

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-01/04-02/12**

Date: **18 December 2012**

TRIAL CHAMBER II

Before:

**Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. MATHIEU NGUDJOLO***

Public document

Judgment pursuant to article 74 of the Statute

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Victims and Witnesses Unit

Ms Maria-Luisa Martinod-Jacome

Detention Section

Mr Patrick Craig

**Victims Participation and Reparations
Section Other**

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CONCURRING OPINION OF JUDGE VAN DEN WYNGAERT

ANNEXES

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”) hereby issues its Judgment pursuant to article 74 of the Rome Statute (“the Statute”) in the case of *The Prosecutor v. Mathieu Ngudjolo Chui*.

I. OVERVIEW

1. The crimes of which Mathieu Ngudjolo stands accused were allegedly committed on 24 February 2003 during the attack on Bogoro, a village in Ituri, Democratic Republic of the Congo (“DRC”).¹

A. LOCATION OF BOGORO

2. The DRC is divided into administrative units designated as “provinces”, “districts”, “territories”, “collectivités”, “groupements” and “localities”.² Bogoro village is located at the intersection of Bagaya and Dodoy localities, and is the capital of Babiase *groupement*, which falls under the Bahema Sud *collectivité*.³ Bahema Sud is situated in Irumu territory, one of the subdivisions of Ituri district, which is in the east of Orientale province.⁴

¹ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/07-716-Conf (public version: ICC-01/04-01/07-717), paras. 573-582 (“Decision on the Confirmation of Charges”).

² P-233, T. 87, pp. 56-57. In this Judgment, witnesses heard by the Chamber are referred to by their witness number, with the prefix “P” for witnesses called by the Prosecution, “D02” for witnesses called by the Defence for Germain Katanga, “D03” for witnesses called by the Defence for Mathieu Ngudjolo, “V” for witnesses called by the common legal representative of the main group of victims, and “CHM” for witnesses called by the Chamber. Transcript references are to the French version and are referenced as: “T. [transcript number]”.

³ P-233, T. 83, pp. 6 and 19; T. 87, p. 55.

⁴ EVD-OTP-00285: MONUC report on the events in Ituri, para. 13; EVD-D02-00219: Administrative map of the Democratic Republic of the Congo. Documentary evidence is also presented following the format set out above: “EVD-[OTP; D02; D03; V; CHM]-[evidence number]”, where “OTP” refers to evidence tendered by the Office of the Prosecutor.

3. Geographically, Bogoro lies to the south of Walendu-Tatsi *collectivité*,⁵ to the north of Walendu-Bindi *collectivité*,⁶ and mid-way between Bunia, the capital of Ituri, and Lake Albert, which forms the border between the DRC and Uganda.⁷

4. Its position in the midst of Bahema Sud *collectivité* means that Bogoro is at the junction of a road between two Lendu communities and a road linking the DRC with Uganda.

B. THE ACCUSED

5. Mathieu Ngudjolo was born on 8 October 1970 in Bunia. His roots are in Likoni locality in Bedu-Ezekere *groupement*, Walendu-Tatsi *collectivité*, Djugu territory, the DRC. He is of Lendu-Tatsi ethnicity and is a member of the Njotsi clan.⁸

6. In October 2006, he was promoted to the rank of colonel in the armed forces of the Democratic Republic of the Congo ("FARDC"). Prior to his transfer to the Court, he was in Kinshasa, where he was undergoing military training as part of the integration process set up by President Kabila's national government. Mathieu Ngudjolo was still a member of the FARDC at the time of his arrest on 6 February 2008.⁹

C. THE CHARGES

7. On 26 September 2008, Pre-Trial Chamber I issued the *Decision on the confirmation of charges* wherein it found unanimously that there was sufficient evidence to establish substantial grounds to believe that, during the attack on Bogoro of 24 February 2003, Germain Katanga and Mathieu Ngudjolo jointly committed through other persons, within the meaning of article 25(3)(a) of the Statute, the following crimes with intent:

⁵ EVD-OTP-00273: Sketch of Bedu-Ezekere by D03-88; D03-88, T. 299, pp. 30-31.

⁶ EVD-D02-00217: Map on which Germain Katanga outlined Walendu-Bindi *collectivité*.

⁷ EVD-D02-00119: Map; EVD-OTP-00250: Map.

⁸ *Decision on the Confirmation of Charges*, para. 8; D03-307, T. 327, pp. 6 and 12.

⁹ *Decision on the Confirmation of Charges*, para. 10.

- the war crime of wilful killing under article 8(2)(a)(i) of the Statute;¹⁰
- the crime against humanity of murder under article 7(1)(a) of the Statute;¹¹
- the war crime of directing an attack against a civilian population as such or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i) of the Statute;¹² and
- the war crime of destruction of property under article 8(2)(b)(xiii) of the Statute.¹³

8. Mathieu Ngudjolo also stands accused of having committed jointly with Germain Katanga through other persons, within the meaning of article 25(3)(a) of the Statute, the war crime of pillaging under article 8(2)(b)(xvi) of the Statute, with the knowledge that the crime would occur in the ordinary course of events.¹⁴

9. Furthermore, Mathieu Ngudjolo stands accused of having committed jointly with Germain Katanga, within the meaning of article 25(3)(a) of the Statute, the war crime of using children under the age of fifteen years to participate actively in hostilities, as set out in article 8(2)(b)(xxvi) of the Statute.¹⁵

10. However, only a majority of the Pre-Trial Chamber – with Judge Anita Ušacka dissenting – found that there was sufficient evidence to establish substantial grounds to believe that during the attack on Bogoro on 24 February 2003, Mathieu Ngudjolo jointly committed with Germain Katanga through other persons, within the meaning of article 25(3)(a) of the Statute, the following crimes, with the knowledge that they would occur in the ordinary course of events:

¹⁰ *Decision on the Confirmation of Charges*, para. 575.

¹¹ *Decision on the Confirmation of Charges*, para. 579.

¹² *Decision on the Confirmation of Charges*, para. 575.

¹³ *Decision on the Confirmation of Charges*, para. 575.

¹⁴ *Decision on the Confirmation of Charges*, para. 575.

¹⁵ *Decision on the Confirmation of Charges*, para. 574.

- the war crime of sexual slavery under article 8(2)(b)(xxii) of the Statute;¹⁶
- the crime against humanity of sexual slavery under article 7(1)(g) of the Statute;¹⁷
- the war crime of rape under article 8(2)(b)(xxii) of the Statute;¹⁸ and
- the crime against humanity of rape under article 7(1)(g) of the Statute.¹⁹

11. On the basis of the charges as set out in paragraphs 7 to 10 above and pursuant to article 64(8)(a) of the Statute, the Accused was invited on 24 November 2009 along with his co-accused to enter a plea of guilty or not guilty. Mathieu Ngudjolo pleaded not guilty.²⁰

12. The Chamber notes in relation to the temporal scope of the case that it is understood that the charges include only crimes which were committed on 24 February 2003 or whose commission commenced on that date.

13. Pursuant to article 74(2) of the Statute, the Chamber's decision "shall not exceed the facts and circumstances described in the charges and any amendments to the charges". Hence the charges as confirmed by the Pre-Trial Chamber establish the factual scope of the Judgment pursuant to article 74(2), as the Chamber explained in a decision issued on 21 October 2009²¹ by which it instructed the Office of the Prosecutor ("the Prosecution") to prepare a summary of the charges,²² and recalled

¹⁶ *Decision on the Confirmation of Charges*, para. 576.

¹⁷ *Decision on the Confirmation of Charges*, para. 580.

¹⁸ *Decision on the Confirmation of Charges*, para. 576.

¹⁹ *Decision on the Confirmation of Charges*, para. 580.

²⁰ T. 80, pp. 11-21.

²¹ *Decision on the Filing of a Summary of the Charges by the Prosecutor*, 21 October 2009, ICC-01/04-01/07-1547 with annex ("Decision on the Filing of a Summary of the Charges").

²² Office of the Prosecutor, "Document Summarising the Charges", 3 November 2009, ICC-01/04-01/07-1588 ("Document Summarising the Charges").

in the decision of 21 November 2012 on the implementation of regulation 55 of the Regulations of the Court.²³

14. It follows that Mathieu Ngudjolo cannot be found guilty on the basis of facts and circumstances not contained in the *Decision on the confirmation of charges*.

²³ *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA.

II. BRIEF HISTORY OF THE CASE

A. JURISDICTION

15. Pursuant to article 19(1) of the Statute, “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it”. The DRC became a State Party to the Statute on 11 April 2002. In March 2004, the DRC Government referred the situation in the DRC, *viz.*, all of the events within the Court’s jurisdiction committed on the territory of the DRC since the entry into force of the Rome Statute on 1 July 2002 – to the Office of the Prosecutor pursuant to article 14 of the Statute.²⁴

16. Pre-Trial Chamber I satisfied itself that the Court had jurisdiction to prosecute Mathieu Ngudjolo.²⁵ The personal, temporal, territorial and material criteria for the Court’s jurisdiction have remained unchanged since the issuance of that decision.²⁶

B. PROCEDURAL BACKGROUND

17. On 6 July 2007, Pre-Trial Chamber I issued a warrant for the arrest of Mathieu Ngudjolo.²⁷ He was arrested and surrendered to the Court by the Congolese authorities, and subsequently transferred to The Hague on 6 February 2008. He made his first appearance on 11 February 2008.²⁸

²⁴ *Situation in the Democratic Republic of the Congo*, Presidency, *Decision assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I*, 5 July 2004, ICC-01/04-1, p. 3 (notified on 6 July 2004).

²⁵ *The Prosecutor v. Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, *Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui*, 6 July 2007, ICC-01/04-02/07-3-US, para. 21 (ICC-01/04-01/07-262).

²⁶ See para. 12 of this Judgment.

²⁷ *The Prosecutor v. Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, *Warrant of arrest for Mathieu Ngudjolo Chui*, 6 July 2007, ICC-01/04-02/07-1-US-tENG (ICC-01/04-01/07-260-tENG with annex).

²⁸ *The Prosecutor v. Mathieu Ngudjolo Chui*, T. 3 (subsequently reclassified as T. 33).

18. On 10 March 2008, Pre-Trial Chamber I joined the previously several cases against Mathieu Ngudjolo and Germain Katanga.²⁹ The decision was upheld by the Appeals Chamber.³⁰

19. The Chamber was constituted on 24 October 2008³¹ and held its first status conference on 27 and 28 November 2008.³² It subsequently held a further 24 status conferences³³ and issued 201 written and oral orders and decisions prior to the commencement of the trial on 24 November 2009.³⁴ On 20 November 2009, the Presiding Judge promulgated directions for the conduct of the proceedings and the various trial stages as well as for the presentation of evidence.³⁵

20. Since its constitution, the Chamber has issued 387 written decisions and orders and 168 oral decisions.³⁶

21. In accordance with rule 118(2) of the Rules of Procedure and Evidence (“the Rules”), prior to the commencement of the trial the Chamber regularly reviewed the decisions on Mathieu Ngudjolo’s continued detention.³⁷

22. The presentation of evidence commenced on 25 November 2009 and concluded on 11 November 2011.³⁸ On 18 and 19 January 2012, the Chamber conducted a judicial site visit to the DRC, accompanied by the parties and

²⁹ *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, *Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI*, 10 March 2008, ICC-01/04-01/07-257.

³⁰ Appeals Chamber, *Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases*, 9 June 2008, ICC-01/04-01/07-573.

³¹ See Annex A, which provides a list of the decisions and orders.

³² T. 52 and T. 53.

³³ T. 54 (28 January 2009) to T. 79 (23 November 2009).

³⁴ *Decision postponing the date of commencement of the trial (Rule 132(1) of the Rules of Procedure and Evidence)*, 31 August 2009, ICC-01/04-01/07-1442-tENG.

³⁵ *Directions for the conduct of the proceedings and testimony in accordance with rule 140*, 20 November 2009, ICC-01/04-01/07-1665-Corr (“Decision on Rule 140”).

³⁶ These figures do not include translations or orders for the redaction of transcripts.

³⁷ See Annex A.

³⁸ See also *Decision on three applications seeking the production of additional evidence and on an agreement as to evidence*, 15 December 2011, ICC-01/04-01/07-3217-Conf-tENG (ICC-01/04-01/07-3217-Red).

participants and representatives of the Registry of the Court.³⁹ The submission of evidence was officially declared closed on 7 February 2012.⁴⁰

23. The Chamber heard 54 witnesses during the trial and sat for 265 days.⁴¹ The Chamber itself called two witnesses,⁴² the Prosecution called 24,⁴³ and two victims were called to appear at the request of the Legal Representative of the main group of victims.⁴⁴ The Defence for Germain Katanga called 17 witnesses⁴⁵ and the Defence for Mathieu Ngudjolo called 11.⁴⁶ Three of the Defence witnesses were common to both teams.⁴⁷ Once all the testimonies were concluded, both Accused in turn took the stand,⁴⁸ answering, as did all witnesses, questions put to them by the Chamber.

24. The Prosecution tendered 261 items of evidence into the record of the case; the Defence for Germain Katanga, 240; and the Defence for Mathieu Ngudjolo, 132. The Chamber itself admitted five items of evidence and authorised the Legal

³⁹ *Decision on a judicial site visit to the Democratic Republic of the Congo*, 18 November 2011, ICC-01/04-01/07-3203-Conf-tENG with confidential annex (ICC-01/04-01/07-3203-tENG with annex) (“Decision on the Chamber’s Site Visit”). See Section VI.

⁴⁰ *Declaration of closure of submission of evidence*, 7 February 2012, ICC-01/04-01/07-3235-tENG.

⁴¹ This figure includes status conferences held in the course of the trial, and the hearings for the oral closing submissions.

⁴² The head of the investigations team in the Investigations Division of the Office of the Prosecutor, and Ms Constance Kutsch Lojenga, an expert in the Ngiti language.

⁴³ Six of these witnesses were women. The witnesses called by the Prosecution testified between 26 November 2009 and 8 December 2010. Nineteen of these witnesses received in-court protective measures pursuant to rules 87 and 88 of the Rules. Witness P-323 was recalled, and testified by video conference on that occasion. Following an application filed by the Prosecution, the Chamber stated that it would not attach any probative value to the testimony of Witness P-159: *Decision on the Prosecution’s renunciation of the testimony of Witness P-159*, 24 February 2011, ICC-01/04-01/07-2731.

⁴⁴ Both these victims gave evidence in hearings held between 21 and 25 February 2011. During their testimony, both women received in-court protective measures pursuant to rules 87 and 88 of the Rules.

⁴⁵ The witnesses for the Defence for Germain Katanga testified between 24 March 2011 and 12 July 2011. Two of these witnesses were women, and three of the witnesses received in-court protective measures during their testimony, pursuant to rule 87 of the Rules.

⁴⁶ The witnesses for the Defence for Mathieu Ngudjolo testified before the Chamber between 15 August and 16 September 2011. One of these witnesses was a woman; she received protective measures during her testimony, pursuant to rule 88 of the Rules.

⁴⁷ Witnesses D02-236/D03-011, D02-147/D03-236 and D02-146/D03-340. These witnesses will be referred to in this Judgment by the pseudonyms D03-011, D03-236 and D03-340.

⁴⁸ Germain Katanga testified on 27 and 28 September 2011 and 4-6, 10-12 and 18-19 November 2011. Mathieu Ngudjolo testified on 27, 28 and 31 October and 8-11 November 2011 (T. 327 to T. 333).

Representatives of Victims to tender a further five items,⁴⁹ bringing the total to 643 exhibits.⁵⁰

25. After filing their Closing Submissions,⁵¹ the parties and participants made their closing oral statements at hearings held between 15 and 23 May 2012.⁵² Finally, Mathieu Ngudjolo made an oral statement pursuant to article 67(1)(h) of the Statute.⁵³

26. On 21 November 2012, following the issuance of the Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons,⁵⁴ the case of Mathieu Ngudjolo was severed from that of his co-Accused, Germain Katanga.

⁴⁹ Four exhibits were tendered by the common legal representative of the main group of victims, and one item by the legal representative of the child-soldier victims.

⁵⁰ The exhibits were admitted either via witnesses, in-court oral decisions of the Chamber, the Decision on Applications (see footnote 38) or the *Decision on the Bar Table Motion of the Defence of Germain Katanga*, 21 October 2011, ICC-01/04-01/07-3184.

⁵¹ Office of the Prosecutor, "*Mémoire final*", 24 February 2012, ICC-01/04-01/07-3251-Conf-Corr with confidential annexes A and C and annex B (ICC-01/04-01/07-3251-Corr-Red with annexes) ("Prosecution Closing Brief"); common legal representative of the main group of victims, "*Conclusions finales*", 24 February 2012, ICC-01/04-01/07-3253-Conf-Corr2 (ICC-01/04-01/07-3253-Corr2-Red) ("Closing Brief of the common legal representative of the main group of victims"); legal representative of the child-soldier victims, "*Conclusions finales du Représentant légal des victimes enfants soldats*", 2 February 2012, ICC-01/04-01/07-3250-Conf-Corr (ICC-01/04-01/07-3250-Corr-Red) ("Closing Brief of the legal representative of the child-soldier victims"); Defence for Germain Katanga, "*Defence Closing Brief*", 24 February 2012, ICC-01/04-01/07-3266-Conf-Corr2 with annex (ICC-01/04-01/07-3266-Corr2-Red) ("Closing Brief of the Defence for Germain Katanga"); Defence for Mathieu Ngudjolo, "*Conclusions finales de Mathieu Ngudjolo*", 30 March 2012, ICC-01/04-01/07-3265-Conf-Corr2 with confidential annexes (ICC-01/04-01/07-3265-Corr2-Red with annexes) ("Closing Brief of the Defence for Mathieu Ngudjolo"). See also, Office of the Prosecutor, "*Observations de l'Accusation à la suite du prononcé du jugement dans l'affaire Lubanga (ICC-01/04-01/06-2842)*", 22 March 2012, ICC-01/04-01/07-3264-Conf (ICC-01/04-01/07-3264-Red); legal representative of the child-soldier victims, "*Conclusions additionnelles du Représentant légal des victimes enfants soldats*", 22 March 2012, ICC-01/04-01/07-3262; common legal representative of the main group of victims, "*Observations additionnelles aux conclusions finales du représentant légal suite au jugement rendu dans l'affaire Lubanga*", 22 March 2012, ICC-01/04-01/07-3263.

⁵² More precisely, the Prosecutor made his oral submissions on 15, 16 and 23 May 2012 (T. 336, T. 337 and T. 340), the Legal Representatives of Victims on 16 May (T. 337), the Defence for Germain Katanga on 21 and 23 May (T. 338 and T. 340), and the Defence for Mathieu Ngudjolo on 22 and 23 May 2012 (T. 339 and T. 340).

⁵³ T. 340, pp. 59-67.

⁵⁴ *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA.

C. PARTICIPATION OF VICTIMS

27. Article 68(3) of the Statute provides that victims may participate in proceedings before the Court. The victims in the present case were afforded this opportunity. Consequently, they participated in the trial via their Legal Representatives, who were able to examine witnesses, tender evidence into the record, file submissions throughout the proceedings, make opening statements and file written submissions, and, lastly, present their closing oral statements.⁵⁵

28. On 26 February 2009, the Chamber laid down the procedure for the treatment of applications filed by individuals seeking to participate in the proceedings as victims. It set 20 April 2009 as the time limit for any new applications for participation to be filed with the Registry.⁵⁶

29. In the decision on the 345 applications for victims' participation, the Chamber ruled on the applications for participation, the status of applications submitted by deceased victims, and the possible influence of intermediaries of the Office of the Prosecutor.⁵⁷

30. Pursuant to the Chamber's order of 22 July 2009 concerning the common legal representation of victims,⁵⁸ the Registry appointed two Legal Representatives, one for the main group of victims, and the other for the group of child-soldier victims.⁵⁹

31. The Decision on Rule 140⁶⁰ set out a number of rules governing the victims' participation in the trial. In a subsequent decision issued on 22 January 2010 and

⁵⁵ See, *inter alia*, footnotes 49 and 51.

⁵⁶ *Decision on the treatment of applications for participation*, 26 February 2009, ICC-01/04-01/07-933-tENG, p. 24.

⁵⁷ *Corrigendum of Operative part of the Decision on the 345 applications for participation as victims in the proceedings*, 5 August 2009, ICC-01/04-01/07-1347-Corr-tENG, *Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims*, 23 September 2009, ICC-01/04-01/07-1491-Conf-tENG, with confidential, *ex parte* annex (ICC-01/04-01/07-1491-Red with confidential, redacted annex).

⁵⁸ *Order on the organisation of common legal representation of victims*, 22 July 2009, ICC-01/04-01/07-1328.

⁵⁹ Registry, "*Désignation définitive de Me Fidel Nsita Luwengika comme représentant légal commun du groupe principal de victimes et affectation des victimes aux différentes équipes*", 22 September 2009, ICC-01/04-01/07-1488.

upheld on appeal,⁶¹ the Chamber responded to various issues raised by the parties and participants, further setting out the precise modalities of victims' participation in respect of points which had not been addressed in the Decision on Rule 140.⁶²

32. Ultimately, 366 persons were authorised to participate in the trial as victims, 11 of them as child soldiers;⁶³ however, victim status was subsequently withdrawn from two of them.⁶⁴ Furthermore, the Chamber authorised four victims to appear as witnesses,⁶⁵ but following an application by the common legal representative of the main group of victims, only two victims ultimately appeared.⁶⁶

⁶⁰ See footnote 35.

⁶¹ Appeals Chamber, *Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial"*, 16 July 2012, ICC-01/04-01/07-2288.

⁶² *Decision on the Modalities of Victim Participation at Trial*, 22 January 2010, ICC-01/04-01/07-1788-tENG.

⁶³ See Annex A.

⁶⁴ *Décision relative au maintien du statut de victime participant à la procédure des victimes a/0381/09 et a/0363/09 et à la demande de Me Nsita Luvengika en vue d'être autorisé à mettre fin à son mandat de Représentant légal desdites victimes*, 7 July 2011, ICC-01/04-01/07-3064.

⁶⁵ *Decision authorising the appearance of Victims a/0381/09, a/0018/09, a/0191/08, and pan/0363/09 acting on behalf of a/0363/09*, 9 November 2010, ICC-01/04-01/07-2517-tENG.

⁶⁶ *Decision on the notification of the removal of Victim a/0381/09 from the Legal Representative's list of witnesses*, 31 January 2011, ICC-01/04-01/07-2674-tENG; *Décision relative à la notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal*, 11 February 2011, ICC-01/04-01/07-2699-Conf (ICC-01/04-01/07-2699).

III. THE CHAMBER'S CRITERIA FOR ITS EVALUATION OF THE EVIDENCE

33. The Chamber will, for the most part, adopt the approach applied in this respect in the judgment issued by Trial Chamber I in *Lubanga*.⁶⁷

A. BURDEN OF PROOF

34. Under article 66 of the Statute, the accused is presumed to be innocent until the Prosecutor has proven his guilt.⁶⁸ For a conviction, each element of the particular offence charged must be established "beyond reasonable doubt".⁶⁹

35. The Chamber emphasises that the standard of proof "beyond reasonable doubt" must be applied to establish the facts forming the elements of the crime or the mode of liability alleged against the accused, as well as with respect to the facts which are indispensable for entering a conviction.

36. It is the Chamber's position that the fact that an allegation is not, in its view, proven beyond reasonable doubt does not necessarily mean that the Chamber questions the very existence of the alleged fact. It simply means that it considers that there is insufficient reliable evidence to make a finding on the veracity of the alleged fact in light of the standard of proof. Accordingly, finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent. Such a finding merely demonstrates that the evidence presented in support of the accused's guilt has not satisfied the Chamber "beyond reasonable doubt".

⁶⁷ *The Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute*, 14 March 2012, ICC-01/04-01/06-2842 with annexes ("*Lubanga Judgment*").

⁶⁸ Article 66(1) and 66(2) of the Statute.

⁶⁹ Article 66(3) of the Statute; *Lubanga Judgment*, para. 92.

B. FACTS REQUIRING NO EVIDENCE

1. Facts of common knowledge

37. Under article 69(6) of the Statute, the Chamber may take judicial notice of facts of common knowledge. However, the Chamber has been unable to do so in the specific context of the present case.

2. Agreements as to evidence

38. In accordance with rule 69 of the Rules, the parties may agree that an alleged fact which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested. In such circumstances, the Chamber may consider such alleged fact as being proven.

39. The parties in the case at bar were able to agree only on a limited number of facts.⁷⁰ The Chamber has considered them to be proven for the purposes of this Judgment.

C. THE EVIDENCE

40. Oral, written and audio-visual evidence was introduced during the trial. Witnesses who provided *viva voce* evidence did so in person or, in some exceptional cases, via video link. Excerpts from the written statements of certain witnesses were admitted into evidence pursuant to rule 68 of the Rules.⁷¹ Documents and other material such as transcripts of interviews, videos, documents from a variety of organisations, letters, photographs and maps were either introduced during the *viva*

⁷⁰ *Decision on Agreements as to Evidence*, 3 February 2011, ICC-01/04-01/07-2681; oral decision, 5 April 2011, T. 243; “Defence Notice of an Admission”, 15 November 2011, ICC-01/04-01/07-3202-Conf.

⁷¹ See, *inter alia*, *Decision on Prosecutor’s request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219*, 3 September 2010, ICC-01/04-01/07-2362; *Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts*, 16 July 2010, ICC-01/04-01/07-2289-Conf-Corr (ICC-01/04-01/07-2289-Corr-Red); *Decision on Request to admit prior recorded testimony of P-30 as well as related video excerpts*, 30 June 2010, ICC-01/04-01/07-2233-Corr.

voce evidence of witnesses or directly by counsel (in the latter case, following a written application).⁷²

41. The Appeals Chamber has held that article 69(4) of the Statute requires the trial chamber to rule on the admissibility of each item of submitted evidence “at some point in the proceedings”.⁷³ In any event, an item will be admitted into evidence only if the Chamber rules that it is relevant and/or admissible within the meaning of article 69, taking into account its probative value and whether it may adversely affect the fairness of the trial or a fair evaluation of the testimony of the witness in question.⁷⁴

42. In order to rule on the admissibility of an item of evidence, the Chamber has employed a three-tiered approach. Firstly, it has examined the relevance of the item; then it has assessed its probative value; and lastly it has weighed the probative value against any prejudice which might result from its admission into evidence.⁷⁵

1. Evidence assessment method

43. This Judgment is based on “the entire proceedings” and on the Chamber’s “evaluation of the evidence” pursuant to article 74(2) of the Statute.⁷⁶

44. This statutory provision requires the Chamber to base its decision “only on evidence submitted and discussed before it at the trial”. In the Chamber’s view, the phrase “discussed before it at the trial” encompasses not only the oral testimony, together with any documents and other items such as video recordings which were “discussed” during the hearings, but also any items of evidence that were “discussed” in the written submissions of the parties and the participants at any

⁷² See, *inter alia*, Decision on the Admission of Evidence.

⁷³ *The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence”, 3 May 2011, ICC-01/05-01/08-1386, para. 37.*

⁷⁴ ICC-01/05-01/08-1386, para. 37; see also article 69(4) of the Statute, and *Lubanga* Judgment, para. 100.

⁷⁵ Decision on the Admission of Evidence; see in particular para. 16.

⁷⁶ *Lubanga* Judgment, para. 94.

stage of the trial (such as documents submitted by counsel pursuant to a prior written application). The principal consideration is that the evidence upon which the Chamber bases its article 74 Decision should have been introduced during the trial and have become part of the trial record, through the assignment of an evidence (EVD) number⁷⁷ and that the parties should have had an opportunity to make submissions as to each item of evidence.

45. The Chamber began by assessing the credibility of all relevant evidence presented. The various witness statements and the exhibits were analysed in light of all the other relevant evidence in the record of the case.

46. On the basis of this analysis, the Chamber decided whether the evidence on which the Prosecution relied should be accepted as establishing the alleged facts, notwithstanding the exculpatory evidence submitted.

47. In determining whether an allegation by the Prosecution had been proven, the Chamber did not restrict its assessment to the evidence to which the parties and participants referred explicitly in their closing statements. It considered on a case-by-case basis whether it could rely on evidence in the record which was not referred to explicitly in order to establish a factual allegation, taking into account the requirements of articles 64(2) and 74(2) of the Statute. In particular, it satisfied itself that the Defence had been afforded the opportunity to make submissions as to the evidence in question.

2. Assessment of oral testimony

48. In evaluating the oral testimony of a witness, the Chamber considered a number of factors, which are set out below.

49. It made appropriate allowance for any instances of imprecision, implausibility or inconsistency, bearing in mind the overall context of the case and the specific

⁷⁷ *Lubanga* Judgment, para. 98.

circumstances of the individual witnesses. It was also mindful that the charges relate to events which took place some time ago, in 2002 and 2003. The passage of time explains why memories may sometimes have faded and witnesses – some of whom were still children at the time or were traumatised – might have had difficulty in providing a coherent, complete and logical account. There are other potential reasons for flaws in some witnesses' evidence. Hence, the Chamber took these considerations into account in its overall assessment of the testimonies in question.⁷⁸

50. In certain instances, the Chamber did not rely on part of a witness's account whilst accepting other aspects of his or her evidence, thereby acknowledging that it is possible for a witness to be accurate on some issues and unreliable on others. Nonetheless, when the Chamber rejected part of a witness's testimony, it invariably considered the impact of that rejection on the reliability of the remainder of the testimony.⁷⁹

51. The Chamber considered the individual circumstances of each witness, including his or her relationship to the Accused, age, vulnerability, any involvement in the events under consideration, the risk of self-incrimination, possible bias towards or against the Accused and motives for telling the truth or providing false testimony.⁸⁰

52. The Chamber assessed each witness's ability to testify and the reliability of their testimony. In light of all of the evidence registered in the record and of the individual circumstances of the witnesses, it verified whether it could establish that the witnesses were indeed physically present at the *locus in quo* where they claimed in their testimony to be during the material time.

