning now to my final point in relation to ground 6, and, in particular, as regards the Prosecution contention that the Trial Chamber committed a technical error in interpreting the crime of ordering displacement in Article 8(2)(e)(viii), I reiterate my written submissions. It is submitted that, contrary to the Prosecution assertion, I did not rely only on one academic comment, but

also on the interpretation of the Pre-Trial Chamber II in the Yekatom and Ngaïssona case; in particular, in paragraph 59, which is neither commented upon by the Prosecution nor was it challenged in that case.

In the absence of any other case law or interpretation of Article 8(2)(e)(viii), this is the most authoritative interpretation of it as the law currently stands.

Besides, the Prosecution offers no authorities for its own interpretation. This even further underlines the need for the Appeals Chamber to authoritatively rule on the correct interpretation, rather than following the Prosecution's suggestion for the Appeals Chamber to not address the error allegedly made by the Trial Chamber.

This concludes my observations.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [14:38:25] Thank you, Mr Suprun.

Mr Bourgon, you now have 10 minutes to respond to the victims' observations.

MR BOURGON: [14:38:34] My colleague will begin, Mr President.

PRESIDING JUDGE MORRISON: [14:38:37] Thank you.

MS GIBSON: [14:38:42] Thank you, Mr President, your Honours. And I'll begin by responding to the first submission made today by CLR1, about whether or not the Trial Chamber was correct to find that the rape and sexual slavery of children was a virtually certain consequence by way of the co-perpetrators' participation in the common plan.

And I wanted to emphasise that our error that we raised on appeal is a legal one and it concerns the level of the Trial Chamber's reasoning. And you'll see in the CLR's submissions, that when we have asserted on appeal that the error of the Trial Chamber was to base a finding of virtually certain consequence on

just one phrase alone in the judgment, the circumstances prevailing in Ituri at the time, the CLR - in her written submissions - has gone back through the judgment and pieced together a number of findings and paragraphs that she says the Trial Chamber was actually relying on when it found that the rape and sexual slavery of children was a virtually certain consequence.

But it's not the role of any of the parties to an appeal to comb back through the Trial Chamber's findings and say, This is what we think the Trial Chamber was relying on. A properly reasoned judgment consists of factual findings and then a series of legal conclusions. And there needs -- the link between the two of these is the reasoning.

In relation to this finding about the virtually certain consequence, the reasoning is absent and the parties have insisted that the Trial Chamber didn't commit an error because it just used shorthand by which it meant to refer to all its other reasoning.

But the problem with this argument is that in using shorthand, the Trial Chamber deprives the Appeals Chamber from the ability to be able to meaningfully review whether or not the findings are sufficient to meet the legal standard, and this is impossible to reconcile with the requirements of Article 74(5) of the Statute, under which the Trial Chamber must give a fully reasoned judgment.

And we invite the Trial Chamber, specifically, in relation to this argument of the CLR, to compare the approach of the Trial Chamber in this judgment to the approach of Trial Chamber I in the Lubanga case and the 74 paragraphs of reasoning that were provided when that Trial Chamber was asked to consider a similar question at trial.

Very briefly, I'd like to also respond to one of the arguments of the second Common Legal Representatives in his brief about the subsequent concerted action of the co-perpetrators. Because he made an argument in his filing, whereby he said that the Trial Chamber was able to look at other factors outside of the subsequent concerted actions of the co-perpetrators when looking to see whether or not it could infer a common plan in the absence of direct evidence.

And he says you can look at an overall picture of the systemic nature of the crimes, of the way in which the crimes were committed and the context and the events, and it's not a requirement per se of the Trial Chamber to look at this subsequent concerted action of the co-perpetrators.

It appears to us that this argument is being hung by the CLR on the word "can" as not being obligatory language. And it's important to look at the test as framed in the jurisprudence set out in Lubanga and then reiterated in all of the jurisprudence we cited at footnote 759 of our brief. The legal test is -- formulated is that the agreement need not be explicit; so the common plan need not be explicit and its existence can be inferred from the subsequent concerted actions of the co-perpetrators themselves.

The word "can" is being used in this jurisprudence because it's being offered as an alternative to direct evidence. So either a Trial Chamber can rely on direct evidence, or a Trial Chamber can rely on the subsequent concerted actions of the co-perpetrators. There's no third option being or a Trial Chamber can rely on the sort things that the CLR was pointing to, to the crimes or to the context or to the events.

And we see this from the cases in which this standard has been properly

applied -- in Ruto, in Lubanga, in Bemba et al. These Trial Chambers realised that there's no direct evidence in this case and so we need to direct ourselves -- we can direct ourselves to look at the subsequent concerted actions of the co-perpetrators themselves.