53. With specific reference to the witnesses' reliability, the Chamber determined the probative value to be attached to the information provided. To this end, it took

⁷⁸ *Lubanga* Judgment, para. 103.

⁷⁹ *Lubanga* Judgment, para. 104.

⁸⁰ *Lubanga* Judgment, para. 106.

the entirety of their testimony into consideration, having regard in particular to the capacity and quality of their recollection. It also considered whether there were indicia suggesting that witnesses may have been pressurised or influenced, or whether there was a risk that they were colluding with other witnesses. To this end, the Chamber took into account, in particular, the consistency and precision of the accounts; whether the information provided was plausible; whether the evidence conflicted with prior statements, insofar as the relevant portion of the prior statement is in evidence;⁸¹ any possible contradictions with the evidence of other witnesses; and, finally, the witnesses' conduct during their testimony, including their readiness, willingness and manner of responding to the questions put to them by the parties, participants and the Chamber itself.

3. Assessment of evidence other than direct oral evidence

54. The framework defined by the Rome Statute affords the Chamber a considerable degree of flexibility in weighing the evidence brought before it, as Trial Chamber I stated at the end of its analysis in its *Decision on the admissibility of four documents*:⁸²

24. [...] the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited – at the outset – the ability of the Chamber to assess evidence “freely”. Instead, the Chamber is authorised by statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness. In ruling on admissibility the Chamber will frequently need to weigh the competing prejudicial and probative potential of the evidence in question. It is of particular note that Rule 63(5) mandates the Chamber not to “apply national laws governing evidence”. For these reasons, the Chamber has concluded that it enjoys a significant degree of discretion in considering all types of evidence. This is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence, which will not infrequently have come into existence, or have been compiled or retrieved, in difficult circumstances, such as during particularly egregious instances of armed conflict, when those involved will have

⁸¹ *Lubanga* Judgment, para. 102.

⁸² ICC-01/04-01/06-1399-Corr, 13 June 2008.

been killed or wounded, and the survivors or those affected may be untraceable or unwilling – for credible reasons – to give evidence.⁸³

55. With evidence other than direct oral testimony, the Chamber made allowance for the difficulties encountered where it proves impossible to examine the individual who originally supplied the information. The degree of relevance and potential prejudice would then depend on the nature and circumstances of the particular piece of evidence. The situations which the Chamber might face in this respect being infinitely variable (as indicated in the preceding quotation), the Chamber has approached this issue on a case-by-case basis.⁸⁴

56. The Chamber took a cautious approach in assessing evidence originating from anonymous hearsay. It did not rule out such evidence *ab initio*, instead assessing its probative value on the basis of the context and conditions in which such evidence was obtained, and with due consideration of the impossibility of cross-examining the information source.

4. Assessment of documentary evidence

57. For documentary evidence, the Chamber assessed the contents of the particular document, its provenance and any other relevant material. The Chamber considered the document's author if known, as well as his or her role in the relevant events and the chain of custody from the time of the document's creation until its submission to the Chamber. The indicia of reliability were broadly assessed, the Chamber bearing in mind that a document, although authentic, may be unreliable.⁸⁵

58. Regarding the relevance of documentary evidence, the Chamber recalls that it has held that:

[...] If a party has tendered an item of evidence as proof of a particular proposition, the Chamber will in principle admit it only for that purpose, even if the entire exhibit is admitted into evidence. Accordingly, if the same item of

⁸³ *Lubanga* Judgment, para. 107.

⁸⁴ *Lubanga* Judgment, para. 108.

⁸⁵ *Lubanga* Judgment, para. 109.

evidence could also prove another proposition than the one(s) for which it was tendered, the Chamber will not consider the evidence in relation to that additional proposition, unless the parties were given an opportunity to address this aspect of the evidence.⁸⁶

59. Accordingly, the Chamber wished to ensure full respect for the adversarial principle, as set out in the final sentence of article 74(2) of the Statute.

5. Expert witnesses

60. In assessing the testimony of expert witnesses, the Chamber considered factors such as the established competence of the particular witness in his or her field of expertise, the methodology used, the extent to which the expert's findings were consistent with other evidence in the case and the general reliability of the expert's evidence.⁸⁷ On this last point, the Chamber considered scientific evidence to be objective, even if the expert was appointed by only one party or by the Court in accordance with regulation 44 of the Regulations of the Court.

6. Interpretation and translation

61. Simultaneous interpretation was used throughout the trial because the evidence in this case was given in a number of different languages. Whilst this was generally of good quality, on several occasions concerns were expressed as to the accuracy of certain interpretations.

62. The Chamber was mindful that difficulties sometimes arose in regard to the interpretation or understanding of certain words, such as the names of people and places. It was also mindful that simultaneous interpretation cannot always reflect what was said absolutely perfectly and precisely. The Chamber also noted on various occasions difficulties in the transcription of statements made in court. Accordingly, it treated with circumspection those passages in the transcripts where witnesses stated that they reported "word for word" what was said by a third party.

⁸⁶ Decision on the Admission of Evidence, para. 17.

⁸⁷ *Lubanga* Judgment, para. 112.

Nevertheless, in the absence of any challenges to the accuracy of the interpretation and transcription in the Closing Submissions, the Chamber decided to rely on those transcripts, in their corrected form as appropriate.

7. Protective measures

63. The Chamber ordered measures to protect the identity of many of the witnesses in this case due to concerns for their personal safety or that of their families.⁸⁸ For the same reasons, witnesses are referred to in this Judgment by a number rather than by name and certain details that might reveal their identities have been omitted.⁸⁹ It is to be emphasised that whenever the Chamber ordered protective measures for witnesses, the parties and participants were always aware of the relevant particulars.⁹⁰

64. To ensure the effectiveness of the protective measures ordered by the Chamber, testimony was frequently heard in closed session, which the public was unable to follow. Nonetheless, insofar as the proceedings must be public as a rule, the Chamber endeavoured to develop, in close cooperation with the parties and participants, best practices which enabled such closed sessions to be kept to a minimum. To the extent necessary and pursuant to articles 64(7) and 67(1) of the Statute, the Chamber instructed the parties and participants to undertake a painstaking review of the transcripts of testimony given in closed sessions, and ordered that any portions thereof not containing information which could pose a security risk be reclassified as public.

65. Aside from these in-court protective measures, the Chamber authorised redactions to certain documents as requested by the parties in order to protect various categories of sensitive information. It carefully reviewed the proposed

⁸⁸ See, *inter alia*, *Order on protective measures for certain witnesses called by the Prosecutor and the Chamber*, 23 November 2009, ICC-01/04-01/07-1667-Conf-tENG (ICC-01/04-01/07-1667-Red-tENG).

⁸⁹ See Annex C.

⁹⁰ *Lubanga Judgment*, para. 115.

redactions before authorising them, and some redacted passages were reinstated during the course of the trial.

66. The Chamber must also emphasise that confidential information has been included to the greatest extent possible in this Judgment, whilst avoiding creating any security risks for witnesses. In this connection, the Chamber notes that in drafting Section VII, it availed itself of the advice of the Victims and Witnesses Unit⁹¹ as to the possible impact of the publication of a public judgment on the safety of the witnesses concerned. On the basis of this advice, the Chamber considered that the confidentiality of certain information need not be maintained in this Judgment. Furthermore, it decided to list in Annex E those footnotes which might potentially identify witnesses.

8. Testimony and statement of the Accused persons

67. Both Accused chose to testify under oath, as is their right under article 67(1)(g) of the Statute. At the closing hearings, they again decided to address the Chamber, as they are authorised to do by article 67(1)(h) of the Statute, but this time not under oath.⁹² Whilst to a certain extent the Chamber took into account their statements under article 67(1)(h), only those statements made under oath must be considered to be part of the case record within the meaning of article 74(2).

9. Judicial site visit

68. After consulting the parties, the Chamber decided to travel to the DRC in order to make findings as to the *loci in quo*.⁹³ The Registry prepared a report on the

⁹¹ "Victims and Witnesses Unit's Supplementary Report in Relation to Protection of Witnesses", confidential, *ex parte*, Registry only, with Annex 1, confidential, *ex parte*, Registry only, 5 December 2012, ICC-01/04-02/12-2-Conf-Exp; "Victims and Witnesses Unit's Report in Relation to Protection of Witnesses", confidential, *ex parte*, Registry only, with Annex 1, confidential, *ex parte*, Registry only, 23 November 2012, ICC-01/04-01/07-3320-Conf-Exp.

⁹² See footnote 53.

⁹³ Decision on the Chamber's Site Visit.

site visit,⁹⁴ which is part of the entire proceedings within the meaning of article 74 of the Statute.⁹⁵

69. The Chamber undertook the judicial site visit on 18 and 19 January 2012, accompanied by representatives of the parties and participants, but not the Accused persons. During the visit, the Chamber travelled to Bunia, Aveba, Zumbe, Kambutso and twice to Bogoro. The exact itinerary and the locations visited are detailed in the Site Visit Report. The Chamber met with several individuals *in situ*, but neither heard any witnesses nor allowed anyone to provide it with any information related to the case. The parties and participants were invited by the Chamber at various places during the visit to identify locations, sites or buildings and to provide any relevant details about the events which occurred there. These observations were also noted by the Court Officer in the Site Visit Report.

70. Aside from the opportunity thus afforded to the Chamber to gain a better understanding of the context of the events of which it is seized, the main purpose of the site visit was to enable the Chamber to conduct the requisite verifications *in situ* of certain specific points and to evaluate the environment and geography of locations referred to by witnesses and the Accused. The Chamber has drawn on such findings in the present Judgment.

10. Circumstantial evidence

71. No provision in the Rome Statute framework precludes the Chamber from relying on circumstantial evidence. Where, based on the evidence, there is only one

⁹⁴ Registry, “*Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo*”, 3 February 2012, ICC-01/04-01/07-3234 with confidential annex (ICC-01/04-01/07-3234-Anx-Red) (“Site Visit Report”).

⁹⁵ *Decision on the nature of the “Procès-verbal de l’opération de transport judiciaire en République démocratique du Congo”*, 14 February 2012, ICC-01/04-01/07-3240-tENG.

reasonable finding to be drawn from particular facts, the Chamber concluded that they have been established beyond reasonable doubt.⁹⁶

11. Corroboration

72. Rule 63(3) of the Rules prohibits the Chamber from “impos[ing] a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence”. The extent to which a piece of evidence, independently, is sufficient to prove a fact at issue is entirely dependent on the issue in question and the strength of the evidence. Accordingly, once again the Chamber adopted a case-by-case approach.

⁹⁶ *Lubanga Judgment*, para. 111; *The Prosecutor v. Omar Hassan Ahmad Al Bashir, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”*, 3 February 2010, ICC-02/05-01/09-73, para. 33.

III. THE SUBMISSIONS OF THE PARTIES AND PARTICIPANTS

A. PROSECUTION SUBMISSIONS

73. The Prosecution's primary factual allegations relate to events that occurred between August 2002 and July 2003, during which period there was an armed conflict in Ituri. The Prosecution alleged that various organised armed groups, *inter alia*, the Lendu militia, comprising the *Front des Nationalistes Intégrationnistes* ("FNI"), the *Force de Résistance Patriotique en Ituri* ("FRPI"), the *Union des Patriotes Congolais* ("UPC") and the *Parti pour l'Unité et la Sauvegarde de l'Intégrité du Congo* ("PUSIC") were party to the armed conflict.⁹⁷ The attack by the Lendu and Ngiti militias against the UPC forces and the predominantly Hema civilian population of Bogoro on 24 February 2003 occurred in the context of an on-going armed conflict pitting these groups against each other.⁹⁸

74. The Prosecution submitted that the conflict was not of an international character.⁹⁹ No State armed force was involved in military hostilities against a regular army and the occupation of part of the Ituri territory by Ugandan forces did not internationalise the armed conflict.¹⁰⁰ As for the attack on Bogoro, it was not of an international character, insofar as Germain Katanga and Mathieu Ngudjolo's forces were involved in an armed conflict not of an international character against the UPC. Nonetheless, in the Prosecution's view, the characterisation of the armed conflict is not material to the responsibility of the Accused.¹⁰¹

75. The Prosecution alleged that at the time, the civilians in Ituri district were at the core of a general military campaign, that there was an ethnic conflict between the Lendu and Ngiti on the one hand, and the Hema on the other hand, and that this is

⁹⁷ Prosecution Closing Brief, para. 20.

⁹⁸ Prosecution Closing Brief, para. 21.

⁹⁹ Prosecution Closing Brief, paras. 24-30; Prosecution Oral Closing Statement, T. 336, pp. 59-60.

¹⁰⁰ Prosecution Closing Brief, para. 26.

¹⁰¹ Prosecution Closing Brief, paras. 24-30; Prosecution Oral Closing Statement, T. 336, pp. 59-60.

the backdrop of the attack on Bogoro. The Prosecution further alleged that prior to the attack of 24 February 2003; the Lendu and Ngiti militia who participated in this operation had killed hundreds of civilians, particularly during the attack on Nyankunde, and had launched other attacks on Mandro, Bunia, Tchomia and Kasenyi, resulting in numerous other civilian casualties.¹⁰²

76. According to the Prosecution, at around 5.00 a.m. on 24 February 2003, Bogoro was attacked by several hundred Lendu and Ngiti combatants¹⁰³ who converged upon the UPC camp, killing combatants and civilians without distinction.¹⁰⁴ The Prosecution also alleged that the combatants targeted children, women, men, and elderly people, who were not participating in the hostilities.¹⁰⁵ Thus, in the Prosecution's submission, on the day of the attack, over 200 civilians were killed and many others injured.¹⁰⁶ It also alleged that the Ngiti and Lendu assailants undertook the widespread destruction of property belonging to the civilian population of Bogoro,¹⁰⁷ were further liable for pillaging in the wake of the attack,¹⁰⁸ and raped and abducted women and young girls who were taken to their camps for sexual enslavement.¹⁰⁹ Finally, the Prosecution alleged that during the attack, numerous children under the age of 15 years actively participated in the hostilities alongside the Lendu and Ngiti troops by killing civilians as well as destroying and pillaging houses.¹¹⁰

77. Having examined the legal framework which in its submission underpins the individual criminal responsibilities of the two Accused,¹¹¹ the Prosecution devoted special attention in its Closing Brief to the factual aspects of its case which support

¹⁰² Prosecution Closing Brief, paras. 36-37; Prosecution Oral Closing Statement, T. 336, pp. 36-40.

¹⁰³ Prosecution Closing Brief, paras. 41-42; see also Prosecution Oral Closing Statement, T. 336, pp. 6-7.

¹⁰⁴ Prosecution Closing Brief, paras. 47-65.

¹⁰⁵ Prosecution Closing Brief, para. 47.

¹⁰⁶ Prosecution Closing Brief, para. 46.

¹⁰⁷ Prosecution Closing Brief, paras. 91-95.

¹⁰⁸ Prosecution Closing Brief, paras. 96-105.

¹⁰⁹ Prosecution Closing Brief, paras. 76-90; Prosecution Oral Closing Statement, T. 336, pp. 50-59.

¹¹⁰ Prosecution Closing Brief, paras. 66-75.

¹¹¹ Prosecution Closing Brief, paras.106-125.

the evidence *vis-à-vis* the respective responsibilities of Germain Katanga and Mathieu Ngudjolo. The Prosecutor sought to demonstrate that each of the Accused – Germain Katanga for the FRPI and Mathieu Ngudjolo for the Lendu militia of Bedu-Ezekere¹¹² – had control of his organisation. Both groups were hierarchically organised¹¹³ and the orders of the Accused were obeyed quasi-automatically.¹¹⁴ According to the Prosecution, the evidence tendered establishes the existence of a common plan¹¹⁵ to which the Accused provided an essential contribution.¹¹⁶ It further argued that Germain Katanga and Mathieu Ngudjolo intended to commit the alleged crimes and were aware that their actions would result in the commission of these crimes or that these crimes would occur in the normal course of events.¹¹⁷ Finally, in specific submissions, the Prosecution sought to demonstrate that Germain Katanga and Mathieu Ngudjolo were aware that their forces included children under the age of 15 years and that they intended to use them to participate in the attack on Bogoro.¹¹⁸

78. In the section of the Prosecution Closing Brief relative to Mathieu Ngudjolo's responsibility, the Prosecution no longer alleged as it did in the Summary of the Charges that the Accused was the FNI commander on 24 February 2003. Mathieu Ngudjolo is thereafter portrayed as the commander-in-chief of the Lendu militia of Bedu-Ezekere.¹¹⁹ It was submitted that the change in appellation does not constitute an amendment of the charges.¹²⁰ In fact, the Prosecution averred that the Lendu militia of Bedu-Ezekere was formed before August 2002 as a self-defence group to repel the attacks of the Ugandan Army, the Hema, and subsequently the UPC. These groups did not restrict their operations to self-defence but also went on the offensive

¹¹² Prosecution Closing Brief, paras. 177-225 and 349-417.

¹¹³ Prosecution Closing Brief, paras. 126-176 and 301-348.

¹¹⁴ Prosecution Closing Brief, paras. 226-235 and 418-431.

¹¹⁵ Prosecution Closing Brief, paras. 500-623.

¹¹⁶ Prosecution Closing Brief, paras. 624-627.

¹¹⁷ Prosecution Closing Brief, paras. 628-689.

¹¹⁸ Prosecution Closing Brief, paras. 690-735.

¹¹⁹ Prosecution Closing Brief, para. 304.

¹²⁰ Prosecution Oral Closing Statement, T. 336; pp. 11-14.

and launched attacks. It was alleged that the militia eventually developed into an organised military structure bringing together a large number of combatants. Mathieu Ngudjolo then became the group's commander-in-chief and Chief of Staff, and was already acting in this capacity by the time the APC soldiers left Bedu-Ezekere, just before the battle of Nyankunde on 5 September 2002.¹²¹

79. In the Bedu-Ezekere *groupement*, the Lendu militia were grouped into several camps. The central camp was located in Zumbe and other camps were notably located in Kambutso, Lagura and Ladile.¹²² Mathieu Ngudjolo was both the head of the main camp¹²³ and commander-in-chief of the commanders of the other camps.¹²⁴ The Prosecution submitted that prior to the attack on Bogoro, the Lendu militia of Bedu-Ezekere had a military structure with a clearly defined chain of command. It had a staff headquarters and was hierarchically structured with a Chief of Staff, his deputies and soldiers, and also included the population. Finally, this group was divided into battalions, companies, platoons and sections, with the combatants recognising the established hierarchy.¹²⁵

80. Furthermore, according to the Prosecution, the Lendu militia of Bedu-Ezekere had a reporting system for transmitting orders and information along the chain of hierarchy.¹²⁶ Additionally, the Prosecution asserted that in order to ensure smooth functioning and the required coordination between the staff headquarters and the various camps in the *groupement*, the Lendu militia adopted and implemented administrative measures.¹²⁷ The combatants had automatic weapons and ammunition at their disposal¹²⁸ and underwent military training.¹²⁹ Military parades

¹²¹ Prosecution Closing Brief, paras. 301-304.

¹²² Prosecution Closing Brief, paras. 309-319.

¹²³ Prosecution Closing Brief, para. 311.

¹²⁴ Prosecution Closing Brief, para. 309.

¹²⁵ Prosecution Closing Brief, paras. 320-323.

¹²⁶ Prosecution Closing Brief, para. 324.

¹²⁷ Prosecution Closing Brief, paras. 325-326.

¹²⁸ Prosecution Closing Brief, paras. 327-338.

¹²⁹ Prosecution Closing Brief, paras. 334-339.

were common practice in the various camps and “morale” activities were also organised.¹³⁰ The Prosecution alleged that the Lendu militia were equipped with internal communication devices such as radios and were capable of facilitating communication outside of the *groupement*¹³¹ as well as planning and executing military operations.¹³²

81. In the Prosecution’s submission, Mathieu Ngudjolo controlled the Lendu militia of Bedu-Ezekere.¹³³ Referring to the relevant evidence, *inter alia*, the Accused’s prior experience,¹³⁴ the Prosecution asserted that the Accused was already commander-in-chief of the Bedu-Ezekere militia on the day of the attack on Bogoro;¹³⁵ retained his functions after 24 February 2003;¹³⁶ was at the battle of Mandro on 4 March 2003;¹³⁷ and led the Lendu during the 6 March 2003 attack on Bunia,¹³⁸ a town where he was subsequently omnipresent as a militia leader.¹³⁹ The Prosecution averred that as commander-in-chief of the Bedu-Ezekere militia, Mathieu Ngudjolo was independent and did not have any superior within or outside Bedu-Ezekere *groupement*.¹⁴⁰ By virtue of his profile, Mathieu Ngudjolo exercised effective control over his subordinates¹⁴¹ and asserted his effective authority.¹⁴² Still in the Prosecution’s submission, by having a uniform and an escort and by directing parades, the Accused had all the usual attributes of an active militia leader.¹⁴³ Furthermore, he could issue orders to his subordinates,¹⁴⁴ receive reports and

¹³⁰ Prosecution Closing Brief, paras. 340-341.

¹³¹ Prosecution Closing Brief, paras. 342-346.

¹³² Prosecution Closing Brief, para. 347.

¹³³ Prosecution Closing Brief, paras. 349-417.

¹³⁴ Prosecution Closing Brief, paras. 349-351.

¹³⁵ Prosecution Closing Brief, paras. 352-370.

¹³⁶ Prosecution Closing Brief, paras. 371-383.

¹³⁷ Prosecution Closing Brief, para. 372.

¹³⁸ Prosecution Closing Brief, para. 373.

¹³⁹ Prosecution Closing Brief, paras. 375-383.

¹⁴⁰ Prosecution Closing Brief, paras. 384-390.

¹⁴¹ Prosecution Closing Brief, paras. 391-417.

¹⁴² Prosecution Closing Brief, paras. 391-397.

¹⁴³ Prosecution Closing Brief, paras. 398-400.

¹⁴⁴ Prosecution Closing Brief, paras. 401-406.

communicate with them;¹⁴⁵ he was able to discipline and punish them;¹⁴⁶ and had control over essential matters such as overall organisation, weapons and training.¹⁴⁷ Finally, it is alleged that the situation Bedu-Ezekere *groupement* faced required “unity around one single leader”.¹⁴⁸

82. The Prosecution claimed that the execution of the crimes was secured by quasi-automatic compliance with Mathieu Ngudjolo’s orders.¹⁴⁹ Observance of the orders was especially made possible by the presence, within the ranks of this militia, of a large number of easily replaceable combatants,¹⁵⁰ child soldiers who had been abducted and were naturally more acquiescent and obedient.¹⁵¹ Moreover, they had a disciplinary mechanism and a military police to ensure compliance as well as social pressure which could be exerted on the combatants.¹⁵²

83. Finally, the Prosecution evaluated the evidence submitted by the Defence for Mathieu Ngudjolo and responded to its principal allegations. The Prosecution challenged the credibility of the evidence adduced to support the argument that the Accused was a nursing intern at the Kambutso health centre until 6 March 2003.¹⁵³ Similarly, the Prosecution repudiated the Accused’s claims that his ascension within the military was fortuitous and actuated by career opportunism,¹⁵⁴ and that he was assisting in a difficult childbirth on the morning of 24 February 2003.¹⁵⁵ Furthermore, it categorically rejected the Defence arguments that Bogoro was of no strategic

¹⁴⁵ Prosecution Closing Brief, paras. 407-409.

¹⁴⁶ Prosecution Closing Brief, paras. 410-415.

¹⁴⁷ Prosecution Closing Brief, para. 416.

¹⁴⁸ Prosecution Closing Brief, para. 417.

¹⁴⁹ Prosecution Closing Brief, paras. 418-431.

¹⁵⁰ Prosecution Closing Brief, paras. 419-422.

¹⁵¹ Prosecution Closing Brief, para. 423.

¹⁵² Prosecution Closing Brief, paras. 410-415 and 425-431.

¹⁵³ Prosecution Closing Brief, paras. 432 and 435-444; Prosecution Oral Closing Statement, T. 336, pp. 17 and 18.

¹⁵⁴ Prosecution Closing Brief, paras. 432 and 445-459; Prosecution Oral Closing Statement, T. 336, pp. 21-23.

¹⁵⁵ Prosecution Closing Brief, paras. 460-474; Prosecution Oral Closing Statement, T. 336, pp. 19-20.

interest to the Lendu of Bedu-Ezekere¹⁵⁶ and that the village was, in fact, attacked by UPDF and Kinshasa forces.¹⁵⁷ All in all, the Prosecutor attached no credibility to the Accused's denial that he had admitted as much to three different witnesses because, in its view, these admissions were indeed made.¹⁵⁸

84. Germain Katanga and Mathieu Ngudjolo, the respective leaders of the Ngiti and Lendu militias, allegedly formed an alliance in order to eliminate the UPC and destroy Bogoro and its civilian inhabitants. They allegedly planned, ordered and executed the attack on Bogoro on 24 February 2003.¹⁵⁹ The Prosecution contended that the Ngiti and Lendu had a common interest in attacking the village in that the capture of Bogoro enabled them to break the siege they were under and to stop the massacres being committed by the UPC.¹⁶⁰ Furthermore, it robustly rejected the Defence arguments that a plan was formulated by EMOI, RCD-ML, APC¹⁶¹ or Uganda.¹⁶² According to the Prosecution, the Lendu and Ngiti began to cooperate in order to neutralise the threat posed by the Hema and the UPC, especially during the two meetings of June and November 2002.¹⁶³ It noted that in late November 2002, a delegation of combatants and civilians from Walendu-Bindi, accompanied by a delegation from Bedu-Ezekere, went to Beni to seek logistical assistance and weapons for attacking Bogoro.¹⁶⁴ These weapons were stored at Germain Katanga's house in Aveba and distributed to the various camps.¹⁶⁵ Lendu combatants from Zumbe and Lagura also collected weapons and ammunition from Aveba.¹⁶⁶ Around late December 2002, Mathieu Ngudjolo sent a delegation from Bedu-Ezekere to

¹⁵⁶ Prosecution Closing Brief, paras. 475-480.

¹⁵⁷ Prosecution Closing Brief, paras. 481-485.

¹⁵⁸ Prosecution Closing Brief, paras. 486-498.

¹⁵⁹ Prosecution Closing Brief, para. 500. See also Prosecution Oral Closing Statement, T. 336, pp. 39-44.

¹⁶⁰ Prosecution Closing Brief, paras. 504-514.

¹⁶¹ Prosecution Closing Brief, paras. 585-618; Prosecution Oral Closing Statement, T. 336, pp. 47-49.

¹⁶² Prosecution Closing Brief, paras. 583-584; Prosecution Oral Closing Statement, T. 336, pp. 47-49.

¹⁶³ Prosecution Closing Brief, paras. 515-519.

¹⁶⁴ Prosecution Closing Brief, paras. 520 and 521; Prosecution Oral Closing Statement, T. 336, p. 41.

¹⁶⁵ Prosecution Closing Brief, paras. 521-523.

¹⁶⁶ Prosecution Closing Brief, paras. 524 and 535.

Aveba, where the Lendu delegation met the Ngiti combatants to finalise the plan to attack Bogoro. Still according to the Prosecution, the UPC and the entire Hema population of Bogoro were the targets of this attack.¹⁶⁷ Before launching the attack, the Ngiti and Lendu allegedly exchanged several radio communications to buttress the plan of the attack,¹⁶⁸ and then deployed their troops around Bogoro.¹⁶⁹ The Lendu troops took part in the attack from the very outset and advanced on Bogoro simultaneously with the troops from Walendu-Bindi.¹⁷⁰ The beleaguerment of Bogoro¹⁷¹ allegedly demonstrates the cooperation and planning that were necessary to execute such an attack.¹⁷²

85. The Prosecution alleged that a few days prior to the offensive, Mathieu Ngudjolo ordered his troops to attack Bogoro¹⁷³ and was immediately at the scene following the attack to celebrate the victory.¹⁷⁴ After the attacks, Bogoro was allegedly then placed under the joint custody and control of the Ngiti and Lendu combatants.¹⁷⁵

86. In the Prosecution's view, the attack against Bogoro would not have materialised without the common plan between the Accused and their essential contribution to its implementation.¹⁷⁶ It is alleged that with a view to attacking Bogoro, Germain Katanga and Mathieu Ngudjolo held preparatory meetings, devised and agreed on the plan to attack and, finally, ensured the supply of weapons and ammunition to their combatants.¹⁷⁷ According to the Prosecution, Germain

¹⁶⁷ Prosecution Closing Brief, paras. 525 and 527; Prosecution Oral Closing Statement, T. 336, pp. 49-50.

¹⁶⁸ Prosecution Closing Brief, para. 551.

¹⁶⁹ Prosecution Closing Brief, paras. 537 and 541-550.

¹⁷⁰ Prosecution Closing Brief, paras. 558-561.

¹⁷¹ Prosecution Closing Brief, paras. 553-561.

¹⁷² Prosecution Closing Brief, para. 552; Prosecution Oral Closing Statement, T. 336, pp. 46-47.

¹⁷³ Prosecution Closing Brief, paras. 544 and 570.

¹⁷⁴ Prosecution Closing Brief, paras. 574-575; Prosecution Oral Closing Statement, T. 336, p. 19.

¹⁷⁵ Prosecution Closing Brief, paras. 578-582.

¹⁷⁶ Prosecution Closing Brief, paras. 624-627.

¹⁷⁷ Prosecution Closing Brief, para. 626.

Katanga led his troops to Bogoro and Mathieu Ngudjolo was the “driving force” within the Lendu forces and commanded his troops to launch an attack.¹⁷⁸ Finally, it was submitted that the Accused intentionally directed an attack against the civilian population of Bogoro with the full awareness that the execution of their actions would result in the commission of crimes “in the ordinary course of events”.¹⁷⁹

87. In conclusion, the Prosecution devoted the last part of its Closing Brief to demonstrating the credibility of the “key witnesses” it called to testify.¹⁸⁰

B. SUBMISSIONS OF THE DEFENCE FOR MATHIEU NGUDJOLO

88. The Defence for Mathieu Ngudjolo argued that the attack on Bogoro was a conflict of an international character,¹⁸¹ and not, as alleged by the Prosecution, a strictly interethnic conflict between the Hema and the Lendu. According to the Defence, the conflict stemmed from land disputes which not only pitted the Hema and the Lendu against each other, but also involved internecine conflict in the Hema and Lendu communities.¹⁸² In its view, although the attack on Bogoro was a war, it was not interethnic in nature, but intended to further “geo-political, economic or strategic interests” in Ituri.¹⁸³ This highly intense conflict between national and foreign belligerents occurred between August 2002 and May 2003.¹⁸⁴

89. The Defence for Mathieu Ngudjolo advanced the argument that the attack on 24 February 2003 was not a widespread or systematic attack against the civilian population of Bogoro;¹⁸⁵ instead, the intended target was the UPC military camp.

¹⁷⁸ Prosecution Closing Brief, paras. 568 and 570.

¹⁷⁹ Prosecution Closing Brief, paras. 628-688.

¹⁸⁰ Prosecution Closing Brief, para. 761.

¹⁸¹ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 39-48; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 340, pp. 19-25.

¹⁸² Closing Brief of the Defence for Mathieu Ngudjolo, paras. 49-54.

¹⁸³ Closing Brief of the Defence for Mathieu Ngudjolo, para. 76; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, p. 28.

¹⁸⁴ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 55-188; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, p. 6.

¹⁸⁵ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 268-291, 303-313 and 434-484. See also the Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 6-7.

Whilst some civilians had sought refuge in the camps, the only people remaining in the village were armed and participating in the hostilities.¹⁸⁶ *Ergo*, the Defence for Mathieu Ngudjolo averred, the Prosecution has not proven beyond reasonable doubt the existence of murder, wilful killing and an attack directed against civilians.¹⁸⁷

90. Furthermore, the Defence submitted that the witness testimony at trial regarding the existence of rape during the attack underdetermines the identification of the actual perpetrators and rape should therefore not be held against the Accused.¹⁸⁸ It also seeks a similar finding on the testimony relating to sexual slavery.¹⁸⁹ As for the Prosecution allegations that children under the age of 15 years participated in the attack on Bogoro, the Defence argued that it is impossible to determine irrefutably the group to which these children belonged and their ages.¹⁹⁰ Regarding the allegations of pillaging and the destruction of property, the Defence repugned the direct or indirect participation of the Accused in the pillaging or destruction of private or public property at Bogoro on 24 February 2003.¹⁹¹ Additionally, the Defence contended that contradictions in the testimonies of Prosecution witnesses regarding the existence of pillaging preclude the attribution of the material element of this crime, beyond reasonable doubt, to Mathieu Ngudjolo.¹⁹² Finally, the Defence averred that whilst some witnesses had substantiated the destruction of property, there is no evidence that it was civilian property or that Mathieu Ngudjolo was responsible for the destruction of property which exclusively constituted military objectives.¹⁹³

¹⁸⁶ Closing Brief of the Defence for Mathieu Ngudjolo, notably paras. 271-273, 305-308 and 430.

¹⁸⁷ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 294, 429 and 487.

¹⁸⁸ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 494-511.

¹⁸⁹ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 517-530.

¹⁹⁰ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 532-586.

¹⁹¹ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 588-628 (pillaging) and paras. 629-658 (destruction of property).

¹⁹² Closing Brief of the Defence for Mathieu Ngudjolo, para. 611.

¹⁹³ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 644-658.

91. As for Mathieu Ngudjolo's criminal responsibility, the Defence impugned the allegations that he devised a common plan with Germain Katanga to attack Bogoro.¹⁹⁴ It contended that *de facto*, it is the DRC and Ugandan governments and the RCD-ML which planned the attack. The Defence argued that the Accused had no involvement in the preparation, planning or execution of the operation. It underscored the nonentity of a link between Mathieu Ngudjolo and the direct perpetrators of the crimes and finally asserted that the attack was perpetrated by the UPDF, commander Yuda's combatants, and the APC and FAC forces which were under the command of EMOI.¹⁹⁵

92. Additionally, the Defence disputed the Prosecution allegations that Mathieu Ngudjolo was the most senior FNI commander in Zombe during the attack or the head of the Lendu militia of Bedu-Ezekere. It maintained that the FNI was non-existent in Bedu-Ezekere *groupement* at the material time.¹⁹⁶ The Defence also emphasised that the purported militia of Bedu-Ezekere was in fact a self-defence group established by Witness D03-88,¹⁹⁷ then chief of the *groupement*.¹⁹⁸ This self-defence committee was therefore not a militia but a legitimate defence entity of the civilian population which was not organised along military lines.¹⁹⁹ Similarly, the Defence denied the existence of any military camp at Bedu-Ezekere²⁰⁰ or Zombe.²⁰¹ It further specified that none of Zombe's inhabitants were involved in the attack of 24 February 2003 on Bogoro²⁰² and that, therefore, the use of the Lendu language by the

¹⁹⁴ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 674-759 and 850; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 38-41.

¹⁹⁵ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 175-178, 226-235, 294, 413, 488, 690 and 859; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 8-9, 29-30, 46-47 and 52-57.

¹⁹⁶ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 317-338 and 773-780; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 38-39.

¹⁹⁷ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 377, 386 and 653.

¹⁹⁸ Closing Brief of the Defence for Mathieu Ngudjolo, para. 239.

¹⁹⁹ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 374, 395-408 and 658.

²⁰⁰ Closing Brief of the Defence for Mathieu Ngudjolo, para. 813.

²⁰¹ Closing Brief of the Defence for Mathieu Ngudjolo, para. 820.

²⁰² Closing Brief of the Defence for Mathieu Ngudjolo, in particular paras. 181, 400 and 1215.

attackers of Bogoro on 24 February 2003 does not necessarily mean that those who used it were Lendu or from Zumbe.²⁰³

93. The Defence also questioned the existence of a nexus between Mathieu Ngudjolo and the FNI during that period. According to the Defence, based on various testimonies and documentary evidence, the FNI did not exist where the Accused lived, the Accused was not a member of the FNI during the attack on Bogoro,²⁰⁴ nor was he a member during the signing of the Agreement to end Hostilities on 18 March 2003.²⁰⁵

94. The Defence further argued that at the time of the events, Mathieu Ngudjolo was a nurse and could not therefore have led a group of combatants.²⁰⁶ As a nurse under the authority of D03-88,²⁰⁷ he could not have devised or executed the attack on Bogoro.²⁰⁸ The Defence contested the existence of military or political relations between Mathieu Ngudjolo and the “purported” commanders of the Bedu-Ezekere camps during the material period.²⁰⁹ Lastly, the Defence submitted that the Accused was not engaged in military activities prior to 6 March 2003;²¹⁰ that he only became Chief of Staff of the FRPI after the short-lived alliance between the FNI and FRPI on 22 March 2003;²¹¹ and could not have retroactively been the Chief of Staff during the attack on Bogoro.²¹²

²⁰³ Closing Brief of the Defence for Mathieu Ngudjolo, para. 643.

²⁰⁴ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 487, 626 and 796-800.

²⁰⁵ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 327-328, 636-637 and 771.

²⁰⁶ Closing Brief of the Defence for Mathieu Ngudjolo, notably, paras. 236-238, 256, 413, 466-470, 810 and 832; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 10 and 25.

²⁰⁷ Closing Brief of the Defence for Mathieu Ngudjolo, para. 462.

²⁰⁸ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 851-852, 856 and 973.

²⁰⁹ Closing Brief of the Defence for Mathieu Ngudjolo, para. 814.

²¹⁰ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 344 and 957. For the chronology of Mathieu Ngudjolo’s military promotion, see paras. 956 and 965.

²¹¹ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 812 and 962; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 39 and 48; T. 340, p. 65.

²¹² Closing Brief of the Defence for Mathieu Ngudjolo, para. 811.

95. In addition, the Defence averred that given his activities as a nurse, Mathieu Ngudjolo was not present during the attack on Bogoro.²¹³ The Defence argument is based on the testimonies of various witnesses to the effect that the Accused was at the Kambutso health centre all day on 24 February 2003 assisting a woman in childbed.²¹⁴

96. Finally, the Defence noted that the Prosecution was unable to establish the Accused's hierarchical position within the FNI ranks prior to 6 March 2003.²¹⁵ Moreover, the Defence submitted that the Prosecution failed to clarify the exact status of Mathieu Ngudjolo, whom it successively depicted as FNI supreme commander, FNI commander of Ezekere *groupement* and, finally, leader of the Lendu militia of Bedu-Ezekere.²¹⁶ According to the Defence, having failed to prove the existence of the FNI and the Accused's status as FNI commander during the material time, the Prosecution sought to vest him with the new status of leader of the Lendu militia of Bedu-Ezekere.²¹⁷ In so doing, the Prosecution unilaterally amended the *Decision on the Confirmation of Charges* in contravention of the provisions of Article 67 of the Statute, which enshrines the right of an Accused to be informed promptly and in detail of the charges against him. This is antithetical to the presumption of innocence and the Chamber's definition of the term "charges".²¹⁸

97. The Defence did not dispute that Mathieu Ngudjolo was appointed Chief of Staff of the FNI-FRPI alliance from 22 March 2003, but argued that this appointment did not make him, as the Prosecution implied, the Chief of Staff who led the attack

²¹³ Closing Brief of the Defence for Mathieu Ngudjolo, para. 256.

²¹⁴ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 241-256 and 465-469.

²¹⁵ Closing Brief of the Defence for Mathieu Ngudjolo, para. 387; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, p. 25.

²¹⁶ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 334-336 and 367; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 34-39.

²¹⁷ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 365 and 367.

²¹⁸ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 30, 368-372 and 390; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 34-37.

on Bogoro.²¹⁹ Furthermore, the fact that the Accused subsequently portrayed himself as a soldier and wore military uniform on various occasions should not, in the view of the Defence, result in the inference that he was engaged in military activities before or during the attack on Bogoro.²²⁰ Therefore, in its view, Mathieu Ngudjolo did not contribute to the “success” of the attack against Bogoro on 24 February 2003.²²¹

98. Finally, the Defence criticised the Prosecution’s investigative methods. The Defence averred that the Prosecution failed to fulfil its obligation to seek the truth in that it primarily sought incriminating evidence during the investigations and displayed passivity in the collection of exculpatory evidence.²²² The Defence also criticised the Prosecution’s choice of witnesses on the basis that the Prosecution pretermitted reliable witnesses in favour of unreliable witnesses.²²³ Notably, it highlighted the conditions – which it considers unorthodox – under which the Prosecutor called three key witnesses whose testimony it subjected to a painstaking analysis, noting that all three were proven to be false child soldiers.²²⁴ *A contrario*, the Defence found fault with the Prosecution for its failure to call two witnesses – D03-11, the founding President of the FNI and D03-88, chief of Bedu-Ezekere *groupement*, ultimately called by both Defence teams – even though they had cogent information. Accordingly, in its view, this shortcoming demonstrates that the Prosecution was not motivated by the pursuit of the truth and was biased.²²⁵

²¹⁹ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 800 and 811-812.

²²⁰ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 797 and 801.

²²¹ Closing Brief of the Defence for Mathieu Ngudjolo, para. 852.

²²² Closing Brief of the Defence for Mathieu Ngudjolo, paras. 913-946; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 12-15, 21-22 and 59-60.

²²³ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 991-1223; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 15-21.

²²⁴ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 992-1160.

²²⁵ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 1161-1223.

C. SUBMISSIONS OF THE LEGAL REPRESENTATIVES OF VICTIMS

1. Submissions of the common legal representative of the main group of victims

99. Firstly, the Legal Representative of the main group of victims made his observations regarding the credibility of various witnesses: Prosecution witnesses, represented victims and other witnesses who testified at his request,²²⁶ as well as Defence witnesses.²²⁷ He submitted that the Prosecution witnesses were credible and reliable, and that any discrepancies in their testimonies must be assessed having regard to a number of factors such as the passage of time, age, level of education and the nature of the questions and difficulties of interpretation.²²⁸ Furthermore, he particularly underscored that some Defence witnesses knew the Accused or their family members, and hence their testimonies should be excluded.²²⁹

100. Thereafter, in reference to the context in which Bogoro was attacked on 24 February 2003, the Legal Representative maintained that not only was that armed conflict of an international character,²³⁰ it was also an interethnic conflict between the Lendu and the Ngiti on the one hand, and the Hema on the other hand.²³¹ In his view, the evidence shows that the UPC was affiliated with the Hema, that the Lendu and Ngiti did not distinguish between civilians and the military,²³² and that the Ugandan army was also involved in this conflict.²³³

²²⁶ Closing Brief of the common legal representative of the main group of victims, paras. 3-16; Oral Closing Statement of the common legal representative of the main group of victims, T. 337, pp. 68-73.

²²⁷ Closing Brief of the common legal representative of the main group of victims, paras. 17-46.

²²⁸ Closing Brief of the common legal representative of the main group of victims, para. 16.

²²⁹ Closing Brief of the common legal representative of the main group of victims, paras. 23-28, 31-40 and 45.

²³⁰ Closing Brief of the common legal representative of the main group of victims, para. 265; Oral Closing Statement of the common legal representative of the main group of victims, T. 337, p. 79.

²³¹ Closing Brief of the common legal representative of the main group of victims, paras. 53-61 and 263-265; Oral Closing Statement of the common legal representative of the main group of victims, T. 337, pp. 74-75 and 79.

²³² Closing Brief of the common legal representative of the main group of victims, para. 61.

²³³ Closing Brief of the common legal representative of the main group of victims, paras. 76-79.

101. The Legal Representative rehearsed the evidence in the case which is relevant to the planning of the attack, the preceding events²³⁴ and the events that occurred at Bogoro on 24 February 2003.²³⁵ According to him, at that time, there were many civilians in the village²³⁶ and the evidence shows that the Lendu and Ngiti attackers²³⁷ sought, pursued and massacred this civilian population without differentiating between the UPC combatants and civilians,²³⁸ especially if the civilians were Hema.²³⁹ He notes that corroborating sources reported that nearly 200 people were killed on the day of the attack.²⁴⁰ It is therefore a clear indication, considering the method used during the attack and the number of civilian casualties, that the objective was not only military but also the elimination of the civilian population.²⁴¹ The Legal Representative recalled that the Chamber heard specific and corroborating testimonies highlighting several cases of women being raped and taken into sexual slavery.²⁴² He further argued that the village was subjected to extensive pillaging of, *inter alia*, livestock, as well as the systematic destruction of houses.²⁴³ Additionally, the Legal Representative recalls that following the attack,

²³⁴ Closing Brief of the common legal representative of the main group of victims, paras. 86-119.

²³⁵ Closing Brief of the common legal representative of the main group of victims, paras. 120-163.

²³⁶ Closing Brief of the common legal representative of the main group of victims, paras. 99-100; Oral Closing Statement of the common legal representative of the main group of victims, T. 337, pp. 81-82.

²³⁷ Closing Brief of the common legal representative of the main group of victims, paras. 171, 173-174, 177 and 202.

²³⁸ Closing Brief of the common legal representative of the main group of victims, paras. 213-154 and 245-251; Oral Closing Statement of the common legal representative of the main group of victims, T. 337, pp. 83-85.

²³⁹ Closing Brief of the common legal representative of the main group of victims, paras. 59, 134-136, 139-150 and 173.

²⁴⁰ Closing Brief of the common legal representative of the main group of victims, paras. 157-162; Oral Closing Statement of the common legal representative of the main group of victims, T. 337, pp. 85-86.

²⁴¹ Closing Brief of the common legal representative of the main group of victims, paras. 245-250.

²⁴² Closing Brief of the common legal representative of the main group of victims, paras. 195-209 and 259; Oral Closing Statement of the common legal representative of the main group of victims, T. 337, pp. 89-91.

²⁴³ Closing Brief of the common legal representative of the main group of victims, paras. 179-193 and 252-257; Oral Closing Statement of the common legal representative of the main group of victims, T. 337, pp. 86-89.

Bogoro was occupied by the attackers and this prevented the return of its inhabitants.²⁴⁴

102. Finally, the Legal Representative contended that the Accused played an essential role in the attack on Bogoro,²⁴⁵ whereby Germain Katanga led all the Ngiti militia in Walendu-Bindi as part of a structured military organisation²⁴⁶ and Mathieu Ngudjolo was the Chief of Staff of an organisation comprising all the Lendu militia of Bedu-Ezekere *groupement*.²⁴⁷ Accordingly, in his view, the Accused developed a common plan and were aware that the execution of the plan would result in the commission of crimes.²⁴⁸

2. Submissions of the Legal Representative of the group of child-soldier victims

103. Firstly, the Legal Representative of the child-soldier victims explained the concept of “active participation in hostilities”. In his view, the Chamber must interpret this concept “[TRANSLATION] broadly and flexibly”, in keeping with the interpretation adopted by the Pre-Trial Chamber in *Lubanga*.²⁴⁹

104. According to the Legal Representative, the August 2002 to May 2003 conflict in Ituri was of an international character.²⁵⁰ Children under the age of 15 years were present in the armed groups that operated in Ituri, particularly in Zumbe and Aveba, and they participated in the hostilities.²⁵¹ These children served as bodyguards, participated in the surveillance of military objectives, transportation of weapons and

²⁴⁴ Closing Brief of the common legal representative of the main group of victims, paras. 202-209.

²⁴⁵ Closing Brief of the common legal representative of the main group of victims, paras. 210-241.

²⁴⁶ Closing Brief of the common legal representative of the main group of victims, paras. 211-225.

²⁴⁷ Closing Brief of the common legal representative of the main group of victims, paras. 226-241.

²⁴⁸ Closing Brief of the common legal representative of the main group of victims, paras. 267-271.

²⁴⁹ Closing Brief of the legal representative of child-soldier victims, paras. 23-43 and 56; Oral Closing Statement of the legal representative of child-soldier victims, T. 337, pp. 59-61. See also “Additional submissions of legal representative child-soldier victims”, 22 March 2013, ICC-01/04-01/07-3262.

²⁵⁰ Closing Brief of the legal representative of child-soldier victims, paras. 44-55; Oral Closing Statement of the legal representative of child-soldier victims, T. 337, pp. 45-56.

²⁵¹ Closing Brief of the legal representative of child-soldier victims, paras. 56-88.

ammunition and were used to maintain order within the armed groups.²⁵² The presence of children under the age of 15 years among the armed groups was confirmed, notably, in the Agreement to end Hostilities signed by the two Accused, as well as in the proceedings of the Ituri Pacification Commission which mention the presence of child soldiers in these armed groups.²⁵³ He averred that Mathieu Ngudjolo was necessarily aware of the presence of these children and intended to use them to participate actively in hostilities.²⁵⁴

105. Furthermore, the Legal Representative argued that according to the evidence, Germain Katanga and Mathieu Ngudjolo agreed on a plan aimed at taking control of Bogoro. He recalled that during the preparations, there was no differentiation between adult combatants and children under the age of 15 years.²⁵⁵ In addition, the implementation of the plan would have been impossible without the respective contributions of the two Accused,²⁵⁶ which involved the use and/or involvement of children under the age of 15 years.²⁵⁷ During the preparations of the attack on Bogoro, children under the age of 15 years participated in the transportation of weapons and ammunition supplied from Aveba; some participated in the attack, the pillaging of the village and the search for and killing of civilians fleeing the fighting.²⁵⁸

106. Finally, the Legal Representative submitted that the Accused were fully aware and knowledgeable as to the presence of children under the age of 15 years amongst their troops and that, in deciding to use them in the attack on Bogoro, they knew that these children would participate actively in the hostilities.²⁵⁹

²⁵² Closing Brief of the legal representative of child-soldier victims, para. 58.

²⁵³ Closing Brief of the legal representative of child-soldier victims, paras. 60-68.

²⁵⁴ Closing Brief of the legal representative of child-soldier victims, paras. 89-133.

²⁵⁵ Closing Brief of the legal representative of child-soldier victims, paras. 145-171.

²⁵⁶ Closing Brief of the legal representative of child-soldier victims, paras. 176-193.

²⁵⁷ Closing Brief of the legal representative of child-soldier victims, para. 195.

²⁵⁸ Closing Brief of the legal representative of child-soldier victims, paras. 196-199.

²⁵⁹ Closing Brief of the legal representative of child-soldier victims, paras. 200-202; Oral Closing Statement of the legal representative of child-soldier victims, T. 337, pp. 62-63.

IV. THE CHAMBER'S APPROACH AND KEY FINDINGS

107. As noted by the Chamber,²⁶⁰ according to the *Decision on the confirmation of charges*, Mathieu Ngudjolo is accused of having jointly committed with Germain Katanga and through other persons the crimes of murder, wilful killing, attack against a civilian population, destruction of property, pillaging, rape and sexual slavery pursuant to article 25(3)(a) of the Statute. He is further accused of having jointly committed with Germain Katanga the war crime of using children under the age of 15 years to participate actively in hostilities pursuant to article 25(3)(a) of the Statute.

108. The Chamber recalls that on 21 November 2012, during the delivery of the *Decision on the implementation of regulation 55 of the Regulations of the Court*, Mathieu Ngudjolo's case was severed from Germain Katanga's case.²⁶¹

109. Following certain preliminary observations regarding the investigations conducted by the Office of the Prosecutor – considered to contribute to a better understanding of the case (Section VI of this Judgment) – the Chamber engaged in an assessment of the credibility of a number of the witnesses, essential to the Mathieu Ngudjolo's case (Section VII). In light of this assessment, it analysed all the evidence in order to establish the facts that had been proven beyond reasonable doubt. At the same time, it limited its ruling to the extent necessary, in this case, to make a determination on the Accused's guilt or innocence. According to the Chamber, this approach was particularly judicious considering the aforementioned *Decision on the implementation of regulation 55 of the Regulations of the Court*. A separate judgment will subsequently be pronounced based on the same evidence relevant to Germain Katanga.

²⁶⁰ Section 1(c).

²⁶¹ *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 November 2012, ICC-01/04-01/07-3319.

110. To assess the Accused's criminal responsibility, the Chamber chose to begin with the examination of the indirect aspect of the mode of liability alleged, as had been deemed necessary by the Prosecution. Desirous of presenting facts which are as independent as possible from the legal criteria set forth in the *Decision on the confirmation of charges* pursuant to article 25(3)(a) of the Statute, the Chamber presented its factual findings in relation to the entire body of evidence concerning the organisation and structure of the Lendu combatants of Bedu-Ezekere during the material period as well as Mathieu Ngudjolo's role and functions. In conclusion thereafter, the Chamber considered that it could not determine beyond reasonable doubt that Mathieu Ngudjolo was, as alleged by the Prosecution, the leader of the Lendu combatants who participated in the attack on Bogoro. Therefore, in the Chamber's view, the Prosecution has not proven beyond reasonable doubt that Mathieu Ngudjolo committed the alleged crimes under article 25(3)(a) of the Statute, insofar as his role within Bedu-Ezekere *groupement*, as it emerges from the evidence examined, in no way allows the Chamber to accept or even contemplate the notion of indirect perpetration adopted by the Pre-Trial Chamber, regardless of how article 25(3)(a) of the Statute is construed.

111. The Chamber noted that, with regard to the factual allegations of Mathieu Ngudjolo's involvement in the preparation and implementation of the plan to "wipe out" Bogoro, the Pre-Trial Chamber took the view that the Accused's involvement was closely linked to the position of authority and control he allegedly exercised over all the commanders and combatants of Bedu-Ezekere who participated in the attack of 24 February 2003.²⁶² It should be noted that the confirmation of charges does not envisage direct co-perpetration of the crimes confirmed, barring, of course, the crime of using children under the age of 15 years to participate actively in hostilities. In light of the factual findings regarding the Accused's role within Bedu-Ezekere *groupement* in Section IX hereinafter, the Chamber therefore considered it

²⁶² Prosecution Closing Brief, paras. 525, 570 and 626.

unnecessary to assess the evidence of co-perpetration accepted by the Pre-Trial Chamber, *viz.*, the existence of a common plan agreed between the Accused and Germain Katanga or his contribution in the fulfilment of the material elements of the crimes.

112. Furthermore, in view of the factual findings regarding the Accused's role, the Chamber made no findings beyond reasonable doubt, either in fact or in law, with respect to the crimes charged in this case, given that such issues have no impact on the judgment. This approach seems all the more justified as such findings could affect the continuation of the trial against Germain Katanga.

113. Nonetheless, the Chamber considered it useful to provide an overview of the conduct of the attack on Bogoro and the violence allegedly committed there on 24 February 2003, on the understanding that this approach does not consist in making findings beyond reasonable doubt as to the material elements of the crimes (Section VIII).

114. With respect to the crime of using children under the age of 15 years to participate actively in hostilities, the Chamber further found that the evidence in the record of the case does not support the existence of a nexus between Mathieu Ngudjolo and children under the age of 15 years within Bedu-Ezekere *groupement*, and the presence of such children at Bogoro on 24 February 2003 (Section X). In the circumstances, the Chamber did not conduct a detailed assessment of the relevant crime.

V. THE PROSECUTOR'S INVESTIGATIONS

115. The investigations in the cases of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo* and *The Prosecutor v Thomas Lubanga* were among the first investigations completed by the Office of the Prosecutor. The Chamber is mindful that these investigations were conducted in a region still plagued by high levels of insecurity.²⁶³ It therefore acknowledges that the Office of the Prosecutor would have encountered difficulties in locating witnesses with sufficiently accurate recollections of the facts and able to testify without fear, as well as in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information.²⁶⁴

116. Having examined all the evidence produced by the Prosecution and the conditions under which the investigations were conducted, the Chamber has nevertheless made various findings which it considers material to a better understanding of this judgment.

117. Firstly, the Chamber notes that the initial investigative documents in its possession date back to mid-2006 and²⁶⁵ therefore pre-date the facts it must adjudge by three years. Yet the collection of testimonies that are as close as possible to the date of the events is particularly important. It is equally desirable, whenever practicable, to make as many factual findings as possible, in particular forensic findings which are often crucial to the identification of victims, expeditiously and in the *loci in quo*. In this case, in the absence of such evidence,²⁶⁶ it was necessary to rely

²⁶³ CHM-1, T. 81, pp. 9-12.

²⁶⁴ CHM-1, T. 81, pp. 10-13.

²⁶⁵ CHM-1, T. 81, pp. 7, 58-59 and 71.

²⁶⁶ The first Prosecution forensic investigation mission to Bogoro was conducted in March 2009 (for an explanation for the delay, see *Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge*, 15 July 2009, ICC-01/04-01/07-1305. paras. 8-14). For reasons explained in its decision of 7 October 2009, the Chamber was of the view that the probative value of the findings in the forensic experts' reports were insufficient to warrant their late admission (*Decision on the disclosure*

primarily on witness statements and reports by MONUC investigators²⁶⁷ or representatives of various NGOs.²⁶⁸

118. Similarly, the Chamber considers that it would have been beneficial for the Prosecution to visit the localities where the Accused lived and where the preparations of the attack on Bogoro²⁶⁹ allegedly took place, prior to the substantive hearings. To cite but a few examples, a good knowledge of Zumbe; the view of Bogoro from Zumbe and Kambutso; the distances between Zumbe and Bogoro as well as between Zumbe, Aveba and Kagaba and the conditions of the roads would have been useful in clarifying several witness testimonies, thereby promoting a better understanding *ab ovo* and a more accurate assessment of the various statements.

119. As the Defence emphasised,²⁷⁰ it would equally have been worthwhile for the Chamber to hear the testimonies of certain of the commanders who played a key role before the attack, during the fighting and afterwards. Without misconstruing its powers under articles 64(6)(d) and 69(3) of the Statute, the Chamber notes that the discretion to call various witnesses rested above all with the Office of the Prosecutor. For example, to the extent that the persons were alive and accessible, the testimonies of military officials such as Colonel Aguru, Captain Blaise Koka and commanders Boba Boba, Yuda and Dark would in particular have provided clarification on the preparations for the attack, the conditions under which it occurred and the forces which occupied Bogoro following the attack.

of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009, 7 October 2009, ICC-01/04-01/07-1515-Corr, paras. 27-36).

²⁶⁷ EVD-OTP-00285: MONUC report on the events in Ituri.

²⁶⁸ CHM-I, T. 81, pp. 24-25.

²⁶⁹ The Chamber was informed that on 10 July 2009, the Prosecutor of Court, Mr Moreno-Ocampo, visited Zumbe. It notes, however, that this journey was part of a general visit the DRC and was not an investigative act in the legal sense. See Section VII.