And we reiterate that, in our view, the Trial Chamber was wrong not to follow this standard and that's because in this case, the Trial Chamber is assessing whether or not an accused can be liable for potentially hundreds of crimes, where, he wasn't the direct co-perpetrator, on the basis of a plan of which there's no direct evidence. So, in these circumstances, it's a very specific alternative that the Trial Chamber's allowed to look to.

And with your leave, I'll pass back to Mr Bourgon in the courtroom.

PRESIDING JUDGE MORRISON: [14:44:20] Thank you.

Mr Bourgon, you have about two minutes.

MR BOURGON: [14:44:23] Thank you, Mr President. I'll be brief. I will address a comment by CLR1 regarding -- at page 79, lines 14 to 19 -- where CLR1 says that the Trial Chamber found that Mr Ntaganda engaged himself in sexual violence with child soldiers.

Mr President, what is important about this comment is one thing. There is one witness, uncorroborated, which led to this Trial Chamber finding and that witness is Witness P-10. On the basis of P-10's testimony, challenged by Mr Ntaganda himself in his testimony, challenged by the testimony of D-251, challenged by the testimony of D-17, and a witness that was -- already was found to have lied about her age, a witness who was found to have lied -- to have adduced incriminating evidence about being abducted.

Now on the basis of that one witness, that's -- this finding was made on the

basis of. And that's very very important. Because I give you the example to understand the Trial Chamber's mindset. A lady came here, D-251, and the Prosecution says, D-251, you were raped by Bosco Ntaganda. She says, No, I wasn't. And the Trial Chamber says, Well, lady, you were. I mean, that's completely incorrect. That's the mindset of the Trial Chamber.

When a lady comes and testifies in public here and she says, No, I did not have sexual intercourse with Mr Ntaganda. No, he did not rape me. No, he did not rape the others. He respected all of us.

No good. That's a Defence witness. We will follow instead, P-10. And all of this is important because then this is used as evidence to draw the mens rea of Mr Ntaganda.

Now that lady who came here, 251, that lady who came here, she and someone very close to her also testified. And that was witness D-17, and D-17 also corroborated the testimony out of personal knowledge. Again, that was set aside.

So we have to be very very careful when we say that Mr Ntaganda himself committed rape because the evidence on mens rea constitutes a clear abuse of the Trial Chamber's discretion.

One last comment regarding CLR2, talking about the logbook and saying that the Trial Chamber does not have -- has no obligation to rule on every single entry thereof because it's only one piece of evidence. Of course, the Trial Chamber's got no obligation to rule on every single entry, but it does have an obligation to consider every relevant entry, and if the entry has something to do with it, then to say something about it.

Of course, there is a presumption that the Trial Chamber has to look at all the

evidence. We all know this. But when an entry is highly relevant and a determining issue in the case, then the Trial Chamber must look at the entry and say why it will take it or not take it, rely on it or not rely on it. And the Trial Chamber in this case did not in many many many cases.

Thank you, Mr President.

PRESIDING JUDGE MORRISON: [14:48:02] Thank you, Mr Bourgon.

And lastly, on this part of the case, I turn to the Office of the Prosecutor.

You have the floor for 10 minutes in response to the victims' submissions.

MS BRADY: [14:48:19] Your Honours, we are generally in agreement with what the victims have said in their submissions today and in the briefs, so there's no need for us to respond. I will, however, just make one quick reply to what has just been put by Mr Bourgon in regarding the finding that Mr Ntaganda personally raped many female members of his own bodyguard. I point your Honours to footnote 1158, and, in particular, yes, P-10 was the person who gave that evidence specifically. But the Chamber found Mr Ntaganda not credible generally on this topic in light -- in that he denied that rape was even happening at all in his -- amongst his soldiers, amongst his escorts.

Mr Ntaganda categorically stated that rape was not accepted within the army; that he gave instructions at assemblies forbidding the sleeping with the female recruits. And the Chamber found that that was not credible in light of much credible evidence to the contrary, which it has exhaustively dealt with in all the preceding paragraphs of that section.

So that went into the Chamber's assessment of Mr Ntaganda's credibility and reliability on that point, and that's an important point to -- that I wanted to

raise.

Apart from that, your Honours, we have no further submissions.

Thank you.

PRESIDING JUDGE MORRISON: [14:50:02] Thank you very much.

That actually brings the proceedings for today to a close. I'm just going to remind all parties not least my colleagues that tomorrow, there is going to be extensive opportunities for judges to ask questions of the parties and - while I can't tell you in advance what those questions might be - for any party to be aware that they may be questioned about anything relevant to do with these proceedings.

So thank you very much.

We will rise now and reconvene tomorrow at 10 a.m.

THE COURT USHER: [14:50:39] All rise.

(The hearing ends in open session at 2.50 p.m.)