²⁷⁰ Closing brief of the Defence for Mathieu Ngudjolo, paras. 509, 811, 945 and 967; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 8-9.

120. The Chamber also considered that it would have been expedient – subject to its approval – for a statement to be taken from the Accused during the investigation stage. Mathieu Ngudjolo opted to testify as a witness under oath at the end of the trial, when he was in possession of all the testimony received during the proceedings. The uniqueness of his testimony at the ultimate stage of the hearing failed to provide the Chamber with the opportunity to collate his testimony with prior testimonies, which would have proven invaluable.

121. It bears repeating that the Chamber is aware of the difficulties encountered by the Prosecution in conducting investigations in a region affected by recurrent conflicts and the fact that it is duty-bound to eschew any action that could result in the identification of witnesses requiring protection. Nonetheless, in order to enhance the credibility of the Prosecution witnesses, it would have been efficacious for the Prosecutor to engage in a more thorough analysis of their marital status and educational history. It must however be noted that, in most cases, it is the Defence teams which produced civil status documents and report cards, all of which were relevant in determining with greater certainty the ages claimed by some witnesses as well as the dates, institutions and localities where they studied. Furthermore, this evidence, for some of which the Prosecution did not raise a challenge as to authenticity, was accorded significant weight in the Chamber's assessment of the status of these witnesses, their membership in a militia, their ability to testify and their reliability.²⁷¹

122. The in-court testimonies enabled the Chamber to appreciate the special significance of the local customs and the function of family relationships in Ituri. It also observed that the notions of hierarchy and obedience were likely to be interpreted very differently, and that in this regard, the position of fetish-priests and their roles in these local societies warranted special attention.

²⁷¹ See Section VII.

123. In all probability, the Prosecution's would have benefitted from a more thorough investigations of these issues, which would have resulted in a more nuanced interpretation of certain facts, a more accurate interpretation of some of the testimonies taken and, again, an amelioration of the criteria used by the Chamber to assess the credibility of various witnesses. In fact, much of the socio-cultural framework was discussed in response to the Chamber's questions. In the Chamber's view, this material should have been discussed at the beginning of the Prosecution's presentation of its evidence so as to prompt a more informed debate from the outset.

VII. ANALYSIS OF THE CREDIBILITY OF SPECIFIC WITNESSES

124. In this section, the Chamber sets out its assessment of the credibility of specific witnesses who are relevant to the assessment of the role Mathieu Ngudjolo may have played. In principle, it is not mandatory for the Chamber to furnish a lengthy analysis of the credibility of each of the witnesses called by the parties. However, since the Prosecution's case with regard to Mathieu Ngudjolo is for the most part based upon testimony of a handful of key witnesses (P-250, P-279 and P-280) whose credibility is vigorously impugned, the Chamber is of the view that the conditions under which they testified and the substance of their testimony should be thoroughly analysed. It adopted the same approach for Witnesses P-28, P-219 and P-317, who were also called to testify by the Prosecution. Lastly, the Chamber analysed the situation of a witness called by the Defence for Mathieu Ngudjolo, whose testimony it considered to be of particular importance (D03-88).

125. However, the Chamber will not analyse the credibility of Mathieu Ngudjolo's own testimony in this section. If need be, the Chamber will make observations warranted by his statements in court where they are mentioned and will at that juncture make a finding as to the credibility of each statement.

126. The portions of testimony by the aforementioned witnesses which are relevant to Germain Katanga were analysed solely for the purpose of assessing the witnesses' credibility.

A. KEY PROSECUTION WITNESSES

1. P-250

a) Main subject areas covered by Witness P-250's testimony

127. P-250 testified before the Chamber on the following dates: from 27 to 29 January 2010 and on 1, 2, 4, 8, 9, 10, 11, 12, 15, 16, 18, 22 and 23 February 2010.²⁷²

128. According to his testimony, Witness P-250 was on holiday in Bunia when Governor Lompondo fell from power in August 2002. He claimed to have then fled the fighting and travelled to Zombe with several of his family members.²⁷³ Witness P-250 stated that Bedu-Ezekere *groupement* became progressively militarised in order to fend off UPC attacks²⁷⁴ and that Mathieu Ngudjolo became the leader of the group when it “[TRANSLATION] became organised”.²⁷⁵

129. P-250 claimed that having arrived simply as a person displaced by war, he subsequently became a combatant.²⁷⁶ He added that Mathieu Ngudjolo's instructions were to be followed to the letter, much like a pupil obeys a primary school teacher.²⁷⁷

130. P-250 described the military structure of the Bedu-Ezekere *groupement*,²⁷⁸ before adding that one of his brothers had acted as secretary to the company led

²⁷² T-91-T-10.

²⁷³ P-250-T-100, pp. 29-30 and 32/P-250- T-101, pp. 21 and 23.

²⁷⁴ P-250-T-91, pp. 23-24.

²⁷⁵ P-250-T-91, p. 30.

²⁷⁶ P-250-T-91, pp. 28-29.

²⁷⁷ P-250-T-92, pp. 20-21.

²⁷⁸ P-250-T-91, pp. 46-58 and 72-74.

by one of the group's commanders,²⁷⁹ a position he himself had held for a time,²⁸⁰ and that some of the commanders of the *groupement* were his uncles.²⁸¹

131. P-250 testified that, at the behest of Mathieu Ngudjolo,²⁸² he was a member of a delegation Mathieu Ngudjolo dispatched to Germain Katanga in Aveba²⁸³ during which journey the decision to attack Bogoro was made.²⁸⁴ After one month, one week and four days,²⁸⁵ the members of the delegation allegedly returned to Zumbe with ammunition provided by Germain Katanga.²⁸⁶

132. According to his testimony, a few days after the delegation returned, commander Bahati de Zumbe addressed the combatants in Ladile, informing them of the planned attack upon Bogoro.²⁸⁷ On the eve of the attack, all the combatants gathered in Kavelega.²⁸⁸ At approximately 5.30 a.m., the FNI and FRPI troops then jointly attacked Bogoro,²⁸⁹ with commander Bahati de Zumbe leading one group of FNI troops²⁹⁰ and communicating with the FRPI via a portable radio.²⁹¹

133. P-250 described the strategy implemented to win the battle in addition to details of the various itineraries followed by the commanders.²⁹² It is his testimony that the civilians had already left Bogoro,²⁹³ which, at the moment of the attack, was nothing more than a military "[TRANSLATION] fortress".²⁹⁴

²⁷⁹ P-250-T-102, p. 60.

²⁸⁰ P-250, T-91, p. 38; T-101, pp. 44-45.

²⁸¹ P-250-T-92, pp. 78-79.

²⁸² P-250-T-93, pp. 26-27; T-101, p. 65.

²⁸³ P-250-T-92, pp. 57-59 and 67; T-93, pp. 26-27; T-95, p. 14; T-101, pp. 65 and 67-68; T-104, p. 64.

²⁸⁴ P-250-T-92, pp. 68-72; T-102, pp. 7-8.

²⁸⁵ P-250-T-92, p. 68.

²⁸⁶ P-250-T-95, pp. 29-32.

²⁸⁷ P-250-T-94, p. 4.

²⁸⁸ P-250-T-94, pp. 8-9.

²⁸⁹ P-250-T-94, p. 83; T-103, p. 30.

²⁹⁰ P-250-T-93, p. 45.

²⁹¹ P-250-T-94, pp. 80-82.

²⁹² EVD-OTP-00022: Sketch drawn by P-250; P-250-T-94, pp. 4, 8-9 and 15-17.

²⁹³ P-250-T-93, pp. 37-38; T-104, p. 49.

²⁹⁴ P-250-T-93, pp. 34-36; T-94, pp. 69-70.

134. After the attack, Mathieu Ngudjolo and Germain Katanga allegedly sat under the mango trees²⁹⁵ near Bogoro Institute, receiving reports from the commanders.²⁹⁶ The town was then temporarily placed under the responsibility of commander Lobo Tchamangere.²⁹⁷

b) Analysis

135. The Prosecution and the Defence teams for both of the Accused are at odds with regard to a major aspect of P-250's testimony, which has an impact upon his very ability to testify to the events in the case. For the Chamber, the point at issue is whether, between September 2002 and July 2003, the witness was either a militia member posted in Zombe or a student dividing his time between Kagaba and Gety, or both.

i. The testimony of Witness P-250

136. In its Closing Brief, the Prosecution emphasised that the level of detail provided by P-250 shows "[TRANSLATION] an intimate knowledge" of the workings of Bedu-Ezekere *collectivité*. In his account he provided details of: the presence of the 12th APC battalion in Zombe; the military structure and various commanders within Bedu-Ezekere *groupement*; and the meetings held to plan the attack upon Bogoro and the attack itself.²⁹⁸

137. In the Chamber's opinion, P-250's description of the living conditions in Zombe after the fall of Governor Lompondo²⁹⁹ has the undeniable ring of sincerity. He had useful information on the itinerary followed by the 12th APC battalion on its journey to Beni.³⁰⁰ He described clearly and with a manifest

²⁹⁵ P-250-T-94, pp. 52-53.

²⁹⁶ P-250-T-94, pp. 54-55 and 69.

²⁹⁷ P-250-T-98, p. 36.

²⁹⁸ Prosecution Closing Brief, para. 774.

²⁹⁹ See, for example, P-250-T-100, p. 52.

³⁰⁰ See P-250-T-91, pp. 25-28; T-92, pp. 56-57; T-104, pp. 42-44.

attempt at accuracy³⁰¹ the military positions within Bedu-Ezekere *groupement* and those of the various commanders in charge,³⁰² in addition to giving a reasonably clear description of the military discipline in force within the militia, useful details of the names of the commanders in charge of this task³⁰³ and information on the workings of the military tribunal in Zombe.³⁰⁴

138. Nevertheless, P-250's testimony was by no means as accurate when discussing other subject areas during his testimony. His statements as to the level of authority Mathieu Ngudjolo wielded within the militia were particularly diffident. Within a short time span in the course of his testimony, Witness P-250 stated that soldiers were not authorised to meet Mathieu Ngudjolo on an individual basis,³⁰⁵ only to claim in apparent contradiction or at the very least extemporaneously, that even an ordinary soldier could report to the Accused or provide him with information directly.³⁰⁶ In addition, the Chamber found the testimony of P-250 particularly nebulous on the subject of the "*phonie*" linking Zombe (Bedu-Ezekere *groupement*) and Chyekele (Walendu-Bindi *collectivité*).³⁰⁷ Witness P-250's testimony regarding the "*phonie*" contradicted his previous testimony that there were no modern means of communication capable of reaching positions outside of Bedu-Ezekere *groupement*.³⁰⁸

139. What is more, Witness P-250 contradicted his previous testimony in regard to the delegation led by commander Boba Boba³⁰⁹ which Mathieu Ngudjolo allegedly dispatched to Aveba.³¹⁰ P-250 maintained during his testimony that Bahati de Zombe was the delegation "[TRANSLATION] head of

³⁰¹ P-250-T-91, p. 33; T-104, p. 54.

³⁰² See, for example, P-250-T-91, pp. 33-36 and 71-72; T-101, pp. 13-14; T-104, p. 54.

³⁰³ P-250-T-92, pp. 26-28.

³⁰⁴ P-250-T-92, pp. 22 and 45-46.

³⁰⁵ P-250-T-92, p. 30.

³⁰⁶ P-250-T-92, p. 34.

³⁰⁷ P-250-T-92, pp. 43-44; T-104, p. 59.

³⁰⁸ P-250-T-92, p. 29.

³⁰⁹ P-250-T-104, pp. 62-63; T-93, pp. 28-29; T-92, pp. 57-58.

³¹⁰ P-250-T-92, p. 73.

mission”³¹¹ and served as a guide on the journey to Aveba,³¹² whereas in his statement in December 2006, he had stated that commander Bahati was one of the officers that this delegation had met in Aveba.³¹³

140. Likewise, when testifying to the alleged final preparations in Ladile before the attack on Bogoro, P-250 stated during examination-in-chief that he went to Ladile, where he took part in a parade before Mathieu Ngudjolo’s staff,³¹⁴ and that this is where he was informed of the plan to attack Bogoro.³¹⁵ He however withdrew this statement during cross-examination, claiming that he was not present and that it was his company commander, Lone Nunye, who went to Ladile to retrieve the plan.³¹⁶

141. Lastly, the Chamber cannot fail to note that on occasion, P-250 made curious statements and behaved oddly during his testimony. It will be recalled that he threatened to interrupt his testimony and even, on one day, refused to appear in court.³¹⁷ He claimed that lead counsel for Germain Katanga had visited his father during the 1990s,³¹⁸ and when presented with his school reports, stated that the battle of Bogoro had taken place in 2005.³¹⁹ The Chamber is mindful of the fact that his behaviour might have been affected by his experiences during the war, but wishes to note that none of the other witnesses considered to be vulnerable behaved in such a peculiar manner.

ii. Assessment of documentary evidence

142. According to the Defence for Mathieu Ngudjolo, the witness was studying in Walendu-Bindi *collectivité* during the material time and was not a militia

³¹¹ P-250-T-101, p. 71.

³¹² P-250-T-93, p. 30; T-101, p. 68; T-102, p. 8.

³¹³ P-250-T-102, pp. 25-26.

³¹⁴ P-250-T-93, pp. 73-75.

³¹⁵ P-250-T-94, pp. 4-5; T-93, p. 73; T-103, p. 8.

³¹⁶ P-250-T-103, pp. 8-10.

³¹⁷ P-250-T-104, pp. 1-2; T-105, pp. 59-61.

³¹⁸ P-250-T-106, pp. 54-56; T-106, pp. 60-62.

³¹⁹ P-250-T-106, pp. 9-10.

member in Bedu-Ezekere *groupement*. In support of this claim, the Defence for Mathieu Ngudjolo presented several school reports certifying his enrolment at Kagaba Institute between 1999 and 2004.³²⁰

143. As the Defence for Mathieu Ngudjolo rightly recalled,³²¹ when questioned on this specific subject, P-250 acknowledged that the various school reports presented to him individually were an accurate record of his school attendance,³²² yet was surprised to see documents that he thought had been lost in a fire at his family home.³²³

144. Document EVD-D03-00008 is conspicuously distinct from the rest as being by far the most important of the school reports in that it confirms that P-250 was a student at Kagaba Institute during the 2002-2003 academic year, which is also the period during which he claims to have served in the Bedu-Ezekere militia. In the Chamber's opinion, the aforementioned document can be deemed authentic when juxtaposed with the comprehensive batch of school reports covering the entire period of the witness's attendance at Kagaba Institute.

145. The Prosecution did not challenge the authenticity of the school reports in its Closing Brief, either under the section entitled "[TRANSLATION] Analysis of evidence presented by the Defence for Mathieu Ngudjolo" or under the section given over to establishing the credibility of P-250. In its oral decision of 23 February 2010 on the admission of the aforementioned documents into evidence,³²⁴ the Chamber noted that the Prosecution had not shown any intention of seeking a second, expert opinion on the school reports authenticated by Witness P-250. In its Closing Brief, the Prosecution merely regretted that the Defence for Mathieu Ngudjolo had failed to present the school reports to Witness

³²⁰ EVD-D03-00006; EVD-D03-00007; EVD-D03-00008; EVD-D03-00009: school reports.

³²¹ Closing Brief of the Defence for Mathieu Ngudjolo, para. 1048.

³²² P-250-T-105, pp. 56, 64, 66 and 68-69.

³²³ P-250-T-106, p. 34.

³²⁴ T-106, p. 61.

D03-100 during his testimony, whereas he would have been well-placed to comment on them as a person close to P-250.³²⁵

146. The Chamber acknowledges that it would have been useful to show the documents to the aforementioned witness for him to be able to confirm their provenance. Nevertheless, it recalls that the burden of proof lies upon the Prosecution, and that even if the Defence for Mathieu Ngudjolo did not choose to put the school reports to the Witness during his testimony, nothing prevented the Prosecution from doing so during its cross-examination. The Chamber therefore finds that the Defence for Mathieu Ngudjolo discharged its obligations by stating the source of these school reports in the document's chain of custody and that it was for the Prosecution to seek any information it deemed necessary if it had not already done so.

147. Having perused the series of school reports, and the Prosecution not having requested an expert opinion, the Chamber considers that these documents are of some probative value and tend to prove that P-250 was indeed studying in Kagaba in 2002-2003. However, the Chamber does not consider that these documents alone are sufficient to cast doubt on the credibility of P-250.

iii. Other testimonial evidence

148. The Defence for Mathieu Ngudjolo called Witness D03-100, a person close to P-250, to testify before the Court. He was examined in regard to P-250's activities during 2002-2003.

149. D03-100 stated that P-250 left for Kagaba in 2000 or 2001 to complete his first year of secondary school studies,³²⁶ and that he remained there to complete his second and third years.³²⁷ However, due to the unrest caused in Kagaba by

³²⁵ Prosecution Oral Closing Statement, T-340, pp. 41-42.

³²⁶ See Annex E.

³²⁷ See Annex E.

commander Yuda in 2003, P-250 spent part of that academic year in Gety before once again returning to Kagaba when Gety in turn became a dangerous locality.³²⁸

150. Without providing any further detail, the Prosecution contended during its closing statements that D03-100's testimony on the subject of P-250's school attendance was not consistent with the school reports presented in court.³²⁹ On comparing the testimony of Witness D03-100 and the school reports, the Chamber also noted that the report for 2002-2003 did not mention that P-250's school year had been divided between Gety and Kagaba. However, the Chamber is of the opinion that it behoved the Prosecution, were it to have deemed it necessary, to challenge D03-100 with P-250's school reports in order to highlight any contradictions.

151. Whatever its precise objective, the Prosecution intended to impugn the credibility of Witness D03-100 who, in its opinion, did not come to testify in order to tell the truth, but to put a stop to alleged "[TRANSLATION] death threats" made by Mathieu Ngudjolo's family against the witness's own family.³³⁰ However, as noted by the Defence for Mathieu Ngudjolo,³³¹ D03-100 spontaneously volunteered the information that there had been "[TRANSLATION] conflict" between the two families during his examination-in-chief,³³² subsequently adding that the family of the Accused had "[TRANSLATION] said some bad things".³³³ In the Chamber's opinion, this acknowledgement is an indication of the witness's attempt at transparency and should be taken into account when assessing his credibility. Nevertheless, it

³²⁸ See Annex E.

³²⁹ Prosecution Oral Closing Statement, T-340, p. 42.

³³⁰ Prosecution Closing Brief, para. 778.

³³¹ Closing Brief of the Defence for Mathieu Ngudjolo, para. 1062.

³³² See Annex E.

³³³ See Annex E.

behoves the Chamber to examine whether the threats, which were mentioned by Witness D03-100 himself, could have adversely affect his testimony.

152. Therefore, in order to measure the impact of any possible tension or threats from Mathieu Ngudjolo's family, the Chamber set out to compare the witness's testimony with that of other witnesses possessing useful information about P-250's schooling in 2002-2003. In this regard, the Chamber noted that four witnesses, of whom two were called to testify by the Defence for Mathieu Ngudjolo and two by the Defence for Germain Katanga, attest to the presence of Witness P-250 in Gety during the 2002-2003 school year:

- D03-66 claimed that Witness P-250 was a student in Gety during the war and that he did not live in Bedu-Ezekere with his parents;³³⁴
- D03-55 claimed to have lived in Bedu-Ezekere from 2002. He maintains that P-250 is a family member and that he was a schoolboy in Gety at the material time;³³⁵
- D02-160 stated that he had studied in Gety between 2002 and 2004 and that P-250 was a pupil at Gety Institute during the 2002-2003 school year;³³⁶
- D02-161 claimed that P-250 was attending school in Gety, that he regularly came to Aveba to visit friends and that she had never seen him in military garb, nor had she seen him carrying a weapon or heard him talk about any fighting.³³⁷

153. These four witnesses hail from different environments. Whilst the two witnesses called by the Defence for Mathieu Ngudjolo were living in Bedu-

³³⁴ See Annex E.

³³⁵ See Annex E.

³³⁶ See Annex E.

³³⁷ See Annex E.

Ezekere *groupement*, those testifying for the Defence of Germain Katanga were students in Walendu-Bindi *collectivité*. Testimony from these four witnesses corroborates one another, and is all the more convincing by virtue of their different circumstances, thereby reinforcing the credibility of D03-100's statement that P-250 was studying in Walendu-Bindi *collectivité* at the material time.

154. On the other hand, the Chamber cannot fail to note that none of the Prosecution witnesses claiming to have been in the militia in Bedu-Ezekere were able to confirm that P-250 was present in Zumbe or the surrounding area, or even that he was a member of the militia. The Chamber was particularly surprised when P-250 recognised P-279, saying that the last time he had seen him was in 2001 or 2002³³⁸ when he was studying at Songolo Institute, and that Witness P-279 said he did not know Witness P-250's name and had never played football with him in Songolo.³³⁹ As the two witnesses claimed to have served in the same militia during the same period and in the same camp, the Chamber had expected their testimonies to be mutually corroborative.

155. The Chamber cannot disregard the fact that Witness P-28, who testified for the Prosecution on the role of Germain Katanga and whose credibility is analysed below, claimed that P-250 was a member of the delegation which had travelled from Zumbe to Aveba.³⁴⁰ However, it has noted a series of indicia suggesting that Witnesses P-28 and P-250 may have conferred before testifying:

- P-28 claimed to have known P-250 before the conflict began,³⁴¹ adding that he had attempted to avoid him when their paths crossed in Kinshasa in

³³⁸ P-250-T-104, pp. 22-23.

³³⁹ P-279-T-151, p. 34.

³⁴⁰ P-28-T-217, p. 39.

³⁴¹ P-28-T-222, pp. 15 and 20.

2009,³⁴² yet he had difficulty recognising his name and photograph in court,³⁴³

- P-250 had no difficulty in recognising P-28's name, claiming that he had seen him in Kinshasa in 2009. He did not explicitly deny that he had discussed his testimony with him;³⁴⁴
- D02-161 stated that P-28 had told him that he had to go to Kinshasa where P-250 had gone to live, adding that the latter had given him news of P-28 when he was passing through Bunia between late 2009 and early 2010;³⁴⁵
- P-28 and P-250 were approached by the same intermediary from the Office of the Prosecutor who had allegedly persuaded P-28 to lie to the investigators about the conditions of his abduction, as P-28 claimed during his testimony.³⁴⁶

The Chamber is aware that P-250 travelled to Bunia on the dates stated by Witness D02-161.³⁴⁷ Therefore, the Chamber considers that any corroboration between the respective testimonies of P-28 and P-250 should be assessed in the light of any possible or even suspected collusion between these two witnesses. Any confirmation of P-250's testimony by P-28 is therefore of little probative value.

156. Lastly, in dealing with the assumption that the witness was studying at Kagaba whilst also being a member of the militia in Zumbe or the surrounding area, the Chamber would emphasise that, in order to fulfil both roles

³⁴² P-28-T-222, pp. 32-33.

³⁴³ P-28-T-222, pp. 20 and 30.

³⁴⁴ P-250-T-104, p. 22.

³⁴⁵ See Annex E.

³⁴⁶ P-250-T-104, pp. 26-27; P-28-T-221, pp. 20-21 and 31.

³⁴⁷ Second Report of the Witness and Victims Unit on the situation of Witness DRC-OTP-P-0250, 7 January 2011, ICC-01/04-01/07-2641-Conf-Exp with Confidential *ex parte* annexes (ICC-01/04-01/07-2641-Conf-Red).

successfully, the witness would have had to make frequent round trips between Walendu-Bindi *collectivité* and Bedu-Ezekere *groupement*. However, it is worth recalling that Zombe camp and Kagaba Institute were located on either side of the front line. P-250 would therefore have had to make regular trips through Bogoro or the surrounding area in order to attend school in Kagaba, thereby taking a route that he himself considered impassable and which, according to his testimony, was now “[TRANSLATION] only frequented by dogs”.³⁴⁸ Moreover, the Chamber notes that the hazards of following such a trajectory, either by road or by passing through the bush, were also noted by D03-66³⁴⁹ and D03-88.³⁵⁰

c) Conclusion

157. Having analysed the testimony, whose imprecision, contradiction and peculiarity it has underscored, the Chamber notes that it is in possession of school reports attesting to P-250’s studies in Kagaba, testimony from four witnesses claiming that he was studying in Gety and the testimony of D03-100 who stated that the witness divided his time between Kagaba and Gety during the 2002-2003 academic year.

158. Whilst mindful of the fact that the school reports do not faithfully reflect any journeys the witness may have made between Kagaba and Gety, the Chamber considers that the sum of the evidence forms a sufficiently coherent whole capable of casting doubt on the theory that P-250 was a member of the Bedu-Ezekere *groupement* militia.

159. Having taken the view that it is highly unlikely that P-250 could have been simultaneously a militia member in Zombe and a student in Kagaba, and given that his testimony was based specifically on his status as a militia member the Chamber finds itself unable to rely on his testimony in this case.

³⁴⁸ P-250-T-100, pp. 52-53.

³⁴⁹ D03-66-T-296, p. 21; T-297, pp. 9-10.

³⁵⁰ D03-88-T-300, p. 32.

2. P-279

a) Main subject areas covered by Witness P-279's testimony

160. P-279 testified before the Chamber on 20, 21, 25, 27 and 28 May 2010 and on 7, 8, 9 and 10 June 2010.³⁵¹

161. P-279 stated that he was born on 30 August 1990.³⁵² Were this date to be correct, he would have been twelve years of age at the time of the attack on Bogoro. In its Closing Brief, the Prosecution does not challenge the authenticity or contemporaneity of the documents indicating that the witness would have in fact been older than eighteen years at the time of the attack launched on 24 February 2003.³⁵³

162. The witness stated that he and his family had fled the village of Dele for Zombe “[TRANSLATION] at the time when there was a war in Bunia,”³⁵⁴ viz., when Governor Lompondo fell from power. According to his testimony, he and his family settled there for an indeterminate period and then returned to Dele after the UPC had left Bunia.³⁵⁵ However, upon returning to his village, he was allegedly abducted by a commander from Bedu-Ezekere.³⁵⁶

163. According to P-279, “[TRANSLATION] chief Ngudjolo” was in charge of three camps: Zombe, Lagura and Ladile.³⁵⁷ Commander Boba was the military leader at Ladile camp,³⁵⁸ and commander Kute was in charge of Lagura camp.³⁵⁹

³⁵¹ T-144-T-154.

³⁵² P-279-T-144, p. 14.

³⁵³ Prosecution Closing Brief, para. 788. See EVD-D02-00124, Birth certificate of P-279; EVD-D02-00125, Birth certificate of P-279; EVD-D02-00126, Invoice. The Prosecution indicated that it no longer intended to rely on Witness P-279 as a child soldier, yet maintained that he was a member of the Bedu-Ezekere combatants.

³⁵⁴ P-279-T-144, p. 18; T-151, pp. 53-54; T-152, pp. 7-10; T-153, pp. 39 and 45.

³⁵⁵ P-279-T-153, pp. 39-45.

³⁵⁶ P-279-T-144, p. 19; T-152, pp. 8-11; T-154, p. 20.

³⁵⁷ P-279-T-146, p. 48.

³⁵⁸ P-279-T-146, p. 17.

³⁵⁹ P-279-T-144, p. 58.

The day after arriving at Zumbe camp, P-279 allegedly started military training³⁶⁰ by learning how to load a rifle.³⁶¹

164. Still according to the witness, combatants were expected to visit the camp “[TRANSLATION] laboratory” in order to be given fetishes.³⁶² The “[TRANSLATION] doctors” would accompany the soldiers and also take part in the fighting.³⁶³ Finally, the fetishes would only be effective if the fetish-priest’s instructions forbidding any killing or rape were heeded during the fighting.³⁶⁴

165. According to the witness, Germain Katanga visited Zumbe Camp with his men in order to discuss the attack on Bogoro with Mathieu Ngudjolo. He allegedly walked past the witness, who was standing guard at one of the Zumbe entry points.³⁶⁵

166. It was allegedly Mathieu Ngudjolo who gave the order to attack Bogoro.³⁶⁶ At approximately 5 a.m., the civilians started to flee;³⁶⁷ and some were killed³⁶⁸ involuntarily, others sometimes intentionally.³⁶⁹ Bodies were scattered throughout Bogoro³⁷⁰ and Mathieu Ngudjolo allegedly ordered that they be buried.³⁷¹ P-279 stated that at the end of the fighting he was near the market³⁷² and saw “[TRANSLATION] chief Ngudjolo” and “[TRANSLATION] chief Germain Katanga” entering the Bogoro school building.³⁷³

³⁶⁰ P-279-T-144, pp. 37-39; T-152, pp. 21-22.

³⁶¹ P-279-T. 144, pp. 37 and 43.

³⁶² P-279-T. 144, pp. 47-48.

³⁶³ P-279-T. 148, p. 29.

³⁶⁴ P-279-T-149, pp. 14-15.

³⁶⁵ P-279-T-144, p. 49; T-152, pp. 36-37.

³⁶⁶ P-279-T-144, p. 50; T-145, p. 20.

³⁶⁷ P-279-T-145, p. 28.

³⁶⁸ P-279-T-144, p. 50; T-145, p. 28; T-148, p. 22.

³⁶⁹ P-279-T-145, p. 29.

³⁷⁰ P-279-T-145, p. 29.

³⁷¹ P-279-T-144, p. 50; T-145, p. 29.

³⁷² P-279-T-153, p. 14.

³⁷³ P-279-T-144, p. 51; T-145, pp. 28 and 33-34; T-153, p. 3.

167. After the attack on Bogoro, P-279 and one of his friends were allegedly appointed bodyguards for a wife of one of the commanders for a brief time.³⁷⁴ Then, when the attack on Bogoro was over, they fled in the direction of Dele.³⁷⁵ The witness claimed to have spent a month and a few weeks in the militia.³⁷⁶

b) Analysis

168. The parties were at odds with regard to a major aspect of P-279's testimony which affects his ability to testify to the events in this case. Is the witness credible when he claims to have participated in the attack on Bogoro as a combatant of the Bedu-Ezekere *groupement* militia or should he be considered to have been an ordinary refugee during his time in Zumbe, which he subsequently left for Aveba before the attack on Bogoro?

i) Testimony of P-279

169. In its Closing Brief, the Prosecution asserted that P-279's testimony was credible, detailed and corroborated in that he describes: the military structure in Zumbe and other camps of Bedu-Ezekere *groupement*; training of the *groupement's* combatants; the use of fetishes in battle and preparations before the attack; and finally, the attack on Bogoro itself. In the Prosecution's opinion, the events as recounted by the witness "[TRANSLATION] are consistent with the account of someone who personally experienced them".³⁷⁷

170. The Chamber noted the details provided by P-279 on the use of fetishes and the ease with which he expressed himself on the subject. He was also able to provide details on practices which are difficult to describe and rarely disclosed. In this regard, the Chamber was alive to the fact that several witnesses seemed

³⁷⁴ P-279-T-145, p. 28; T-146, pp. 9-10.

³⁷⁵ P-279-T-145, p. 28; T-146, pp. 9 and 48; T-149, p. 47.

³⁷⁶ P-279-T-150, p. 33.

³⁷⁷ Prosecution Closing Brief, para. 785.

wary of questions put to them on the subject in court and were very concerned about any consequences that their answers could have on their existence.³⁷⁸

171. The fact remains that although P-279's account was consistent on the subject of fetishes, this is contrary to the rest of his testimony, which evolved throughout the hearings. During examination-in-chief, P-279 claimed that a commander had come to Dele to enlist him forcibly into the Zumbe militia.³⁷⁹ During cross-examination, he admitted fleeing to Dele with his family and travelling to Zumbe of his own volition in order to escape the troops which had just won victory over Governor Lompondo.³⁸⁰ When challenged with these contradictory versions, the witness finally stated that he had been abducted after his family returned to Dele.³⁸¹

172. In more general terms, the Chamber notes that the details provided by P-279 do not permit it to establish the chronological pattern of his account. Whilst alive to the difficulties of remembering events in the distant past, the Chamber notes that the witness remained very confused or even silent on this episode of his life.³⁸² Despite managing to recall that he returned to Dele with his family after the UPC had left the locality,³⁸³ he could not remember how much time elapsed between his return and the moment he was abducted by the commander from Bedu-Ezekere.³⁸⁴

173. The Chamber observes that the witness claimed to have remained in the Bedu-Ezekere *groupement* militia for a period of a month and a few weeks before leaving it several weeks after the attack on Bogoro.³⁸⁵ As the attack occurred on

³⁷⁸ See, for example, P-28-T-217, pp. 45-47.

³⁷⁹ P-279-T-144, pp. 34-35; T-149, p. 47.

³⁸⁰ P-279-T-153, pp. 39-40 and 44.

³⁸¹ P-279-T-152, pp. 8-11.

³⁸² P-279-T-151, pp. 51-52; T-152, p. 10 and 11; T-153, p. 48; T-154, pp. 19 and 20.

³⁸³ P-279-T-153, p. 41.

³⁸⁴ P-279-T-152, p. 11; T-154, p. 20.

³⁸⁵ P-279-T-150, p. 33.

24 February 2003, it can be inferred that the commander abducted the witness around late January 2003.³⁸⁶ In other words, P-279's family would have fled Dele for Zumbe in August 2002, returning to settle in Dele at an undetermined date before the commander came to abduct the witness in late January 2003. However, the Chamber recalls that Dele is a suburb of Bunia and that the UPC was only temporarily driven out of this locality – initially on 6 March 2003, then for a longer period when the UN forces arrived in June of the same year. If the witness's claim that he only returned to Dele with his family once the UPC had been defeated is to be believed, it would then have been impossible for him to be abducted in late January 2003.

174. Therefore, it would seem to the Chamber that the various stages of P-279's school attendance and the sequence of events he claims to have experienced when giving evidence are inconsistent.

175. Moreover, the Chamber noted contradictions in other statements made by P-279. During the hearing, P-279 claimed to have worked as a bodyguard for the wife of one of the Bedu-Ezekere commanders, whereas in a previous statement he had mentioned working as a bodyguard for this very commander.³⁸⁷ In addition, P-279 testified that he had seen Germain Katanga in Zumbe shortly before the attack on Bogoro, claiming that he was able to identify him thanks to the other soldiers on duty with him. However, in a previous statement, he claimed that Germain Katanga was accompanied by commanders Cobra Matata and Oudo Mbafele and that he was able to recognise the Accused as he had previously crossed paths with his father before being abducted.³⁸⁸

176. Finally, there also appears to be an issue with the statements offered by P-279 to the effect that he had seen the two Accused enter a school located near the

³⁸⁶ P-279-T-149, p. 49.

³⁸⁷ P-279-T-146, p. 21.

³⁸⁸ P-279-T-147, p. 43; T-152, pp. 40-42.

military camp in order to hold a meeting. Indeed, the witness claimed that he was near the market in Bogoro when the Accused entered the school,³⁸⁹ yet on a visit to the site, the Chamber was able to note that the camp and the market are too far apart for the witness to have been able to see the Accused enter Bogoro Institute.³⁹⁰ In its closing statement, however, the Prosecution contended that P-279 was in fact referring to a secondary position located at Kavali School,³⁹¹ and that this school building was indeed near the market. The Chamber is of the opinion that it was for the Prosecution to clarify with the witness during his testimony whether he was referring to Bogoro Institute or Kavali School. The Chamber considers that the explanations provided by the Prosecution on the subject are but one interpretation, amongst others, of the witness's testimony.

177. Finally, the Chamber intends to emphasise two aspects of the Witness's testimony which considerably reduce any faith which might be invested in his testimony as a whole; notably the contradictions with regard to his date of birth and his claim that he did not know Witness P-280.

178. With regard to P-279's age, the Chamber recalls that the Prosecution did not challenge the authenticity of documents EVD-D02-00124, EVD-D02-00125 and EVD-D02-00126,³⁹² which show that the witness was over the age of 18 years when the attack on Bogoro occurred. The situation with regard to this Witness is quite different from that of P-280 and P-28. Indeed, P-280 stated in court that he was unsure of his precise age and that he wished to have an identity document issued stating his true date of birth. P-28 admitted to having forged school reports in order to continue his studies and to having provided false information regarding his age in order to be accepted into the demobilisation programme for adults. P-279 also admitted to attempting to appear older when giving his date of

³⁸⁹ P-279-T-144, p. 51; T-145, pp. 28 and 33; T. 153, pp. 13-14.

³⁹⁰ Judicial site visit report, paras. 45-46.

³⁹¹ Prosecution Oral Closing Statement, T-336, p. 75.

³⁹² Prosecution Closing Brief, para. 788.

birth as 30 August 1984 for the issuance of his voter's card. He claimed that this card would guarantee his security if FARDC forces were to conduct an identity check.³⁹³ The fact remains that the witness proved highly reticent when efforts were made in court to determine his precise age. What is more, when presented with various documents pertaining to his date of birth and asked to answer a series of questions on this point by the Defence for Germain Katanga, the witness was silent for lengthy periods,³⁹⁴ in addition to showing unwillingness to respond and a resiliently negative attitude, without any credible attempt at explaining the contradictions raised.

179. For this reason, the Chamber does not intend to rely upon a school document pertaining to the age of his sister which was issued at the behest of the Defence for Germain Katanga, to which the Prosecution mounted a robust challenge.³⁹⁵ However, the Chamber cannot fail to note that the witness seemed particularly confused when he initially agreed spontaneously that his sister was 22 years old in 2010,³⁹⁶ only to state subsequently that he had forgotten her age,³⁹⁷ before recalling that she was in fact three years younger than he.³⁹⁸ Moreover, he was not able to provide a satisfactory explanation as to why neither his name nor that of his sister were mentioned as minors and dependents of his father in an employment contract issued to his father by his employer on 7 December 2007.³⁹⁹

180. When assessing the credibility of P-28 and P-280, the Chamber clearly put into perspective the weight to be ascribed to any contradictions noted in the testimony of the witnesses with regard to their dates of birth. P-279's behaviour when testifying to this issue is considered to be of some weight, as his general

³⁹³ P-279-T-151, pp. 16-23; T-154, pp. 48 and 49.

³⁹⁴ See, for example, T-151, pp. 24 and 28.

³⁹⁵ Prosecution Closing Brief, para. 789.

³⁹⁶ P-279-T-149, p. 68.

³⁹⁷ P-279-T-149, p. 71.

³⁹⁸ P-279-T-150, p. 47.

³⁹⁹ EVD-D02-00037: Employment contract: P-279-T-151, pp. 33-34.

attitude was one of denial and he also refused to acknowledge that he knew P-280.

181. It has been established that there were good neighbourly relations between the families of D03-236 and D03-340, who were both closely related to P-279 and P-280 respectively.⁴⁰⁰ However, the Chamber was surprised that when P-280's name was mentioned to him, P-279 stated repeatedly that he did not remember that name⁴⁰¹ and did not recognise P-280 in a photograph.⁴⁰² This is all the more surprising as P-280 claimed to have also been a combatant in the Bedu-Ezekere militia. The Chamber was all the more surprised to note that P-280 also claimed to have experienced a solitary childhood, without ever spontaneously mentioning P-279,⁴⁰³ whilst Witnesses D03-340⁴⁰⁴ and D03-236⁴⁰⁵ claimed to have seen an intermediary from the Office of the Prosecutor having a conversation with both P-279 and P-280.⁴⁰⁶

182. In its closing statements, the Prosecution challenged the notion that Witnesses P-280 and P-279 had stated they were not acquainted, pointing out that the Defence for Germain Katanga had not shown P-279 the photograph of him with P-280 and had not been explicitly asked P-280 whether he knew P-279.⁴⁰⁷ The Chamber considers, however, that the Defence discharged its obligations by first putting to P-279 the name and then the photograph of P-280.⁴⁰⁸ These details inevitably contribute to the Chamber's concerns as to the

⁴⁰⁰ See Annex E.

⁴⁰¹ P-279-T-151, pp. 47 and 49-50; T-152, pp. 43-47.

⁴⁰² EVD-D02-00039: Photograph of Witness P-280; P-279-T-152, pp. 43-47.

⁴⁰³ P-280-T-161, pp. 70-71.

⁴⁰⁴ See Annex E.

⁴⁰⁵ See Annex E.

⁴⁰⁶ This refers to Intermediary 143. As the question of the credibility of Witnesses P-279 and P-280 is resolved on the basis of other factors than those referring solely to the involvement of this intermediary, the arguments presented by the parties in this regard are not addressed in this Judgment.

⁴⁰⁷ Prosecution's closing statement, T-336, pp. 73-75.

⁴⁰⁸ P-279-T-151, p. 47; T. 152, pp. 43-47.

possibility of collusion between Witnesses P-279 and P-280, who sought to conceal any connection between them.

183. In the Chamber's opinion, P-279's attitude of denial in court explained the difficulties he encountered in answering any of the questions put to him by the Defence teams. These difficulties bore no likeness to those experienced by other Prosecution witnesses. The Chamber noted over seventy prolonged silences in the transcripts of the examination of the witness. Without wishing to minimise the fact, as emphasised by the Prosecution, that this Witness is considered vulnerable,⁴⁰⁹ it is undeniable that P-279 proved all the more taciturn when confronted with his own insurmountable contradictions.

ii. Other testimonial evidence

184. D03-236, a person close to P-279, was called by both Defence teams to testify to P-279's activities in 2002-2003.⁴¹⁰

185. It is D03-236's opinion that P-279 made false statements when he claimed that he was abducted in Dele by a commander from Bedu-Ezekere, that he joined the *groupement* militia and that he took part in an attack.⁴¹¹ D03-236 stated that he fled to Dele in August 2002 on his way to Zumbe with other family members "[TRANSLATION] because he was afraid" as "[TRANSLATION] members of the UPC wanted to kill him".⁴¹² After the UPC soldiers had attacked this locality in December 2002, D02-236 purportedly sent his family members to Aveba,⁴¹³ whilst he remained behind in Zumbe for a few days in order to tend to his herd of goats⁴¹⁴ prior to heading for the bush.⁴¹⁵ After the UPDF soldiers left Ituri, he in

⁴⁰⁹ Prosecution Closing Brief, para. 786.

⁴¹⁰ See Annex E.

⁴¹¹ See Annex E.

⁴¹² See Annex E.

⁴¹³ See Annex E.

⁴¹⁴ See Annex E.

⁴¹⁵ See Annex E.

turn allegedly fled to Aveba,⁴¹⁶ where he claimed to have lived for three years⁴¹⁷ with his family members, including P-279.⁴¹⁸

186. The Prosecution argued that D03-236's testimony was implausible when he claimed never to have seen any combatants in Zumbe during his four-month stay there, despite having made claims to the contrary in a prior statement. In the Prosecution's opinion, his credibility was damaged when he stated that he had never seen a military camp in Zumbe, that he was unaware that Mathieu Ngudjolo was the leader and that he had never heard of the battle in Bogoro. It was also implausible, in the Prosecution's opinion, for D03-236 to have lived in Aveba for three years without ever noticing the military camp or hearing about the demobilisation site there. Finally, the Prosecution underscored that the Witness was lying when he maintained that he was unaware that P-279 had been relocated by the Court, as he admitted to having had dealings himself with officials from the Court on the subject.⁴¹⁹

187. The Chamber underscores, however, that D03-236 merely pointed out during the hearing that it was difficult to distinguish between combatants and civilians and that he had not stated that there were no combatants in Zumbe.⁴²⁰ Nevertheless, the Chamber concurs with the Prosecution that D03-236's statements were indeed surprising in many respects, notably with regard to life in Zumbe and in Aveba. It will assess the credibility of each of the above statements one by one should the need arise.

188. More importantly, the Chamber observed that Witness D03-236 was very guarded on the subject of militia activity in Aveba, causing it to consider with

⁴¹⁶ See Annex E.

⁴¹⁷ See Annex E.

⁴¹⁸ See Annex E.

⁴¹⁹ Prosecution Closing Brief, para. 790.

⁴²⁰ See Annex E.

circumspection any probative value to be attributed to the information provided by the witness regarding the life led by P-279 in 2002-2003.

c) Conclusion

189. Witness P-279's assertions regarding his presence within the ranks of the Zombe combatants at the time of the attack on Bogoro are, as previously noted, overly inaccurate and contradictory. Furthermore, his attitude of denial regarding his precise age and his relationship with P-280 affects the general credibility of his testimony. What is more, the Chamber notes that the testimony of D03-236, despite its relative probative value, further contributes to the doubts harboured by the Chamber as to his capacity to testify to the events in the case.

190. For all these reasons, the Chamber finds that it is not able to rely on the testimony of P-279 in this case.

3. P-280

a) Main subject areas covered by Witness P-280's testimony

191. Witness P-280 testified on 15, 16, 17, 21, 22, 23, 28 and 29 June 2010.⁴²¹

192. P-280 stated that he was born on 11 November 1990.⁴²² Were this date to be accurate, he would have been aged 12 years at the time of the attack on Bogoro. When shown a number of documents concerning his civil status during the hearing, the Witness himself expressed doubts as to his date of birth.⁴²³ In its Closing Brief, the Prosecution does not challenge the authenticity or contemporaneity of the documents showing that the witness would have in fact been older than 15 years at the time of the attack on Bogoro.⁴²⁴

⁴²¹ P-280-T-155-T-162.

⁴²² P-280-T-155, p. 16.

⁴²³ P-280-T-162, pp. 46-48.

⁴²⁴ Prosecution Closing Brief, para. 781.

193. It is the witness's testimony that he lived near Bunia until the fall of Governor Lompondo in August 2002,⁴²⁵ when he fled in the direction of Zumbé hill and was abducted during his flight by a commander from Bedu-Ezekere *groupement*.⁴²⁶

194. He was taken to Lagura camp, where he underwent military training that was frequently interrupted by fighting.⁴²⁷ During this training, he was taught how to fire a rifle and follow a plan of attack.⁴²⁸ He was also told repeatedly that it was necessary to fight against all Hema.⁴²⁹

195. The Witness described Lagura camp, providing details of the two underground prisons⁴³⁰ and the weapons depot.⁴³¹ He also drew a sketch of Zumbé village,⁴³² indicating the location of the airport, the market, the camp and the house of Mathieu Ngudjolo.⁴³³ According to P-280, Mathieu Ngudjolo was "[TRANSLATION] the most important person",⁴³⁴ "[TRANSLATION] the one with the biggest camp",⁴³⁵ or even "[TRANSLATION] the Chief of Staff".⁴³⁶

196. P-280 stated that the combatants would collect fetishes before each battle and that these were distributed with specific conditions of use which were to be respected.⁴³⁷ P-280 claimed that these conditions might vary according to the village targeted, adding that they were given "[TRANSLATION] the green light" whenever they attacked a Hema village.⁴³⁸

⁴²⁵ P-280-T-155, pp. 23 and 26; T-160, p. 66; T-161, pp. 68 and 70.

⁴²⁶ P-280-T-155, pp. 27 and 28; T-160, pp. 65 and 69; T-161, pp. 73-74.

⁴²⁷ P-280-T-155, p. 37; T. 160, p. 70.

⁴²⁸ P-280-T-155, pp. 32-33.

⁴²⁹ P-280-T-155, p. 38.

⁴³⁰ P-280-T-156, pp. 3-5.

⁴³¹ P-280-T-155, pp. 62-63.

⁴³² EVD-D03-00023: Sketch of Zumbé village provided by P-280 ("Sketch"); P-280-T-162, pp. 37-38.

⁴³³ P-280-T-162, pp. 39-40.

⁴³⁴ P-280-T-155, pp. 58 and 64.

⁴³⁵ P-280-T-158, p. 22.

⁴³⁶ P-280-T-156, pp. 9 and 11.

⁴³⁷ P-280-T-157, pp. 7-8 and 17-19.

⁴³⁸ P-280-T-157, pp. 18-19.

197. According to P-280, it was commander Kute who ordered the combatants to attack Bogoro.⁴³⁹ The witness stated that he was happy to follow the instructions given by the commander without knowing the plan of attack and that it was during the fighting that he realised Bogoro had been surrounded by the militia from Bedu-Ezekere *groupement* with the help of those from Walendu-Bindi *collectivité*.⁴⁴⁰

198. According to his account of the attack, it was difficult to tell combatants and civilians apart,⁴⁴¹ as the latter were armed⁴⁴² and he had been told to consider all Hema as the enemy.⁴⁴³

199. In addition to the attack on Bogoro, P-280 claimed to have taken part in the attacks on Mandro and Kasenyi.⁴⁴⁴

b) Analysis

200. The Prosecution and the Defence teams for Germain Katanga and Mathieu Ngudjolo disagreed on a major aspect of P-280's testimony which has an impact upon his very capacity to testify to the events in the case. The question arises as to whether the witness fled Dele in August 2002 to become a militia member within Bedu-Ezekere *groupement* or whether he fled his village in the month of May 2003 to seek temporary refuge in Aveba with his family.

i) Testimony of P-280

201. In its Closing Brief, the Prosecution submitted that the level of detail provided by P-280 shows "[TRANSLATION] an intimate knowledge" of Lagura camp, the military structure of the Bedu-Ezekere *groupement* combatants, the execution of the attack on Bogoro and its occupation by commander Yuda's

⁴³⁹ P-280-T-156, pp. 9 and 18-19.

⁴⁴⁰ P-280-T-157, pp. 22-23.

⁴⁴¹ P-280-T-160, p. 39; T. 162, p. 7.

⁴⁴² P-280-T-156, p. 39.

⁴⁴³ P-280-T-159, pp. 79-80.

⁴⁴⁴ P-280-T-156, p. 9.

group once the fighting had ceased. In addition, the Prosecution maintained that his confessions as to his participation in the crimes committed in Bogoro are an important indicator of the credibility of his testimony.⁴⁴⁵

202. The Chamber wishes to focus on the description provided by the witness of the functioning of the Bedu-Ezekere *groupement* militia and his account of the Bogoro battle. In addition to the level of detail he provided, his account is all the more plausible as it reflects the viewpoint of a low-ranking soldier with limited access to information. He claims to have merely crossed paths with Mathieu Ngudjolo without approaching him directly⁴⁴⁶ and to have participated in the fighting in Bogoro without any prior knowledge of the plan of attack.⁴⁴⁷ This information of relative importance could indeed be consistent with the witness's position within the militia. The Chamber was also particularly mindful of the witness's statements with regard to the crimes he claims to have himself committed during the fighting. Nevertheless, in view of the contradictions and inaccuracies noted within his testimony (which shall be clarified) raising serious doubts as to his actual presence in Zombe, and especially in on the day of the events, the Chamber does not consider that it may rely on the witness's testimony on these various points.

203. Unlike for the testimony of P-279, the Chamber does not intend to attach any particular importance to the contradictions noted in this witness's statements with regard to his date of birth. Note was taken that he endeavoured to foil the efforts by Counsel for the Defence to ascertain his precise age. He was reluctant to talk about his school attendance⁴⁴⁸ and was incapable of stating his current age or that of his younger brother.⁴⁴⁹ The fact remains that he seemed genuinely

⁴⁴⁵ Prosecution Closing Brief, para. 780.

⁴⁴⁶ P-280-T-158, pp. 34 and 41.

⁴⁴⁷ P-280-T-157, p. 22.

⁴⁴⁸ P-280-T-155, pp. 65-66.

⁴⁴⁹ P-280-T-160, pp. 79-81; T-161, pp. 24-25.

surprised when presented with various possible dates of birth, claiming that he would like to have an identity card issued in order to know his true date of birth.⁴⁵⁰

204. Nevertheless, the Chamber cannot ignore the often peculiar and contradictory nature of P-280's testimony. The witness did not recall the name of the commander who appointed him as a member of the military police,⁴⁵¹ or the names of those who led the parades, with the exception of Kute,⁴⁵² and had no recollection of the speeches given to the combatants on this occasion.⁴⁵³ P-280 also provided an extremely confused account of his demobilisation.⁴⁵⁴ His account of the manner in which he was turned away by CONADER is particularly impenetrable.⁴⁵⁵

205. Above all, with regard to his account of the Bogoro battle the Chamber notes major contradictions between his previous statements and his testimony in court. In his statement, the witness claimed that commander Kute passed himself off as a UPC guard in order to allow his men to access the enemy camp in silence and that the combatants then killed the UPC soldiers when they woke up. During the hearing, he claimed that the combatants had killed the inhabitants in their homes with bladed weapons before opening fire on the UPC soldiers and subsequently overrunning the camp. When asked to explain this contradiction, P-280 stated that he must have conflated several battles.⁴⁵⁶ In the Chamber's opinion, this response does not account for such a radical change in his account. In this regard, the Chamber notes that the witness described all the other battles in which he participated without ever mentioning the subterfuge employed by

⁴⁵⁰ P-280-T-162, pp. 46-48.

⁴⁵¹ P-280-T-155, pp. 45-46.

⁴⁵² P-280-T-155, pp. 39-40.

⁴⁵³ P-280-T-155, p. 40.

⁴⁵⁴ P-280-T-161, pp. 28-30; T-162, pp. 44-45.

⁴⁵⁵ P-280-T-162, pp. 51-52.

⁴⁵⁶ P-280-T-161, pp. 55-58.

commander Kute to introduce his soldiers into the enemy camp unbeknownst to its occupants.

206. Accordingly, great circumspection is essential to considering his testimony before the Chamber in the light of the confusing accounts and contradictions it contains. In particular, the contradiction noted between his prior statement and his in-court testimony with regard to the unfolding of the attack on Bogoro affects the apparent credibility of what initially appeared to be a plausible and measured account of the attack.

207. Finally, the Chamber is surprised at P-280's silence with regard to P-279,⁴⁵⁷ in view of the alleged relationship between them. Once again, the Chamber must consider the possibility of collusion between the two men, as discussed in the assessment of P-279's credibility.

Sketch of Zumbe drawn by P-280

208. At the behest of the Defence for Mathieu Ngudjolo, P-280 drew a map of Zumbe,⁴⁵⁸ on which he indicated the location of the airport, the market, the camp, the house of Mathieu Ngudjolo and the church.⁴⁵⁹

209. During the judicial site visit to the DRC, the Chamber was able to compare the sketch with the true situation on the ground. It found that it was difficult to place the airport at the location indicated by the witness.⁴⁶⁰ In the light of the Closing Briefs submitted by the parties, the Chamber finds it difficult to rely on P-280's claim that there was an airport in Zumbe.

210. In its Closing Brief, the Prosecution conceded that in assessing the credibility of P-280 the Chamber would need to bear in mind that his testimony in this regard was extremely vague. However, the Prosecution made it clear that

⁴⁵⁷ P-280-T-161, pp. 70-71.

⁴⁵⁸ EVD-D03-00023: Sketch.

⁴⁵⁹ P-280-T-162, pp. 39-40.

⁴⁶⁰ Judicial site visit report, para. 32.

this was only “[TRANSLATION] a peripheral detail” of his testimony and that the witness had merely stated that he had heard people say that this landing strip served as an airport.⁴⁶¹ Nevertheless, the Defence for Mathieu Ngudjolo considered this statement to be a major lie by the witness aimed at exaggerating the importance of Zombe camp in order to incriminate the Accused further and attracting the attention of the Prosecution with a view to being accepted into the Court’s protection programme.⁴⁶²

211. The Chamber recalls that P-280 claimed to have lived in Zombe before leaving Bedu-Ezekere *groupement*.⁴⁶³ The Chamber was therefore justified in expecting the witness to exhibit a good level of local knowledge of the locality. The description he provided should therefore be factored into the assessment of his credibility. Furthermore, P-280’s error in claiming the existence of an airport is more troublesome than the Prosecution cares to admit when juxtaposed with the excerpt from his 2007 statement, which was read out in court, in which he stated that a “[TRANSLATION] group from Zombe airport” attacked Bogoro alongside his own group.⁴⁶⁴ This reference to the existence of a “[TRANSLATION] group from Zombe airport” participating in the attack on Bogoro makes it impossible to consider the non-existence of any airport in Zombe as a mere “peripheral detail” of his testimony.

212. Aside from the issue of the existence of any airport in Zombe, the Chamber felt it necessary to examine the sketch in more general terms. According to the sketch of Zombe drawn by P-280, the military camp is located at the end of a road due west from the market, and the airport is to be found along another road due north from the same market. However, during the judicial site visit to Ituri, the Chamber noted that this representation of the

⁴⁶¹ Prosecution Closing Brief, para. 784.

⁴⁶² Closing Brief of the Defence for Mathieu Ngudjolo, para. 1146.

⁴⁶³ P-280-T-158, pp. 40-41; T-159, pp. 62-64; T-162, p. 44.

⁴⁶⁴ P-280-T-161, p. 48.

village of Zumbe was in fact more consonant with the topography of the village of Aveba. Confirmation of this view is easily found in a comparison of P-280's sketch with EVD-D02-00153, drawn by Witness D02-258 to describe Aveba, noting that as represented in the diagram, the locations of the market, the airport and the camp are one and the same.⁴⁶⁵

213. In the light of this analysis, the Chamber cannot rule out the possibility that the witness transposed what he had seen of Aveba to flesh out his description of Zumbe. The analysis of this sketch and the witness's claims to the existence of a "[TRANSLATION] group from Zumbe airport" can only leave the Chamber sceptical.

ii) Other testimonial evidence

214. Both the Defence for Germain Katanga and the Defence for Mathieu Ngudjolo called D03-340, a person close to Witness P-280, to testify to P-280's activities during 2002-2003.⁴⁶⁶

215. It is to be recalled that D03-340 stated that he had remained in Dele with P-280 until the Ugandans left Bunia in May 2003. Having sought refuge in Aveba for a period of three months, he allegedly returned to his village when French forces arrived in Bunia.⁴⁶⁷ Whilst in Aveba, he was taken in by the family of Witness D03-236, who had fled Dele as early as August 2002.⁴⁶⁸ According to D03-340, P-280 lived with him throughout the war, was never a member of the militia and did not take part in the attack on Bogoro.⁴⁶⁹

216. The Prosecution challenged the credibility of D03-340, claiming that it should be assessed in the light of the pressure he had undergone from his

⁴⁶⁵ See the topographical survey provided by the Registry for the Chamber's visit to Ituri. Judicial site visit report, p. 31.

⁴⁶⁶ See Annex E.

⁴⁶⁷ See Annex E.

⁴⁶⁸ See Annex E.

⁴⁶⁹ See Annex E.

community to provide exonerating testimony. The Prosecution recalled that it was unlikely that he had never seen Germain Katanga during his stay in Aveba although it was a small locality, and that he had lied in claiming that the Court had failed to inform him of P-280's relocation.⁴⁷⁰

217. D03-340's account is corroborated by the testimony of Witness D03-236, who confirmed that his family took in P-280's family in Aveba as from May 2003.⁴⁷¹ However, the fact remains that the respective families of these two witnesses lived in the same locality and had been on friendly terms for a long time.⁴⁷² In view of these close ties and the attendant risk of collusion, it is difficult for the Chamber to attach a high probative value to these two testimonies.

c) Conclusion

218. As previously noted, P-280's account of his presence within the ranks of the Zombe combatants at the time of the attack on Bogoro is excessively imprecise and contradictory. What is more, the Chamber cannot exclude the possibility that the witness transposed what he knew of Aveba to flesh out his description of Zombe. In addition, the Chamber notes that D03-340's account, though of relative probative value, further fuelled its doubts as to his capacity to testify to the events in this case. Finally, taken as a whole, the testimony of P-280 implicitly confirms D03-340's testimony that P-280 fled Dele for Aveba and never visited Bedu-Ezekere *groupement*.

219. For all these reasons, the Chamber finds that it is unable to rely on the testimony of P-280 in this case.

⁴⁷⁰ Prosecution Closing Brief, para. 783. See Annex E.

⁴⁷¹ See Annex E.

⁴⁷² See Annex E.

B. OTHER WITNESSES

1. P-28

a) Main subject areas covered by Witness P-28's testimony

220. Witness P-28 testified on 15, 16, 17, 18, 22, 23, 24 and 25 November 2010.⁴⁷³

221. According to P-28's testimony, he was born in 1989.⁴⁷⁴ On 24 February 2003, during the witness's alleged participation in the attack, he was therefore 14 years old. He specified that he is related to Germain Katanga's wife, Denise Zekuze, whom he also calls his sister.⁴⁷⁵

222. The witness stated that he had fled Bunia during the clashes preceding the fall of Governor Lompondo in August 2002. According to his account, he took refuge first in Oicha,⁴⁷⁶ then Singo,⁴⁷⁷ and finally in Avenyuma⁴⁷⁸ with members of his extended family.⁴⁷⁹

223. Whilst travelling between Avenyuma and Aveba, P-28 was allegedly abducted by the men of a local commander and forced to undergo military training in Bulandjabo camp.⁴⁸⁰ Managing to escape, he went to Aveba shortly before Germain Katanga's wedding.⁴⁸¹

224. Once in Aveba, P-28 allegedly joined Germain Katanga's combatants and became a member of his personal escort.⁴⁸² In this capacity, he allegedly accompanied Germain Katanga on several journeys within Walendu-Bindi

⁴⁷³ T. 216-T. 223.

⁴⁷⁴ P-28, T. 216, p. 23; P-28, T. 219, p. 62; P-28, T. 223, p. 6.

⁴⁷⁵ P-28, T. 217, p. 3.

⁴⁷⁶ P-28, T. 216, pp. 33-34; T. 219, pp. 36-37.

⁴⁷⁷ P-28, T. 216, p. 35.

⁴⁷⁸ P-28, T. 216, p. 43.

⁴⁷⁹ P-28, T. 216, p. 44.

⁴⁸⁰ P-28, T. 216, pp. 49 and 52; T. 219, p. 14.

⁴⁸¹ P-28, T. 219, pp. 14-15; T. 220, p. 66.

⁴⁸² P-28, T. 217, pp. 19-20; T. 221, pp. 44-47.

*collectivité*⁴⁸³ which the latter made in the capacity of “[TRANSLATION] number one chief of the FRPI combatants” according to the witness.⁴⁸⁴

225. As one of Germain Katanga’s escorts, P-28 claimed to have witnessed the preparations for the attack on Bogoro.⁴⁸⁵ Subsequently, he allegedly participated in the attacks on Bogoro⁴⁸⁶ and Mandro before being demobilised.⁴⁸⁷

226. With regard to Mathieu Ngudjolo, P-28 stated that Zumbe was his territory.⁴⁸⁸ He also stated that he had seen him in Bogoro after the fighting ended.⁴⁸⁹ According to the witness, Bogoro was attacked by FRPI, FNI and APC combatants⁴⁹⁰ and the attack on Mandro was launched by Zumbe combatants jointly with FRPI and APC combatants⁴⁹¹ and, still according to the witness, Zumbe was Mathieu Ngudjolo’s territory.⁴⁹²

b) Analysis

227. The Office of the Prosecutor and the Defence for Germain Katanga disagreed over several key aspects of P-28’s testimony which affect the witness’s capacity to testify to the facts in the case. Both parties accepted that P-28 left Bunia after the fall of Governor Lompondo, and that he took refuge in Oicha. However, they disagreed as to the date on which he arrived in Aveba and as to whether he was a member of the militia.

228. Indeed, the Prosecutor contended that P-28 was abducted in Kaswara by a commander from Walendu-Bindi and that he subsequently went to Aveba. It is alleged that he arrived there shortly before Germain Katanga’s wedding, which,

⁴⁸³ P-28, T. 217, p. 19.

⁴⁸⁴ P-28, T. 217, p. 13.

⁴⁸⁵ P-28, T. 217, pp. 34 *et seq.*

⁴⁸⁶ P-28, T. 217, pp. 37 and 50-55.

⁴⁸⁷ P-28, T. 218, pp. 23-26.

⁴⁸⁸ P-28, T. 218, p. 23.

⁴⁸⁹ P-28, T. 223, p. 33.

⁴⁹⁰ P-28, T. 217, pp. 34 and 38.

⁴⁹¹ P-28, T. 218, p. 23.

⁴⁹² P-28, T. 218, pp. 23-24.

in the Accused's own words, took place on 18 November 2002,⁴⁹³ which the Prosecutor did not contest. He stayed with a pastor for two days and then went to live with a commander from Aveba.⁴⁹⁴ It is the Prosecutor's view that P-28 was one of the Aveba combatants, and even one of the Accused's bodyguards. As such, he allegedly participated in the attack on Bogoro.⁴⁹⁵

229. According to the Defence for Germain Katanga, the witness left Oicha and travelled directly to Aveba in late January or early February 2003. The Defence therefore contested both P-28's alleged abduction by a Walendu-Bindi commander and the date of his arrival in Aveba.⁴⁹⁶ The Defence considers that, when the witness arrived in Aveba, he lived with a pastor for a long period of time.⁴⁹⁷ It is the Defence's view that P-28 was never a combatant and that his account describing the preparations for the attack on Bogoro, his participation in the fighting and his description of the attack on Mandro are pure fabrication.⁴⁹⁸

i) P-28's testimony

230. In its Closing Brief, the Prosecution submitted that the numerous details contained in the evidence given by P-28 constituted an important guarantee of his reliability and show that he had personal knowledge of the facts.⁴⁹⁹

231. The Chamber indeed notes that P-28 testified in detail to a certain number of facts. It recalls, however, that the final version of his account was provided only after several successive statements. During his testimony in court, P-28 made further corrections to his prior statements that he himself considered

⁴⁹³ D02-300, T. 316, p. 20.

⁴⁹⁴ Prosecution Closing Brief, paras. 185 and 701-703.

⁴⁹⁵ Prosecution Closing Brief, paras. 703-704.

⁴⁹⁶ Closing Brief of the Defence for Germain Katanga, paras. 154, 178-180, 190-192 and 233.

⁴⁹⁷ Closing Brief of the Defence for Germain Katanga, paras. 194-195.

⁴⁹⁸ Closing Brief of the Defence for Germain Katanga, para. 154.

⁴⁹⁹ Prosecution Closing Brief, paras. 763-765. The Prosecutor emphasised that P-28 and Defence Witness D03-88 both stated that the ammunition transported from Beni was contained in "[TRANSLATION] plastic bags". For the Prosecutor, not only can this detail "[TRANSLATION] not have been fabricated", but it demonstrates, on the contrary, that the witness was already in Aveba when Germain Katanga returned from his first journey to Beni in early December 2002.

necessary to make during his last statement. Admitting that he had first given Prosecution investigators an inaccurate account of the circumstances of his abduction, he explained that he had not been abducted on the way to school with three classmates,⁵⁰⁰ that he had not witnessed the abduction of children after school by the commander who allegedly abducted him,⁵⁰¹ and that he had also not witnessed an abortive escape attempted by his three classmates.⁵⁰²

232. According to P-28, his initial erroneous statements were attributable in part to an Office of the Prosecutor intermediary – Intermediary 183 – who allegedly asked him to alter his account.⁵⁰³ For the Prosecutor, this explanation is evidence of the witness’s sincerity and his willingness to tell the Chamber the truth.⁵⁰⁴ In contrast, it is the view of the Defence for Germain Katanga that he changed his version of the facts in October 2010, *viz.*, only several weeks before his appearance before the Chamber, when developments in *Lubanga* gave him to understand that the Defence was also carrying out inquiries of its own.⁵⁰⁵

233. The Chamber notes that in court, the witness was consistent in repeating explanations that he had furnished in his corrective statement of October 2010. Nonetheless, it noted a certain number of inconsistencies, of variable importance, in the witness’s testimony.

234. Some of the inconsistencies relate to his date of birth. During his examination-in-chief, P-28 stated that he was born in 1989.⁵⁰⁶ This date of birth appears on two reports from Songolo Institute which, according to the witness himself, were falsified to enable him to continue attending school.⁵⁰⁷ Attempting

⁵⁰⁰ P-28, T. 220, p. 70.

⁵⁰¹ P-28, T. 220, pp. 48 and 49.

⁵⁰² P-28, T. 220, p. 57.

⁵⁰³ P-28, T. 220, p. 49; T. 220, pp. 69-70; T. 221, pp. 20-21.

⁵⁰⁴ Prosecution Closing Brief, paras. 701 and 769.

⁵⁰⁵ Closing Brief of the Defence for Germain Katanga, para. 185.

⁵⁰⁶ P-28, T. 216, p. 23; T. 219, p. 62; T. 220, p. 35; T. 223, p. 6.

⁵⁰⁷ P-28, T. 220, pp. 20 and 24.

to clarify this point, the Defence put forward three alternative dates of birth based on three separate documents: the first of the dates appeared on P-28's voting card,⁵⁰⁸ indicating that the witness would therefore have been at least 15 years old in February 2003; the second date appeared on a report from the Congolese authorities, dated 2005,⁵⁰⁹ and on a court document from the Congolese judicial authorities.⁵¹⁰ P-28 would therefore have been 16 years old in February 2003; the final date appeared on the registers of two separate schools,⁵¹¹ indicating that P-28 would have been 14 years old in February 2003.

235. According to the Prosecutor, 1988 – the year which features on the two oldest school reports from Muzora Institute and the Nyankunde school – should be taken as the correct year since these documents were drawn up when P-28 was a child, and it was a family member who provided this date of birth to the school.⁵¹² Since P-28 said that his mother had given him another date of birth, which he provided in court,⁵¹³ the Chamber cannot accept the date advanced by the Prosecution. It seems unlikely to the Chamber that the witness's parents would have given the correct date of birth to the school authorities but lied to their son.

236. Whilst the Chamber is prepared to accept that, in the very specific context in which he lived, the witness did not know the precise date of his birth, it cannot fail to note that he appears to have altered his age according to circumstances. Thus, P-28 himself admitted to having falsified school reports in order to resume his studies⁵¹⁴ and also to having given erroneous information about his age in order to secure admission into the demobilisation programme for adults and

⁵⁰⁸ EVD-D02-00086: Voting card; P-28, T. 220, p. 29.

⁵⁰⁹ EVD-D02-00088: Record of proceedings; P-28, T. 220, pp. 30, 33-34.

⁵¹⁰ EVD-D02-00089: Court document; P-28, T. 219, p. 63; T. 220, p. 36.

⁵¹¹ EVD-D02-00090: Register, p. 14; P-28, T. 220, pp. 25-26; T. 221, pp. 4-5. EVD-D02-00085: Register, p. 3.

⁵¹² Prosecution Closing Brief, para. 698.

⁵¹³ P-28, T. 216, pp. 31-32.

⁵¹⁴ P-28, T. 220, pp. 20 and 24.

thus to benefit from certain material advantages specific to the demobilisation centre.⁵¹⁵

237. Nonetheless, the Chamber does not consider that such variations affect the witness's reliability. From the considerable amount of material in the case file, it seems to the Chamber that modifying birthdates is a fairly common practice in the DRC, particularly in relation to school enrolment, depending on whether the intention is to delay or accelerate a child's enrolment in school. The Chamber further highlights that P-28 is not an isolated case, since it is also acknowledged that two Defence witnesses, D02-161⁵¹⁶ and D02-259,⁵¹⁷ provided false information about their civil status in order to be accepted into the demobilisation programme. It is the Chamber's view, therefore, that P-28 is not answerable for the inconsistencies in his statements concerning his age as, locally, they are very widespread. Additionally, the Chamber finds that the witness demonstrated sincerity when he explained, *sua sponte*, that he had on two occasions furnished false information about his civil status.

238. However, the Chamber considers the discrepancy in P28's accounts concerning Germain Katanga's wedding more significant. In his statement of April 2006, he claimed that he had arrived in Aveba after the Accused's wedding, but during the hearing, he said that, to the contrary, he had participated in the marriage ceremony.⁵¹⁸ The Chamber further considers that this contradiction is inconsistent with the very reasoning in P-28's testimony: indeed, for him, this ceremony constituted – with reference to his description of his relationship to the couple – a significant personal event. It also represented a public event that was equally important for the Ngiti population from that locality, having further

⁵¹⁵ P-28, T. 218, pp. 27-28.

⁵¹⁶ See Annex E.

⁵¹⁷ See Annex E.

⁵¹⁸ P-28, T. 220, pp. 64 and 66.

regard to the witness's description of Germain Katanga as commander of the whole Walendu-Bindi *collectivité*.

239. Finally, the Defence for Germain Katanga challenged the very consistency of P-28's testimony, highlighting certain ambiguities, and even various contradictions relating⁵¹⁹ to the circumstances of his appointment to the post of bodyguard for that Accused,⁵²⁰ his participation in various unidentified attacks, which allegedly took place at a rate of two or three per week,⁵²¹ his participation also in several other battles on unspecified dates, allegedly in Nyankunde⁵²² and in Singo,⁵²³ and, lastly, his participation in alleged meetings in Aveba and/or Bavi between FRPI commanders before the attack on Bogoro.⁵²⁴

240. The Chamber is indeed surprised at the contradictions, identified in P-28's account, in relation to commander Adolphe. The contradictions relate both to the witness's appointment as bodyguard for Germain Katanga and the actuality of an alleged meeting in Bavi on the evening before the attack on Bogoro. In his statement of April 2006, P-28 stated that commander Adolphe appointed him head bodyguard for the Accused,⁵²⁵ that, together with commander Adolphe, he had accompanied Germain Katanga to Bavi, and that he had returned to Aveba in order to lead the troops from that locality to the gathering organised in Kagaba on the evening of 23 February 2003.⁵²⁶ During his testimony in court, P-28 maintained that it was, in fact, another commander who enabled him to become a bodyguard,⁵²⁷ that he went directly from Aveba to Kagaba without detouring to

⁵¹⁹ Closing Brief of the Defence for Germain Katanga, para. 231.

⁵²⁰ Closing Brief of the Defence for Germain Katanga, paras. 201-205.

⁵²¹ Closing Brief of the Defence for Germain Katanga, para. 200.

⁵²² Closing Brief of the Defence for Germain Katanga, para. 189.

⁵²³ Closing Brief of the Defence for Germain Katanga, paras. 197-199.

⁵²⁴ Closing Brief of the Defence for Germain Katanga, paras. 208-214.

⁵²⁵ P-28, T. 221, pp. 46-47.

⁵²⁶ P-28, T. 221, pp. 56-57.

⁵²⁷ P-28, T. 217, p. 20, T. 221, pp. 45-47.

Bavi,⁵²⁸ and that Adolphe was still only a soldier of lower rank and not a commander.⁵²⁹ Whilst not unaware of the difficulty of remembering in specific detail events that occurred a long time ago, the Chamber considers that the numerous changes in position are more redolent of contradictions than of mere confusion.

241. Finally, P-28's behaviour in court sometimes also surprised the Chamber. After listening carefully to his account of the fighting in Bogoro, the Chamber observed that he did not really enter into the detail of events that he claimed to have experienced personally during the attack.⁵³⁰ Admittedly, his restraint could be interpreted as proof of his difficulty in recalling painful memories and relating particularly traumatising events. However, this explanation does not explain why the witness did not deliver the account that would be expected from a combatant who had personally experienced the event, participated in it and taken risks. On the contrary, Witness P-28 provided a detached report of the fighting in Bogoro which did not appear to reflect the acts of someone who had directly participated in the attack, but rather seemed to be the recollection of a person who was far removed from the battle field, and who had, perhaps, heard numerous accounts of the events which took place at Bogoro on 24 February 2003.

ii) Other testimonial evidence

242. Firstly, the Chamber notes that the Prosecution did not call any witness who could corroborate the circumstances in which P-28 might have been abducted, his membership in the militia of Walendu-Bindi *collectivité*, or even, simply, his alleged arrival in Aveba in November 2002. The Chamber did note that P-28 identified Prosecution Witness P-219,⁵³¹ just as it noted the

⁵²⁸ P-28, T. 217, pp. 43-44; T. 222, p. 40.

⁵²⁹ P-28, T. 221, pp. 46-47.

⁵³⁰ P-28, T. 217, pp. 37 and 52-53; T. 218, pp. 16-18.

⁵³¹ P-28, T. 219, pp. 15-16.

Prosecution's submission that the fact that it was impossible to say when P-219 arrived in Aveba attests to his honesty and keenness to testify "[TRANSLATION] to the best of his knowledge".⁵³² However, it is difficult for the Chamber to ignore that P-219 did not mention the presence of P-28 amongst Germain Katanga's bodyguards whereas the two witnesses knew each other.

243. Conversely, the Chamber notes that several witnesses called by the Defence for Germain Katanga gave evidence on P-28's activities during this period. Chief amongst these is Witness D02-134, who notably stated that he had met P-28 in Oicha in October 2002,⁵³³ that P-28 had travelled to Aveba in February 2003⁵³⁴ before the celebration of his marriage,⁵³⁵ and lastly that P-28 had lived there with him as from May 2003.⁵³⁶ To this information about P-28's itinerary, he added that P-28 had never been a member of the militia.⁵³⁷ The Chamber notes, however, that D02-134 voiced his concern as to the possible deterioration of relations between the family of the Accused and his own because of the incriminating testimony of P-28.⁵³⁸ Such a statement inevitably leads the Chamber to view his testimony with caution.

244. Nonetheless, D02-134's account on this point was corroborated exactly by five other Defence witnesses. D02-129 thus stated that he had arrived in Aveba in January 2003 and that P-28 had arrived one month after him.⁵³⁹ He also stated that he had never heard that P-28 had joined the militia, only that he had been demobilised.⁵⁴⁰ D02-161 said that he had arrived in Aveba in September 2002 and

⁵³² Prosecution Closing Brief, para. 762.

⁵³³ See Annex E.

⁵³⁴ See Annex E.

⁵³⁵ See Annex E.

⁵³⁶ See Annex E.

⁵³⁷ See Annex E.

⁵³⁸ See Annex E.

⁵³⁹ See Annex E.

⁵⁴⁰ See Annex E.

that P-28 was not a combatant.⁵⁴¹ D02-136, for his part, stated that P-28 had not yet arrived in Aveba when he himself left the locality in early December 2002.⁵⁴² D02-259 maintained that P-28 had arrived in Aveba in early 2003⁵⁴³ and that he had never seen him carrying a weapon⁵⁴⁴ or wearing a uniform.⁵⁴⁵ Finally, D02-501 stated that P-28 had come to Aveba for the first time shortly before Witness D02-134's wedding in July 2003⁵⁴⁶ and that, to his knowledge, he was not a member of the militia.⁵⁴⁷

245. The Chamber emphasises that none of those Defence witnesses denied that P-28 could have been present in Aveba before the attack on Bogoro and that the majority of them recognise that he had special ties with one of the commanders from Aveba.

246. The Prosecution's Closing Brief emphasised that these Defence witnesses maintained close ties with Germain Katanga's extended family (D02-501 and D02-259) and with Germain Katanga's wife (D02-501, D02-129 and D02-134) when they were not close to the Accused himself (D02-136 and D02-161).⁵⁴⁸ It also stressed that they were close to one another.⁵⁴⁹ In the Prosecution's submission, this demonstrates that all those witnesses colluded in an attempt to disqualify P-28.⁵⁵⁰

247. For the Chamber, belonging to mutual circles of acquaintances including Germain Katanga could indeed weaken the corroborative evidence contained in the evidence of these Defence witnesses. The Chamber also intends to accord

⁵⁴¹ See Annex E.

⁵⁴² See Annex E.

⁵⁴³ See Annex E.

⁵⁴⁴ See Annex E.

⁵⁴⁵ See Annex E.

⁵⁴⁶ See Annex E.

⁵⁴⁷ See Annex E.

⁵⁴⁸ Prosecution Closing Brief, paras. 706-712.

⁵⁴⁹ Prosecution Closing Brief, para. 714.

⁵⁵⁰ Prosecution Closing Brief, para. 715.

only little probative value to the evidence of D02-136, who not only happens to be Germain Katanga's half-brother, but also acknowledged having been in contact more than four times, by telephone, with the Accused in 2009 and 2010.⁵⁵¹ The Chamber holds the same view regarding Witness D02-501, whose recollection appeared, in some respects, very defective throughout his testimony. Indeed, he stated that he did not know whether Germain Katanga was the leader of the combatants in Aveba between 2002 and 2003⁵⁵² and claimed that he had never heard of deliveries of weapons and ammunition to Aveba.⁵⁵³

248. The Chamber further noted that Germain Katanga had allegedly contributed financially to Witness D02-161's studies and this potentially affects this witness's credibility.⁵⁵⁴ However, it also notes that not all of this witness's testimony was in favour of the Accused; his testimony rang true, in particular when he provided specific details concerning the authority exercised by Germain Katanga,⁵⁵⁵ without excluding the possibility that he could have participated in the battle of Bogoro.⁵⁵⁶ In addition, contrary, for example, to the testimony of Witness D02-501, D02-161's testimony was not entirely dedicated to P-28. As a result, the Chamber considers that this witness should be considered credible, although his testimony can only be taken into account if it is corroborated.

249. For all that, and in the absence of any other supporting evidence, the Chamber considers it problematic to cast doubt on the impartiality of these Defence witnesses solely on the ground that they allegedly maintained or continue to maintain close relations with members of Germain Katanga's family. In this regard, the Chamber recalls that P-28 himself belongs to Germain Katanga's family circle and that it is therefore natural that he went to see persons

⁵⁵¹ See Annex E.

⁵⁵² See Annex E.

⁵⁵³ See Annex E.

⁵⁵⁴ See Annex E.

⁵⁵⁵ See Annex E.

⁵⁵⁶ See Annex E.

in Germain Katanga's entourage whilst he himself was living in Aveba. The Chamber also considers that the persons likely to testify meaningfully on P-28's activity in Aveba, which is a small place, were very likely to have ties with Germain Katanga. The Chamber therefore finds that it cannot hold against the Defence for Germain Katanga the inability to call witnesses who had had dealings with P-28 in Aveba but were not part of Germain Katanga's circles of acquaintances.

250. The Chamber took very seriously the risk of collusion on the part of Defence witnesses raised by the Prosecutor. Indeed, although it would appear to the Chamber that visiting the same place of worship, carrying out similar professional activities, and the existence of common friendships should dictate caution when evaluating testimony, those factors do not inevitably lead to the conclusion that the witnesses concerned were colluding with each other. Nevertheless, the Chamber compared the manner in which the witnesses expressed themselves in order to detect possible signs of collusion. At the end of this analysis, the Chamber found that their accounts of P-28's itinerary before arriving in Aveba were not similar. Thus, Witness D02-134 was able to state with precision that P-28 arrived in Aveba in February 2003. Witness D02-129, however, estimated a gap of one month between his own arrival in Aveba and P-28's arrival. Witness D02-136 said that P-28 had not yet arrived in Aveba by the time he himself left that location in December 2002. Given the range of points of view expressed, the Chamber does not consider itself able to accept the allegation of collusion.

c) Conclusion

251. In light of the foregoing, the Chamber cannot consider P-28 credible when he states that he was abducted by a commander from Walendu-Bindu, that he arrived in Aveba in November 2002, or that he was a combatant in the Aveba militia. This witness's testimony, put into perspective by the testimony given by

at least four of the abovementioned Defence witnesses, can only impel the Chamber to find that he is not credible on various points and that he could only have arrived in Aveba in early February 2003 at the earliest.

252. Since the Chamber accepts that the witness was present in Aveba before the attack on Bogoro and that the majority of the witnesses acknowledged that he had special ties with a commander from Aveba, the Chamber considers that P-28 could, however, provide useful information on the Aveba militia, its activities and its operations. The Chamber thus considers that it can rely on the parts of his testimony concerning the various aspects of life in Aveba in that he is an informed person who had taken refuge there from February 2003, had also had the opportunity to enter Germain Katanga's home and lived in close proximity to an Aveba commander.

253. It is therefore for the Chamber to determine in the judgment that it will render on Germain Katanga's liability which of the passages from P-28's testimony may be of interest to the Chamber with regard to Germain Katanga and their probative value.

254. With regard to P-28's testimony about Mathieu Ngudjolo, the Chamber will draw inferences from the findings above relating to the credibility of the witness, case by case, in the present judgment, depending on the subject matter. The Chamber wishes to make clear that nevertheless, as of now, it does not intend to take into consideration the testimony concerning Mathieu Ngudjolo's participation in the attacks on Bogoro and Mandro, since it does not consider credible the witness's statement that he was in the militia.

2. P-219

a) Main subject areas covered by Witness P-219's testimony

255. Witness P-219 testified on 15, 18, 19, 20, 21 and 22 October 2010.⁵⁵⁷ During the Prosecution investigation, the Prosecutor met with this witness on several occasions in order to record his statements. At the Chamber's request, the transcripts of P-219's interviews, carried out in February 2007 and November 2009, were summarised in the form of a statement in December 2009.⁵⁵⁸ Furthermore it appears that, in June 2009, Germain Katanga spoke with P-219 from the Detention Centre in The Hague. The telephone conversation was recorded, transcribed and translated by the competent services of the Registry.⁵⁵⁹

256. In his oral testimony, P-219 said that he had fled Bunia after the fall of Governor Lompondo in August 2002 and that he had gone to Aveba to find refuge.⁵⁶⁰ When he arrived in Aveba, he allegedly lived with a member of Germain Katanga's family.⁵⁶¹

257. He maintained that he had never been a member of the FRPI, but that he did have privileged access to the BCA camp⁵⁶² because he knew several commanders from that organisation personally. He further stated that his professional activity meant that he knew the various FRPI camps in Walendu-Bindi *collectivité* well.⁵⁶³

258. According to the witness's testimony, the FRPI was created in Beni immediately after the battle in Nyankunde⁵⁶⁴ and, following the killing of

⁵⁵⁷ T. 204-T. 209.

⁵⁵⁸ 17 December 2009, ICC-01/04-01/07-1727-Conf-Exp-AnxA.

⁵⁵⁹ EVD-D02-00077: Transcript.

⁵⁶⁰ P-219, T. 204, pp. 53-54.

⁵⁶¹ P-219, T. 204, p. 56.

⁵⁶² P-219, T. 204, pp. 54-56.

⁵⁶³ P-219, T. 205, pp. 21-25.

⁵⁶⁴ P-219, T. 205, p. 8.

commander Kandro, Germain Katanga succeeded him as “[TRANSLATION] head of the Ngiti army”.⁵⁶⁵

259. P-219 stated that, as a regular visitor to the BCA camp in Aveba, he witnessed the preparations for the attack on Bogoro. He spoke of flights carrying military supplies between Aveba and Beni⁵⁶⁶ and stated that a “*phonie*” existed between Aveba and Zumbe.⁵⁶⁷ He also claimed that Germain Katanga chaired a strategic meeting in Aveba on the eve of the attack on Bogoro.⁵⁶⁸

260. Still according to the witness’s testimony, he went, on foot, to Bogoro the day after the attack of 24 February 2003 and made the return journey back to Aveba the same day.⁵⁶⁹ Although he did not stay a long time there,⁵⁷⁰ he said that he was able to ascertain the extent of the crimes committed by the attackers.⁵⁷¹

261. Lastly, P-219 maintained that, on several occasions, he had been able to talk about the details of the attack on Bogoro with various combatants who had participated in the attack, including Witness D03-88,⁵⁷² commander Bahati de Zumbe, commander Yuda,⁵⁷³ and even Germain Katanga⁵⁷⁴ and Mathieu Ngudjolo.⁵⁷⁵

262. According to the witness, Bogoro was half-way between the FRPI forces led by Germain Katanga and the FNI forces led by Mathieu Ngudjolo.⁵⁷⁶ P-219 stated that Mathieu Ngudjolo, who was based in Zumbe, communicated

⁵⁶⁵ P-219, T. 205, p. 7; T. 207, p. 66.

⁵⁶⁶ P-219, T. 205, p. 42.

⁵⁶⁷ P. 219, T. 208, pp. 62-63.

⁵⁶⁸ P-219, T. 205, pp. 43-44.

⁵⁶⁹ P-219, T. 205, pp. 54-56; T. 208, pp. 66-69; T. 209, pp. 5-11.

⁵⁷⁰ P-219, T. 205, p. 56.

⁵⁷¹ P-219, T. 205, pp. 56-58, T. 206, p. 17; T. 207, pp. 19-21.

⁵⁷² P-219, T. 205, p. 62; T. 209, pp. 19-22.

⁵⁷³ P-219, T. 205, p. 63; T. 206, p. 48.

⁵⁷⁴ P-219, T. 205, pp. 62-63; T. 206, pp. 47-48.

⁵⁷⁵ P-219, T. 206, pp. 8-10.

⁵⁷⁶ P-219, T. 205, p. 47.

regularly with Germain Katanga using a “*phonie*”⁵⁷⁷ before the attack on Bogoro.⁵⁷⁸

263. Furthermore, at the time when a Uruguayan contingent was present, P-219 spoke with Mathieu Ngudjolo in Bunia.⁵⁷⁹ Mathieu Ngudjolo allegedly stated: “[TRANSLATION] Germain instigated the war in Bogoro, but he could not have won if I had not gone to help him. He could not have won because he had been repulsed several times”.⁵⁸⁰

264. Lastly, P-219 stated that Germain Katanga and Mathieu Ngudjolo participated in the attack on Mandro.⁵⁸¹

b) Analysis

265. The Prosecutor and the Defence for Germain Katanga disagreed over a key aspect of P-219’s testimony affecting the witness’s fitness to give evidence in the present case: was this witness credible when he stated that he arrived in Aveba after the fall of Bunia in August 2002?

266. The Prosecutor submitted that the amount of detail provided by P-219 shows that he was indeed in Aveba before the attack on Bogoro.⁵⁸² It is the view of the Defence for Germain Katanga that he did not arrive in Aveba until May 2003, after the re-conquest of Bunia by the UPC.⁵⁸³

i) P-219’s testimony

267. P-219 provided numerous details demonstrating that he was indeed living in Aveba before the attack on Bogoro. In this connection, the Prosecution noted that the witness described supplies of weapons and ammunition arriving in

⁵⁷⁷ P-219, T. 205, pp. 47-49.

⁵⁷⁸ P-219, T. 208, pp. 62-63.

⁵⁷⁹ P-219, T. 209, p. 42.

⁵⁸⁰ P-219, T. 206, pp. 8-10.

⁵⁸¹ P-219, T. 206, p. 18.

⁵⁸² Prosecution Closing Brief, para. 792.

⁵⁸³ Closing Brief of the Defence for Germain Katanga, paras. 243, 246 and 248.

Aveba from Beni,⁵⁸⁴ Doctor Adirodu's participation in the first delivery of weapons,⁵⁸⁵ the delivery of ammunition to Germain Katanga's house,⁵⁸⁶ the commanders "[TRANSLATION] of the FPRI" who travelled to Aveba to obtain supplies of weapons and ammunition,⁵⁸⁷ and lastly, an incident involving commander Kisoro in February 2003.⁵⁸⁸

268. According to the Prosecution, those various events, which could all prove that P-219 was present in Aveba before the attack on Bogoro, constitute evidence which is all the more reliable as some of the information was confirmed by Witness P-28 and other information by Germain Katanga himself. P-28's testimony did confirm the delivery of ammunition and weapons to Aveba from Beni before the attack on Bogoro, the transportation of weapons and ammunition to Germain Katanga's house and the journey of commanders to Aveba to collect weapons and ammunition. As for Germain Katanga, his testimony in court confirmed that the incident involving commander Kisoro in February 2003 took place, and also confirmed the presence of Dr Adirodu on one of the flights bringing supplies from Beni.⁵⁸⁹

269. For the Chamber, the various aspects of P-219's account tend to show that the witness could indeed have been a direct observer of the events that took place in Aveba between September 2002 and February 2003. It however notes that the extent of corroboration between P-219, P-28 and Germain Katanga was not perfect and that the Prosecution had itself mentioned this in its Closing Brief.⁵⁹⁰ Indeed, P-219 disagreed with P-28 over the name of the airline which flew to Aveba from Beni, and the date that he gave for Dr Adirodu's alleged

⁵⁸⁴ Prosecution Closing Brief, para. 792.

⁵⁸⁵ Prosecution Closing Brief, para. 792.

⁵⁸⁶ Prosecution Closing Brief, para. 792.

⁵⁸⁷ Prosecution Closing Brief, para. 794.

⁵⁸⁸ Prosecution Closing Brief, para. 793.

⁵⁸⁹ Prosecution Closing Brief, paras. 792-794.

⁵⁹⁰ Prosecution Closing Brief, paras. 792-794.

journey to Aveba is inconsistent with the date given by Germain Katanga. The Chamber however recalls that the events date from more than ten years ago, which could explain the minor discrepancies.

270. However, P-219's retraction of his account on several occasions during his testimony leads the Chamber to question whether he actually could have been a direct observer of the events he reported. The Chamber has thus examined three significant inconsistencies that exist between his prior statement and his testimony in court; all three of the inconsistencies throw into doubt the exact circumstances in which he found out about the information he described.

- The preparations for the attack on Bogoro: citing a prior statement given by the witness, the Defence for Germain Katanga⁵⁹¹ noted that P-219 had claimed that he had been present at a planning meeting which took place on the evening before the attack on Bogoro, before retracting this in court, stating that he had only learnt that the meeting took place following a conversation with a man called Oudo Jackson.⁵⁹² P-219 therefore initially presented himself as being a direct witness to that meeting before later saying that he had only learnt that the meeting took place through hearsay.

- Communications between Aveba and Zumbe: in the same statement, the witness had said that he heard Germain Katanga inform the Lendu from Zumbe of the Bogoro attack via "*phonie*". At the hearing, he changed his testimony, maintaining that he had simply heard of the existence of regular communication between Aveba and Bedu-Ezekere *groupement*, without, however, being in a position to attest to their exact content.⁵⁹³

The Chamber finds that the witness's testimony at the hearing was much

⁵⁹¹ Closing Brief of the Defence for Germain Katanga, paras. 270-275.

⁵⁹² P-219, T. 208, pp. 55-57.

⁵⁹³ P-219, T. 208, pp. 62-63.

more general than his earlier statement, which was much more specific. The Chamber therefore must consider whether the witness's account of communications exchanges between Zombe and Aveba faithfully reflect the situation at the material time.

- Germain Katanga's participation in the battle of Mandro: in one of his prior statements, P-219 had indicated that he had seen Germain Katanga leave for Mandro. At the hearing, to the contrary, he stated that he had not seen him leave for this attack. Questioned about this contradiction, he replied that the village of Aveba was small enough for everyone to be aware that Germain Katanga had left for Mandro.⁵⁹⁴ Even if this latest version should be accepted, the change in his statements, as above, leads the Chamber once again to question the circumstances in which P-219 found out the information that he reported and his capacity to describe it.

271. It therefore appears that on several occasions during his testimony, P-219 modified or attenuated the accounts he had provided in prior statements, either presenting as hearsay what he had initially claimed to have witnessed, or declining to provide concrete details about matters that he observed before the attack on Bogoro.

272. Over and beyond the changes between his various accounts, several aspects of P-219's testimony seem highly implausible, reinforcing the doubts harboured by the Chamber about the veracity of some of his statements. Thus, it would seem difficult to credit the witness's claim that on the day after the attack on Bogoro, he covered around one hundred kilometres – the distance of a return journey between Bogoro and Aveba – on foot in one day alone, despite a state of health likely to affect his mobility.⁵⁹⁵ Taking into account the particularly difficult

⁵⁹⁴ P-219, T. 209, p. 23.

⁵⁹⁵ P-219, T. 208, p. 68; T. 209, pp. 5-10.

terrain of that region, which the Chamber noted when it visited the area, such a return journey would seem extremely difficult, or even impossible, to complete in such a short period of time. In addition, the Chamber was also surprised that the witness could have met such a large number of commanders during the very short time he spent in Bogoro on that day.⁵⁹⁶ The Chamber was further surprised that he was the only witness to mention the presence of defiled corpses and human remains on prominent display.⁵⁹⁷ The Chamber can, of course, accept that a witness might be telling the truth even if he is reporting an event which seems doubtful when considered in relation to all the evidence in the case file. However, the accumulation in P-219's account of such extraordinary events, mentioned by him alone, throws into serious doubt his claim that he travelled to Bogoro.

ii) Other testimonial evidence

273. Several witnesses broached the subject of P-219's presence in Aveba and the period in which he had allegedly arrived there. D02-134 claimed that P-219 was, like him, part of a group of persons who had fled Bunia in May 2003.⁵⁹⁸ D02-161, who had lived in Aveba since September 2002, stated that P-219 had arrived in Aveba approximately three months after the battle of Bogoro, when everyone was fleeing Bunia, and that he shared accommodation with P-219.⁵⁹⁹ D02-228 also maintained that P-219 had arrived in Aveba after the attack on Bunia, on 12 May 2003.⁶⁰⁰ D02-129 stated that he had not seen P-219 come to Aveba before May 2003.⁶⁰¹ D03-11 learnt that P-219, who knew one of his family members well, was in Bunia during the proceedings of the Ituri Pacification Commission, which started work in April 2003.⁶⁰² Among the Prosecution witnesses, only P-28 stated

⁵⁹⁶ P-219, T. 205, pp. 58-59; T. 209, pp. 18-19.

⁵⁹⁷ P-219, T.206, p. 17; T. 207, pp. 16-17.

⁵⁹⁸ See Annex E.

⁵⁹⁹ See Annex E.

⁶⁰⁰ See Annex E.

⁶⁰¹ See Annex E.

⁶⁰² See Annex E.

that he had seen P-219 in Aveba, but he also admitted that he did not know whether P-219 had arrived in Aveba before or after the battle of Bogoro.⁶⁰³

274. The Chamber has previously made a finding on the credibility of D02-134 and D02-161 during the review of Witness P-28's credibility. Regarding D02-161, the Chamber asserts its finding that the witness is credible but that his proximity to Germain Katanga requires circumspection in assessing the probative value of his testimony. However, it considers that the grounds for doubting D02-134's testimony concerning P-28's itinerary had no foundation in this instance. Indeed, although D02-134 stated that P-28's testimony was likely to cause problems between him and Germain Katanga's family, it does not appear that the same could have been the case with P-219's family members, since he did not allege close relations with the latter. Furthermore, the Chamber considered Witnesses D03-11 and D02-228 reliable on that aspect of their testimony.

275. Although the Chamber accepts that the finding of a close relationship between Germain Katanga and a Defence witness could possibly raise doubts as to the witness's sincerity, it would also emphasise that the corroboration offered by the Defence for Germain Katanga, which called five witnesses who were able to testify about the date of P-219's arrival in Aveba, only reinforces its opinion on that point. As for the risk of collusion between the various Defence witnesses, the Chamber notes that Witnesses D02-228 and D03-11, who were held in prison in Kinshasa before coming to give evidence in The Hague, could not, *a priori*, have conferred with Germain Katanga's relatives on that issue in an attempt to discredit P-219's testimony.

276. It must therefore be acknowledged that the testimonies of Witnesses D02-129, D02-134, D02-161, D02-228 and D03-11 are consonant in that P-219 did not arrive in Aveba before the attack on Bogoro.

⁶⁰³ P-28, T. 219, pp. 15-16.

277. However, the Chamber accepts that this witness's proximity to various Ngiti commanders could have provided him with useful information about the operations of the Walendu-Bindi *collectivité* militia.⁶⁰⁴ Given the impossibility of determining whether the witness's description relates to the militia's activities before or after the attack on Bogoro, however, the Chamber will not rely on the witness's testimony on that point.

Conversations with various persons

278. Ultimately, the issues which may be analysed independently of P-219's arrival date in Aveba are restricted to the conversations that he could have had with various Lendu and Ngiti commanders in the four following circumstances: a conversation which allegedly took place with Germain Katanga about the attack on Bogoro, date unknown;⁶⁰⁵ a conversation which allegedly took place with Mathieu Ngudjolo on the respective liability of both Accused at the time when the Uruguayan contingent was in the area;⁶⁰⁶ a conversation which he allegedly had with commander Yuda about the crimes that the latter had allegedly committed in Bogoro, date unknown;⁶⁰⁷ and lastly, a conversation that allegedly took place with commander Bahati de Zumbe on his own participation in the attack on Bogoro and on Germain Katanga's presence during the fighting, date also unknown.⁶⁰⁸

279. Since the Chamber considers P-219's alleged journey to Bogoro on 25 February 2003 to have been highly unlikely, it has also excluded the conversation that the witness claimed to have with D03-88 during that visit.⁶⁰⁹

⁶⁰⁴ P-219, T. 204, pp. 54-57.

⁶⁰⁵ P-219, T. 205, pp. 62-63; T. 206, pp. 47-48.

⁶⁰⁶ P-219, T. 206, pp. 8-10; T. 209, p. 42.

⁶⁰⁷ P-219, T. 205, pp. 63.

⁶⁰⁸ P-219, T. 205, p. 63; T. 209, p. 24.

⁶⁰⁹ P-219, T. 205, p. 62; T. 209, pp. 20-22.

280. For the Chamber, those conversations should be considered in the light of the conversation that P-219 held with Germain Katanga when the latter was incarcerated at the Detention Centre in The Hague. However, P-219's record of his conversation with Germain Katanga is inconsistent with the recording thereof which was played in court. As the Defence for Germain Katanga noted, the Accused had indeed neither cried nor begged P-219 to come to give false testimony before the International Criminal Court, as P-219 claimed.⁶¹⁰ It is the Chamber's view that this inaccurate account demonstrates that P-219 had no scruples about modifying both the content and the tone of a conversation. Accordingly, the Chamber does not consider itself able to accept the conversations that the witness claimed to have had with various commanders who allegedly participated in the attack on Bogoro.

c) Conclusion

281. The anomalies or even contradictions noted in P-219's account, when juxtaposed with the statements of the above-mentioned five Defence witnesses, constitute material which leads the Chamber to the finding that P-219 is not credible when he states that he arrived in Aveba before the attack on Bogoro.

282. Additionally, the Chamber notes that on several occasions the witness displayed an inability to provide an accurate account of events as he experienced them; either he claimed to be a direct witness of an event that, in reality, was reported to him by others, or he exaggeratedly dramatised certain aspects of his account, or he modified the facts constituting the event.

283. For all these reasons, it is the Chamber's view that it cannot rely on this witness's testimony in the present case.

⁶¹⁰ Office of the Prosecutor, "Prosecution's Request seeking temporary prohibition of contacts between Germain Katanga and the outside; post-factum analysis of telephone conversations and immediate temporary exclusion of an investigator", 23 December 2009, ICC-01/04-01/07-1739 with *ex parte* confidential annexes (DRC-OTP-1052-0141).

3. P-317

a) Main subject areas covered by Witness P-317's testimony

284. Witness P-317 gave evidence before the Chamber on 6, 7, and 8 December 2011.⁶¹¹ She stated that she had arrived in the DRC in December 2002 to set up the Investigations Unit of the MONUC Human Rights Division.⁶¹² In the witness's view, the aim of those investigations was to establish the truth and to pave the way for justice, commencing with Congolese justice.⁶¹³

285. As part of her duties, P-317 first wrote an interim report on the situation in Ituri on 20 June 2003⁶¹⁴ and then an official report addressed to the Security Council on 16 July 2004.⁶¹⁵ One of the nine tasks carried out during the course of this investigation, which took place from 24 March to 7 April 2003, had been commissioned precisely following the attack on Bogoro on 24 February 2003.⁶¹⁶

286. During her investigations, P-317 learnt from those in charge at the UPDF that the forces which had been based in the area of Bogoro were under the command of Mathieu Ngudjolo.⁶¹⁷ Furthermore, the Ugandan authorities allegedly took care to seek authorisation to enter Bogoro from Mathieu Ngudjolo so that the witness could travel there with her team.⁶¹⁸

287. P-317 stated that, having arrived in Bogoro on 26 March 2003, at approximately 10 a.m., she stayed a little less than an hour there⁶¹⁹ and was able to meet with commander Dark for around half an hour.⁶²⁰ Commander Dark

⁶¹¹ T. 228-T. 230.

⁶¹² P-317, T. 228, p. 10; T. 229, pp. 35-37.

⁶¹³ P-317, T. 229, pp. 15-16.

⁶¹⁴ P-317, T. 228, pp. 50 -52; EVD-OTP-00205: MONUC interim report on the events in Ituri.

⁶¹⁵ P-317, T. 228, pp. 47-50; EVD-OTP-00285: MONUC report on the events in Ituri.

⁶¹⁶ P-317, T. 228, pp. 21-22; T. 229, pp. 37-38.

⁶¹⁷ P-317, T. 228, p. 26.

⁶¹⁸ P-317, T. 228, pp. 25-26.

⁶¹⁹ P-317, T. 228, p. 26.

⁶²⁰ P-317, T. 228, pp. 28 and 30-31; T. 229, pp. 53-55.

allegedly informed her that he was in charge of the Lendu forces from Bogoro and that Germain Katanga was his superior.⁶²¹

288. Lastly, P-317 mentioned that, on 4 April 2003, she had approached Mathieu Ngudjolo at the end of a meeting of the Pacification Commission, which had been held behind the Centre Hellenique in Bunia. At Mathieu Ngudjolo's request, they met in another area of the town at around 7 p.m.⁶²² During the discussion which allegedly ensued, Mathieu Ngudjolo confirmed to the witness that he had organised the attacks on Bogoro and Mandro.⁶²³

b) Analysis

289. P-317's testimony seemed very consistent. She expressed herself with authority and demonstrated much aplomb and ease during both the examination-in-chief and the Defence teams' cross-examinations.

290. In the view of the Defence for Mathieu Ngudjolo, it was inconceivable that the Ugandan authorities could have advised approaching Mathieu Ngudjolo for authorisation to enter Bogoro.⁶²⁴ Similarly, the Defence for Mathieu Ngudjolo contested that a meeting took place between the Accused and P-317 in Bunia and the confessions that he allegedly made concerning his role in organising the attacks on Bogoro and Mandro.⁶²⁵

291. The Chamber has no reason to doubt the objectivity and sincerity of the witness, who is an outsider to the conflict and lacks evidence indicating any bias whatsoever on her part against Mathieu Ngudjolo.

292. The Chamber therefore has no reason to doubt that a conversation took place between P-317 and Mathieu Ngudjolo, during which the latter allegedly

⁶²¹ P-317, T. 228, pp. 29 and 31.

⁶²² P-317, T. 228, p. 43; T. 230, p. 32.

⁶²³ P-317, T. 228, p. 44.

⁶²⁴ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 179 and 362; Oral Closing Statement, Defence for Mathieu Ngudjolo, T. 340, pp. 25-26.

⁶²⁵ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 218-221.

made the statements that the witness recorded in her report and then recalled subsequently during her testimony in court. The Chamber does not doubt the credibility of the witness; at the same time, it does not consider that it must make a finding at this stage of the judgment on the probative value of the statements made by the Accused.

293. The investigation report written by P-317 is entitled “Special report on the events in Ituri, January 2002-December 2003”.⁶²⁶ P-317 explained clearly the methodology adopted by her team to carry out its investigation, making considered and knowledgeable comments on certain parts of her report.

294. It is the Chamber’s view that P-317’s report provides useful information on the events that took place in Ituri at the time. With respect to the components of any investigation into human rights violations, she emphasised that she only included information directly concerning the attack on Bogoro when it was corroborated by other sources. The witness herself stated,⁶²⁷ and the Chamber wishes to emphasise, that conducting an investigation into human rights violations is not subject to the same rules as those for a criminal investigation. Reports are prepared in a non-adversarial manner; they are essentially based on oral testimony, sometimes derived from hearsay, and the identity of sources is always redacted.

c) Conclusion

295. It is the Chamber’s view that P-317 is credible and that it can therefore rely on her testimony in the present case.

296. The Chamber specifies that excerpts from the report on human rights violations which might be mentioned in the judgment will be included on the

⁶²⁶ EVD-OTP-00285: MONUC report on the events in Ituri.

⁶²⁷ P-317, T. 228, p. 15.

proviso that the information relating directly to the events of Bogoro has been corroborated beforehand.

4. D03-88

a) Main subject areas covered by Witness D03-88's testimony

297. Witness D03-88 testified on 26, 29 and 30 August 2011; on 1 September 2011; from 5 to 9 September; and lastly, on 12 September 2011.⁶²⁸ He stated that he was the customary chief of Bedu-Ezekere *groupement* between 2001 and 2005.⁶²⁹

298. Although he was called by the Defence for Mathieu Ngudjolo, it should be recalled that D03-88 had met the Office of the Prosecutor on three occasions, firstly in Bunia in 2009,⁶³⁰ then in Entebbe, in Uganda, between 19 and 21 March 2009,⁶³¹ and lastly during a visit to Zombe on 10 July 2009,⁶³² when he met the Court's Prosecutor, Mr Moreno-Ocampo.

299. According to the witness, numerous persons displaced by the war allegedly left their home localities to take refuge in Zombe, in Bedu-Ezekere *groupement*,⁶³³ and he stated that Zombe was attacked every day, morning and afternoon.⁶³⁴ During the last attack, the UPC and UPDF allegedly left behind numerous anti-personnel mines.⁶³⁵

300. The witness testified that the group of youths in charge of self-defence for Bedu-Ezekere *groupement* had more than 500 members,⁶³⁶ but that there was no

⁶²⁸ T. 299-T. 308.

⁶²⁹ D03-88, T. 299, p. 13; T. 303, pp. 3-4.

⁶³⁰ D03-88, T. 302, pp. 17-18.

⁶³¹ D03-88, T. 302, p. 61; T. 308, p. 10.

⁶³² D03-88, T. 299, p. 19; T. 303, p. 4; T. 308, p. 10.

⁶³³ D03-88, T. 299, p. 43; T. 303, p. 21.

⁶³⁴ D03-88, T. 299, p. 49.

⁶³⁵ D03-88, T. 299, pp. 50-52 and 61.

⁶³⁶ D03-88, T. 307, p. 33.

military camp⁶³⁷ or modern method of communication.⁶³⁸ He stated that some of the youths already had military experience and were thus in a position to provide rudimentary training to the others on the use of firearms.⁶³⁹ The witness maintained that he had not heard of youths under the age of 15 years carrying weapons⁶⁴⁰ and he considered that the investigators had in all likelihood mistaken the Lendu for children because of their small stature.⁶⁴¹

301. Following the fall of Governor Lompondo [August 2002], D03-88 allegedly invited Mathieu Ngudjolo to Zombe to lend medical assistance.⁶⁴² According to the witness, Mathieu Ngudjolo was not the leader of the group of youths,⁶⁴³ and was not a particularly important figure in the *groupement*, nor was he venerated by the whole population of Bedu-Ezekere,⁶⁴⁴ although he did command a certain amount of respect because of his level of education and his status as a nurse.⁶⁴⁵

302. At the invitation of the RCD-ML authorities,⁶⁴⁶ the witness allegedly went to Beni in late 2002 accompanied by three other persons from Zombe.⁶⁴⁷ On his journey, he spent between one and two weeks in Aveba,⁶⁴⁸ where he allegedly stayed with Germain Katanga.⁶⁴⁹ D03-88 stated that in Aveba, the members of his delegation had participated in the writing of a letter intended to alert

⁶³⁷ D03-88, T. 300, p. 53.

⁶³⁸ D03-88, T. 300, pp. 60-61.

⁶³⁹ D03-88, T. 305, pp. 33-34.

⁶⁴⁰ D03-88, T. 307, pp. 6-7.

⁶⁴¹ D03-88, T. 300, p. 58.

⁶⁴² D03-88, T. 301, pp. 9 and 27.

⁶⁴³ D03-88, T. 306, p. 70.

⁶⁴⁴ D03-88, T. 305, pp. 65-68.

⁶⁴⁵ D03-88, T. 305, pp. 65-66.

⁶⁴⁶ D03-88, T. 301, p. 36.

⁶⁴⁷ D03-88, T. 301, p. 32.

⁶⁴⁸ D03-88, T. 301, p. 40; T. 304, p. 37.

⁶⁴⁹ D03-88, T. 304, p. 40.

the Congolese government to the difficulties faced by the Lendu in Djugu territory.⁶⁵⁰

303. D03-88 stated that he then left for Beni in the company of Germain Katanga⁶⁵¹ but that unlike Germain Katanga, he did not attend meetings held for a military purpose.⁶⁵² He allegedly, however, learnt that the “council” had taken the decision to cut the supplies provided by Uganda for the UPC by taking control of Bogoro.⁶⁵³

304. Having returned to Zombe with 12 sacks of ammunition, each containing 100 bullets,⁶⁵⁴ the witness allegedly prohibited the population of Zombe from taking part in the attack on Bogoro.⁶⁵⁵ Although he accepts that perhaps certain “bandits” disobeyed him,⁶⁵⁶ he maintained that Mathieu Ngudjolo did not participate in the attack launched against Bogoro.⁶⁵⁷

b) Analysis

305. D03-88 led Bedu-Ezekere *groupement* from 2001 to 2005 and, in the view of the Defence for Mathieu Ngudjolo, he can therefore be considered a particularly authoritative voice when it comes to giving evidence on the *groupement's* operations and the events that took place there between August 2002 and March 2003.⁶⁵⁸

306. The Chamber notes that the Prosecution expressed doubts over the reliability of D03-88's testimony concerning Mathieu Ngudjolo's liability, but recognised that the witness had provided useful information on Germain

⁶⁵⁰ EVD-D03-00098: Letter to the President of DRC-Kis/ML in Beni (“letter of complaint”); D03-88, T. 300, pp. 51-52; T. 301, pp. 32, 41 and 46.

⁶⁵¹ D03-88, T. 304, p. 48.

⁶⁵² D03-88, T. 301, pp. 57-58.

⁶⁵³ D03-88, T. 306, p. 28.

⁶⁵⁴ D03-88, T. 301, pp. 61 and 63.

⁶⁵⁵ D03-88, T. 300, pp. 62-63; T. 306, pp. 25-29.

⁶⁵⁶ D03-88, T. 300, p. 63.

⁶⁵⁷ D03-88, T. 305, pp. 61-62.

⁶⁵⁸ Closing Brief of the Defence for Mathieu Ngudjolo, para. 239.

Katanga's liability. In a summary of the Prosecution Closing Brief, the Prosecutor stated that D03-88 had "[TRANSLATION] provided credible information about Katanga, but his testimony about Ngudjolo is biased".⁶⁵⁹ The Prosecution recalled that the witness knew the Accused very well and that he defended him openly.⁶⁶⁰

307. In particular, the Prosecutor maintained that D03-88 lied when he stated that, on the day of the attack on Bogoro, he ordered the youths of Zumbe not to join the fighting, when he had previously indicated that the location of the battlefield was uncertain.⁶⁶¹ The Prosecutor also recalled that telephone contact took place between D03-88 and Mathieu Ngudjolo from the Detention Centre, which, in his view, demonstrated their collusion and that D03-88's objective was to protect the Accused.⁶⁶²

308. The Chamber notes that, throughout his testimony, D03-88 appeared quite natural, consistent and specific, quickly establishing the limits of his knowledge when answering questions that did not directly deal with Mathieu Ngudjolo's liability or the position that he held during the period prior to 24 February 2003. This was the case, for example, for questions relating to his journey to Beni, the existing structures in Walendu-Bindi and Bedu-Ezekere and the dynamic of relations between the Lendu and the Hema.

309. On the other hand, D03-88 appeared much more evasive, often replying in the form of questions, and sometimes even appearing to be on the defensive when it came to answering questions that directly involved Mathieu Ngudjolo, or even himself. Thus, he expressed directly to the Chamber his impression that he was "[TRANSLATION] on trial" throughout his testimony.⁶⁶³ Whilst providing details on his position as chief of Bedu-Ezekere *groupement* and on the contacts

⁶⁵⁹ Prosecution Closing Brief, para. 363.

⁶⁶⁰ Prosecution Closing Brief, para. 363.

⁶⁶¹ Prosecution Closing Brief, para. 363.

⁶⁶² Prosecution Closing Brief, para. 363.

⁶⁶³ D03-88, T. 306, p. 18.

that he had with commanders passing through Zumbe, or during his own travels, he also maintained that “[TRANSLATION] military affairs did not interest him at all.”⁶⁶⁴

310. More fundamentally, D03-88 wished to recall that whilst the Prosecutor of the Court was in Zumbe, one of his objectives was to “[TRANSLATION] tell the Prosecutor, in the presence of the whole population, that Ngudjolo was not in Bogoro”,⁶⁶⁵ a statement that he repeated numerous times, demonstrating a strong desire that his testimony convince the Chamber.⁶⁶⁶

311. Relying on a prior statement made by the witness, the Prosecutor attempted to determine whether Mathieu Ngudjolo had communicated with him regularly from the Detention Centre in The Hague. D03-88 confirmed that the Accused had called him in 2009 regarding a vehicle accident, but he denied having been in contact with him since.⁶⁶⁷ On this point, whilst noting the apparent good faith of D03-88 when he answered the question put to him by the Prosecution,⁶⁶⁸ the Chamber would emphasise the defensive attitude that he adopted when he stated that he had had no contact with Mathieu Ngudjolo.⁶⁶⁹ Examined on the same subject, Mathieu Ngudjolo also admitted that a telephone call had taken place between him and the witness in 2009, and he then stated that he did not remember having any further conversations with him.⁶⁷⁰ The Chamber noted however, that the Accused also replied with irritation to the Prosecutor’s questions concerning contact made with Witness D03-88.⁶⁷¹ In the Chamber’s view, a degree of caution is therefore required, given the behaviour demonstrated by both the witness and the Accused.

⁶⁶⁴ D03-88, T. 306, p. 71.

⁶⁶⁵ D03-88, T. 300, pp. 18-19.

⁶⁶⁶ See, for example, D03-88, T. 305, pp. 61-62; T. 306, p. 70.

⁶⁶⁷ D03-88, T. 306, pp. 61-65.

⁶⁶⁸ D03-88, T. 306, pp. 61-62.

⁶⁶⁹ D03-88, T. 306, p. 65.

⁶⁷⁰ D03-707, T. 330, pp. 31-32.

⁶⁷¹ D03-707, T. 330, pp. 31-32.

312. Lastly, the Prosecution averred that D03-88's credibility was affected by the fact that he had tried to evade the question regarding the sudden transition of Mathieu Ngudjolo from nurse to soldier.⁶⁷² On reading the transcript, the Chamber notes that, on the one hand, D03-88 gave reasons as to why he was reticent to advance an opinion about a question that he had asked himself, but that, on the other hand, he propounded the theory that Mathieu Ngudjolo's level of education had convinced senior members of the FNI, who were looking for a spokesperson able to represent Walendu-Tatsi *collectivité*.⁶⁷³ On this point, the Chamber notes that, in answering that question, the witness specified that he was giving his personal opinion, and, where necessary, will therefore consider its probative value accordingly.

c) Conclusion

313. It is the Chamber's view that D03-88's testimony is credible in the main. Nevertheless, it considers that the sections which directly deal with Mathieu Ngudjolo's liability must be treated with a great deal of caution.

VIII. THE EVENTS IN BOGORO

314. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that there were substantial grounds to believe that in the early morning of 24 February 2003, FRPI and FNI combatants armed with heavy weapons and bladed weapons surrounded Bogoro village, having taken all the roads leading to it.⁶⁷⁴ Civilians in Bogoro were awakened that day by the sound of gunfire as Lendu and Ngiti combatants began an attack which was directed not only against the UPC military camp but also against the civilian population.⁶⁷⁵ According to the above-mentioned decision, about 200 people were killed during

⁶⁷² Prosecution Closing Brief, para. 382.

⁶⁷³ D03-88, T. 306, pp. 67-69.

⁶⁷⁴ *Decision on the confirmation of charges*. See, in particular, para. 403.

⁶⁷⁵ *Decision on the confirmation of charges*. See, in particular, para. 403.

and in the aftermath of the attack on the village,⁶⁷⁶ and the combatants destroyed a large number of houses, shops, schools and/or public or private property belonging to the civilian population.⁶⁷⁷ They also pillaged property belonging to civilians⁶⁷⁸ and raped and sexually enslaved civilian women and girls.⁶⁷⁹ Finally, children under the age of 15 years actively participated in the attack.⁶⁸⁰

315. In this section, the Chamber will describe the village of Bogoro as it was in February 2003 and then give a broad overview of the circumstances in which the 24 February 2003 attack took place. First, to enable clearer understanding of this Judgment, it considers it worthwhile to clarify a number of terms.

A. TERMINOLOGY

316. Firstly, the Chamber notes that the term “Lendu” can have two different meanings. “Lendu” is most commonly used to refer to one of a number of ethnic groups in the district of Ituri which itself comprises several sub-groups. It also notes that “Lendu” refers either to this group as a whole – for example, in opposition to the “Hema” ethnic group – or to one of its subgroups, restricted to the Lendu of Djugu territory, as opposed to the “Ngiti”. According to established local usage, the witnesses used the term “Lendu” to refer to Lendu groups living Djugu territory and “Ngiti” to refer to Lendu from Walendu-Bindi *collectivité*.⁶⁸¹

317. The Chamber wishes to emphasise that whilst it uses the term “Lendu from Bedu-Ezekere” to refer to the combatants from that *groupement*, this geographic appellation does not correspond to the actual territorial borders of an ethnic sub-group. It also notes that it has been at pains to reproduce witnesses’ words as uttered in court. Accordingly, the Chamber’s terminological

⁶⁷⁶ *Decision on the confirmation of charges*, paras. 298-307 and 424-427.

⁶⁷⁷ *Decision on the confirmation of charges*, paras. 319-326.

⁶⁷⁸ *Decision on the confirmation of charges*, paras. 334-338.

⁶⁷⁹ *Decision on the confirmation of charges*, paras. 347-354, 434-436 and 442-444.

⁶⁸⁰ *Decision on the confirmation of charges*, paras. 253-263.

⁶⁸¹ See, in particular, P-166, T. 226, p. 61; P-233, T. 83, p. 52; P-268, T. 108, p. 17.

preferences apply only when it is writing in its own words. In this connection, it notes that witnesses also used the term “Northern Lendu” in reference to Lendu from Djugu *collectivité* and “Southern Lendu” in reference to those from Walendu-Bindi *collectivité*.⁶⁸²

B. BOGORO VILLAGE

318. A census performed prior to the conflicts which plagued the north-east of the DRC for a number of years reported a population of 6,320 in Babiase *groupement*, where the village of Bogoro is located.⁶⁸³ Although the majority of the population of Bogoro was Hema, more than ten ethnic groups were present, notably the Lendu and the Bira.⁶⁸⁴ Pastoralism formed a significant part of the Bogoro economy, especially amongst the Hema, who are pastoralists by tradition.⁶⁸⁵ The inhabitants of Bogoro also cultivated the land.⁶⁸⁶

319. When tensions between the Hema and Lendu increased in 2001, the Lendu population left the village.⁶⁸⁷ The school known as “Bogoro Institute” then became a military camp.⁶⁸⁸

320. In 2003, the UPC camp in Bogoro comprised straw houses, known locally as *manyata*,⁶⁸⁹ which were scattered around the open area where Bogoro Institute is located.⁶⁹⁰ As shown in the sketch drawn by Witness P-323, the camp was also surrounded by trenches, themselves embedded in a concentric network of

⁶⁸² See, in particular, P-166, T. 226, pp. 11 and 50; T. 228, p. 36.

⁶⁸³ EVD-OTP-00202: Statement by Witness P-166, para. 15; P-166, T. 225, p. 53.

⁶⁸⁴ EVD-OTP-00202: Statement by Witness P-166, para. 14; P-166, T. 225, pp. 14-15; T. 226, pp. 49-50; P-233, T. 88, p. 79.

⁶⁸⁵ P-166, T. 225, pp. 56-58.

⁶⁸⁶ P-166, T. 225, pp. 58-59; V-2, T. 231, pp. 48-49.

⁶⁸⁷ P-323, T. 118, pp. 20-21; P-166, T. 226, pp. 49-50.

⁶⁸⁸ EVD-OTP-00202: Statement by Witness P-166, paras. 30 and 47; P-323, T. 117, p. 9; P-233, T. 83, p. 48.

⁶⁸⁹ P-233, T. 83, pp. 48 and 52; P-323, T. 117, p. 9.

⁶⁹⁰ EVD-OTP-00202: Statement by Witness P-166, paras. 47 and 90.

military positions.⁶⁹¹ The Chamber notes that on the day of the attack, the UPC troops had a significant military arsenal of light weapons.⁶⁹² It noted that P-268 stated that there were between 300 and 400 UPC men in Bogoro at the time of the attack, whereas P-233⁶⁹³ put their number at between 100 and 200.⁶⁹⁴ Faced with a discrepancy in the estimates, the Chamber is unable to establish the exact number of UPC soldiers in Bogoro on 24 February 2003. Nevertheless, it can be said that there were at least a hundred well-armed soldiers at the camp.

321. The Chamber has also been unable to establish the precise number of civilians who were still in Bogoro on 24 February 2003. However, it considers the fact that civilians did live in the village and were mostly ethnic Hema to have been established.⁶⁹⁵

C. THE ATTACK

322. The witnesses who were in Bogoro on 24 February 2003 stated that the attack began at dawn, at around four or five a.m.,⁶⁹⁶ at which time they were awoken by the chatter of gunfire.⁶⁹⁷ The residents of Bogoro and the soldiers at the UPC camps all emphasised that their attackers were numerous,⁶⁹⁸ that the gunfire was heavy,⁶⁹⁹ that their assailants came from all sides⁷⁰⁰ and that the attack was particularly intense.⁷⁰¹

⁶⁹¹ EVD-OTP-00050: Photograph of Bogoro in which P-323 pointed out the position of the trenches; see also P-323, T. 117, p. 28; P-233, T. 83, pp. 48-49.

⁶⁹² P-233, T. 83, pp. 49-50; P-323, T. 117, pp. 3-5; see also P-268, T. 108, pp. 16-17.

⁶⁹³ P-233, T. 83, pp. 48-49; T. 88, pp. 19-20.

⁶⁹⁴ P-268, T. 108, p. 17.

⁶⁹⁵ With regard to the ethnic composition of Bogoro, see, *inter alia*, P-233, T. 88, p. 79; EVD-OTP-00202: Statement of Witness P-166, para. 14; P-166, T. 226, pp. 49-50.

⁶⁹⁶ P-268, T. 107, p. 14; P-233, T. 83, p. 66; P-323, T. 117, p. 23; V-2, T. 231, p. 28; V-4, T. 233, p. 68.

⁶⁹⁷ P-233, T. 83, pp. 66-67; P-268, T. 107, p. 14; V-2, T. 231, p. 28; V-4, T. 233, pp. 68-69; P-323, T. 117, p. 27.

⁶⁹⁸ P-268, T. 107, p. 26; P-323, T. 117, pp. 28-30.

⁶⁹⁹ P-268, T. 107, p. 19; T. 108, p. 85; V-2, T. 231, p. 29; P-323, T. 117, pp. 27-28.

⁷⁰⁰ P-268, T. 108, p. 85; V-2, T. 231, p. 41; V-4, T. 233, p. 69; T. 234, p. 9; P-323, T. 117, pp. 27-29 and 36.

⁷⁰¹ P-323, T. 117, p. 27; V-2, T. 232, pp. 15 and 73; P-323, T. 118, p. 24.

323. Regarding the attackers' advance, the Chamber wishes to focus on the evidence of P-323, a UPC soldier who, from his position in the camp, saw them enter Bogoro and advance as far as the camp.⁷⁰² The attackers arrived in Bogoro by different routes and were thus able to enter the camp,⁷⁰³ forcing the UPC troops to abandon Bogoro and retreat along a corridor leading towards Bunia via Waka mountain.⁷⁰⁴ This opening also enabled some of the village's population to escape together with the UPC soldiers.⁷⁰⁵ From the evidence before it, the Chamber notes that the camp fell to the attacking forces before midday.⁷⁰⁶

324. The Chamber further notes that, according to various testimonies, the attackers' weapons included machetes, arrows, knives and spears.⁷⁰⁷ Some carried firearms.⁷⁰⁸ Some wore military uniforms of various kinds, whilst others were in civilian dress.⁷⁰⁹ According to various testimonies, there were women amongst the attacking forces.⁷¹⁰ Finally, several witnesses stated that those leading the offensive shouted, sang, played drums, rang bells and blew whistles.⁷¹¹

325. Some witnesses also reported seeing youths among the combatants during the attack,⁷¹² especially among the Lendu.⁷¹³ They stated they had been armed and fighting alongside the adults.⁷¹⁴ Some attacked inhabitants, killing them. In

⁷⁰² P-323, T. 117, pp. 23 and 27-29.

⁷⁰³ P-323, T. 117, pp. 29, 36 and 73.

⁷⁰⁴ P-323, T. 117, pp. 27, 29 and 36.

⁷⁰⁵ P-323, T. 117, pp. 27, 36-37 and 73-74.

⁷⁰⁶ See, *inter alia*, D02-129, T. 271, p. 26; P-323, T. 117, p. 59.

⁷⁰⁷ P-268, T. 107, pp. 62-63; P-323, T. 117, p. 31.

⁷⁰⁸ See, *inter alia*, P-323, T. 117, p. 31; P-268, T. 107, p. 62; EVD-OTP-00285: MONUC report on events in Ituri, para. 65.

⁷⁰⁹ P-268, T. 107, pp. 36-37; T. 108, p. 14; P-233, T. 83, p. 68; P-323, T. 117, p. 30; T. 118, pp. 23-24; EVD-OTP-00285: MONUC report on events in Ituri, para. 65.

⁷¹⁰ P-323, T. 117, p. 61; P-268, T. 107, pp. 26-27 and 62; T. 108, pp. 26-27.

⁷¹¹ P-268, T. 107, pp. 14, 32-33; V-4, T. 233, pp. 69-70; P-323, T. 117, pp. 28-29 and 40.

⁷¹² P-268, T. 107, pp. 38 and 61; P-267, T. 166, pp. 32-33; T. 170, p. 13.

⁷¹³ P-323, T. 117, pp. 33 and 55-57; P. 268, T. 107, pp. 26-27 and 37-38; T. 108, pp. 12 and 40-42; P-287, T. 139, pp. 44-47 and 49-50.

⁷¹⁴ P-268, T. 107, pp. 37-39 and 62-63; P-323, T. 117, pp. 33 and 55.

this regard, Witness P-323 stated that some of these young combatants slashed those they came across with machetes and took part in the pillaging of property.⁷¹⁵

326. Some witnesses identified the attackers' origin based on the direction they came from. Several witnesses stated that on 24 February 2003 the attackers had entered Bogoro from various directions and on different sides, in particular from Waka mountain and the Gety road⁷¹⁶ – *viz.*, the road towards Walendu-Bindi *collectivité*⁷¹⁷ – as well as from the roads to Zumbe and Lagura,⁷¹⁸ *viz.*, towards Bedu-Ezekere *groupement*.⁷¹⁹

327. The Chamber notes that visibility at sunrise was in all likelihood insufficient for the witnesses⁷²⁰ to gain a clear view of the situation. Moreover, during the judicial site visit to Bogoro, the Chamber was able to see that the village covered a large area and that it was thus difficult to see all the entry points simultaneously.⁷²¹ Nevertheless, as mentioned above, inhabitants of Bogoro as well as UPC soldiers reported that the attackers had moved through village noisily. The Chamber emphasises that these witnesses knew the area well and were therefore in a position to determine where the attackers came from. There is thus sufficient evidence for the Chamber to find that the attackers reached Bogoro by various tracks leading from Bedu-Ezekere *groupement* and Walendu-Bindi *collectivité*.

⁷¹⁵ P-323, T. 117, pp. 56-57 and 61; P-268, T. 107, p. 39.

⁷¹⁶ P-268, T. 108, p. 43; P-323, T. 117, pp. 28-29, 36 and 73. See also V-4, T. 233, pp. 68-69.

⁷¹⁷ See EVD-D02-00217: Map on which Germain Katanga outlined Walendu-Bindi *collectivité*; D02-300, T. 314, p. 45. See also Annex D.

⁷¹⁸ P-323, T. 117, pp. 28-29, 36 and 73; P-317, T. 228, pp. 32 and 36; EVD-OTP-00285: MONUC report on events in Ituri, para. 65; P-268, T. 107, p. 26; EVD-D03-00010: Map on which P-268 indicated the positions of Zumbe and Katonie; P-268, T. 108, pp. 59-62; EVD-OTP-00273: Sketch showing the boundaries of Bedu-Ezekere *groupement* drawn by D03-88; see also V-4, T. 233, pp. 68-69.

⁷¹⁹ D02-44, T. 292, pp. 9-11; EVD-OTP-00273: Sketch showing the boundaries of Bedu-Ezekere *groupement* drawn by D03-88; D03-88, T. 303, p. 37. See Annex D.

⁷²⁰ See, *inter alia*, V-2, T. 231, p. 30; V-4, T. 234, p. 4.

⁷²¹ Report of the judicial site visit, pp. 12-18.

328. Furthermore, several witnesses identified the attackers as being Ngiti and Lendu on the basis, in particular, of the language they spoke: Kilendu or Kingiti.⁷²²

329. As for the presence of commanders from Bedu-Ezekere *groupement*, the Chamber notes that two witnesses, who knew commander Kute when he lived in Bogoro, recognised him among the attackers.⁷²³ Witness P-323 identified him as being a Lendu commander,⁷²⁴ and P-268 identified him as coming from Zumbe.⁷²⁵

330. From the start of the fighting at around 5 a.m., numerous inhabitants left their homes and tried to find refuge. Witness V-4 stated that on 24 February 2003, as she and others ran to hide at Bogoro Institute,⁷²⁶ they were chased by armed assailants trying to kill them.⁷²⁷ She thought that all the inhabitants of Bogoro, whether Hema, Alur, Gegere or Northern Hema,⁷²⁸ women, children or the elderly, had tried to get into the classrooms to hide. Some entered through the doors and others through windows,⁷²⁹ and those fleeing were squeezed into the rooms of the Institute in appalling conditions.⁷³⁰ V-4 also stated that she could hear those who had not yet reached the Institute shouting and crying.⁷³¹

331. Some of the inhabitants, fleeing in the direction of Waka mountain, were killed, as were those who ran into the bush to hide there.⁷³² Thus, as Bogoro resident Witness V-2 ran from her house with her family, she was overtaken by

⁷²² V-4, T. 233, pp. 69-70; V-2, T. 231, p. 32; P-233, T. 88, pp. 44-45; P-268, T. 107, pp. 26-27, 39-40 and 61; T. 108, pp. 68-69 and 78.

⁷²³ P-323, T. 117, pp. 31-33; P-268, T. 107, pp. 37 and 63; T. 108, pp. 12-13.

⁷²⁴ P-323, T. 117, pp. 32-33. See also EVD-OTP-00202: Statement by Witness P-166, para. 37.

⁷²⁵ P-268, T. 107, p. 63: commander Kute held the position in Lagura in Bedu-Ezekere *groupement*. See Section IX.

⁷²⁶ V-4, T. 234, pp. 2-3.

⁷²⁷ V-4, T. 235, pp. 18-19; see also P-233, T. 83, pp. 66-67; T. 88, pp. 24-25.

⁷²⁸ V-4, T. 234, p. 5.

⁷²⁹ V-4, T. 234, pp. 4-5.

⁷³⁰ V-4, T. 234, pp. 5-6.

⁷³¹ V-4, T. 234, pp. 6-7.

⁷³² V-2, T. 231, pp. 32-33 and 36; P-268, T. 107, pp. 15 and 20.

attackers who were shouting that the Hema had to be captured.⁷³³ She testified that once they were directly behind her, they savagely killed her child with a machete.⁷³⁴ Pursued by the shouts of her assailants, whom she identified as being Lendu because they were speaking Kilendu, the witness ran onwards to escape them and take refuge in the bush.⁷³⁵

332. Others who had managed to take refuge in the bush were extracted and killed. Witness P-233 stated that whilst he was hiding,⁷³⁶ the attackers ordered those who had hidden to reveal themselves.⁷³⁷ He said that those who obeyed and came out were killed. He had heard one of his companions being killed in this manner.⁷³⁸

333. Witnesses also stated that during the 24 February 2003 attack on Bogoro, women were raped by combatants and that others were also abducted and then held captive and raped.⁷³⁹

334. The Chamber further notes that, during the fighting, both houses and public and private buildings were “[TRANSLATION] de-roofed”, destroyed and burnt and that property belonging to civilians in Bogoro was taken during and after the attack.⁷⁴⁰ Some witnesses identified the people who were destroying and pillaging as being Lendu and/or Ngiti. For example, Witness P-268 was able to identify people as coming in all likelihood from Bedu-Ezekere *groupement*, in which direction the property was taken.⁷⁴¹ V-2 also stated that the persons who

⁷³³ V-2, T. 231, pp. 32-33 and 36.

⁷³⁴ V-2, T. 231, pp. 36-40.

⁷³⁵ V-2, T. 231, pp. 32-33 and 40-41.

⁷³⁶ EVD-OTP-00010: Sketch by P-323 showing the position of his first hiding place.

⁷³⁷ P-233, T. 83, pp. 74-75 and 79.

⁷³⁸ P-233, T. 83, pp. 75 and 79-80; T. 84, p. 7.

⁷³⁹ P-268, T. 107, pp. 48-51; T. 108, p. 79; P-233, T. 86, pp. 15-16 and 23-24; T. 87, pp. 26-27.

⁷⁴⁰ P-268, T. 107, pp. 14-15, 26-27 and 31; T. 108, pp. 70-72; V-4, T. 234, pp. 24-25; D03-707, T. 332, pp. 32-34; T. 333, pp. 44-45.

⁷⁴¹ P-268, T. 108, p. 12.

stole her livestock were Lendu.⁷⁴² Finally, Witness V-4 stated that she had heard, from her brother in particular, that a significant number of her cows, heifers and calves, goats and hens, as well as beds, tables and various household items from her home had been taken, and she identified the Lendu and Ngiti attackers as the perpetrators of these acts.⁷⁴³

335. Finally, the witnesses stated that they had noted, *a posteriori*, that buildings in the village, such as the Diguna mission,⁷⁴⁴ the “CECA 20”, “CIA” and “CEPAC” churches, and the Kavali school,⁷⁴⁵ had been destroyed and pillaged.

336. Ultimately, from the evidence before the Chamber, including the witness evidence on the crimes committed in Bogoro on 24 February 2003, it is not possible to ascertain when exactly the Bedu-Ezekere combatants took part in the fighting or whether they were there from the start of the attack.⁷⁴⁶

D. CONCLUSION

337. In light of the foregoing, the Chamber is able to find that the attack on Bogoro began at around 5 a.m. on 24 February 2003. The attackers, who included children, came from several different directions, via roads and tracks leading from localities mostly inhabited by Ngiti and Lendu. It can be stated on the basis of the various testimonies that there were Ngiti combatants from Walendu-Bindi *collectivité* and Lendu combatants from Bedu-Ezekere *groupement* in Bogoro on that day.

338. The Chamber further notes that there is a wealth of evidence to show that during and after the 24 February 2003 attack, inhabitants of Bogoro were killed,

⁷⁴² V-2, T. 231, p. 46.

⁷⁴³ V-4, T. 234, pp. 23-25 and 35-36.

⁷⁴⁴ P-233, T. 83, pp. 50-51; V-2, T. 232, pp. 40-41.

⁷⁴⁵ V-2, T. 232, pp. 39-40; P-268, T. 108, p. 9; P-233, T. 83, pp. 50-51.

⁷⁴⁶ See, for example, P-323, T. 117, pp. 28-29, 31-33, 36 and 73; P-268, T. 107, p. 26; T. 108, pp. 43 and 62-63; D02-01, T. 277, p. 62; EVD-OTP-00285: MONUC report on events in Ituri, para. 65.

women were raped and some were kept in captivity by the attackers, property was pillaged and, lastly, buildings were attacked and destroyed.⁷⁴⁷

⁷⁴⁷ See Section V.

IX. FACTUAL FINDINGS ON THE ROLE OF MATHIEU NGUDJOLO

A. INTRODUCTION

339. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found the following:

There is also sufficient evidence to establish substantial grounds to believe that the FNI, over which Mathieu Ngudjolo Chui had the command, was a hierarchically organised group. This is shown in particular by the fact that:

- i. the FNI was organised into camps within the Ezekere *groupement* and that each of these camps had a commander;
- ii. Mathieu Ngudjolo Chui was the commander of the Zumbe camp that served as the central camp in the Ezekere *groupement*;
- iii. the FNI was a military structured organisation divided into sectors, battalions, companies, platoons and sections;
- iv. FNI commanders had the ability to communicate with each other through two way radios (Motorola); Mathieu Ngudjolo Chui used a *phonie* and even appointed a *phonie* operator; and it is notably through these assets that Mathieu Ngudjolo Chui gave his orders;
- v. Mathieu Ngudjolo Chui, in his power as a superior leader, had the ability to jail and adjudicate. For instance, he punished an FNI soldier for sexually enslaving a Lendu woman.⁷⁴⁸

340. It also found the following:

[...] [T]here is sufficient evidence to establish substantial grounds to believe that, from the beginning of 2003 until he was integrated into the FARDC, Mathieu Ngudjolo Chui:

- i. served as *de jure* supreme commander of the FNI; and
- ii. had *de facto* ultimate control over FNI commanders, commanders who sought his orders for obtaining or distributing weapons and ammunitions, and was the person to whom other commanders reported.⁷⁴⁹

341. The Pre-Trial Chamber further found that there were substantial grounds to believe that compliance with Mathieu Ngudjolo's orders to his subordinates was "assured".⁷⁵⁰

⁷⁴⁸ *Decision on the confirmation of charges*, para. 544 (footnotes omitted).

⁷⁴⁹ *Decision on the confirmation of charges*, para. 541 (footnotes omitted).

⁷⁵⁰ *Decision on the confirmation of charges*, paras. 545-547 (footnotes omitted).

342. In this section, the Chamber will analyse the evidence relating to Mathieu Ngudjolo's authority over the Lendu combatants from Bedu-Ezekere. To this end, it will first examine the evidence relating to the organisation of those combatants and the manner in which they were structured. It will then analyse the evidence relating to the role and duties of the Accused before, during and after the attack on Bogoro, in order to ascertain whether he exercised authority over the Lendu combatants on 24 February 2003 and, if so, what the nature of that authority was. Whilst adopting a chronological approach, the Chamber has also analysed the evidence as a whole, putting events which took place at different times into perspective.

343. The Chamber recalls that the Prosecutor relied in particular on Witnesses P-250, P-279 and P-280 in arguing that Mathieu Ngudjolo had been the commander of the Lendu combatants during the 24 February 2003 attack on Bogoro. However, it must also recall that it did not find these witnesses to be credible.⁷⁵¹

344. The Chamber first sought to determine the relationship between the FNI combatants and the Lendu combatants from Bedu-Ezekere *groupement*.

B. RELATIONSHIP BETWEEN THE FNI COMBATANTS AND THE LENDU MILITIA COMBATANTS FROM BEDU-EZEKERE GROUPEMENT

345. In its Closing Brief, the Prosecution no longer argued, as it had done in its amended charging document and as was confirmed in the *Decision confirming the charges*, that Mathieu Ngudjolo was the FNI supreme commander on 24 February 2003. It now maintains that he was the commander-in-chief of the Lendu militia in Bedu-Ezekere.⁷⁵² It claims Mathieu Ngudjolo became the "commander-in-

⁷⁵¹ See Section VII.

⁷⁵² Prosecution Closing Brief, para. 304.

chief” – the “Chief of Staff” – of this militia just before the battle of Nyankunde on 5 September 2002.⁷⁵³

346. The Chamber further notes that, according to the *Decision on the confirmation of charges*, the direct perpetrators of the crimes of murder, wilful killing, pillaging, destruction of property, rape and sexual slavery were the “FNI/FRPI combatants”, whereas the Prosecution Closing Brief identifies “Lendu and Ngiti combatants”.⁷⁵⁴

347. To demonstrate that this change in allegations is of no consequence to the determination of the Accused’s responsibility,⁷⁵⁵ the Prosecution maintains, in particular, that there was already a reference to Mathieu Ngudjolo’s position from late 2002 as commander of the Lendu combatants based in the military camps located to the south of Bunia in the amended charging document⁷⁵⁶ and that he was the *de jure* supreme commander of the FNI of Bedu-Ezekere *groupement*, a second reference which appeared in the Summary of the Charges.⁷⁵⁷ Moreover, according to the Prosecution, the evidence admitted into the record of the case shows that the abbreviation “FNI” was used retrospectively by the combatants and the population of Ituri to refer to the Lendu militia prior to the official establishment of the FNI.⁷⁵⁸

348. The Prosecution is of the opinion that this change does not affect the charges as confirmed by the Pre-Trial Chamber. Mathieu Ngudjolo’s responsibility has consistently been described in identical fashion: “[TRANSLATION] beyond appellations, the Lendu group which, along with the Ngiti, perpetrated the attack of 24 February on Bogoro has always been

⁷⁵³ Prosecution Closing Brief, para. 304.

⁷⁵⁴ See, for example, Prosecution Closing Brief: paras. 47, 76, 91 and 96.

⁷⁵⁵ Prosecution Closing Brief, para. 308.

⁷⁵⁶ Prosecution Closing Brief, para. 305.

⁷⁵⁷ Prosecution Closing Brief, para. 306.

⁷⁵⁸ Prosecution Closing Brief, para. 307.

designated and identified by the Prosecution with reference to the ethnic origin (Lendu), geographic location (Bedu-Ezekere *groupement*) and the leadership (Ngudjolo)".⁷⁵⁹ In the Prosecution's view, then, this is "[TRANSLATION] simply an issue of appellation".⁷⁶⁰ Accordingly, the Prosecution argued that Mathieu Ngudjolo was notified of the charges against him from the outset – being the commander of the Lendu group of combatants from Bedu-Ezekere which took part in the attack on Bogoro.⁷⁶¹

349. The Defence for Mathieu Ngudjolo, however, maintains that the Prosecution is not in a position to attest to the existence of the FNI in Bedu-Ezekere and Mathieu Ngudjolo's position with the hierarchy of this organisation before 6 March 2003.⁷⁶² The Defence is of the view that the Prosecution does not itself appear to know the exact position held by Mathieu Ngudjolo: first FNI supreme commander, then FNI commander for Ezekere *groupement* and, finally, leader of the Lendu militia in Bedu-Ezekere *groupement*.⁷⁶³ It maintains that, as the Prosecution has not succeeded in proving the existence of the FNI at the time of the facts or the Accused's position as FNI commander, it has sought to ascribe a different position to him, that of leader of the Lendu militia in Bedu-Ezekere *groupement*.⁷⁶⁴ Furthermore, in the Defence's view, the Prosecution has unilaterally amended the charges contained in the *Decision on the confirmation of charges*, in contravention of article 67 of the Statute, under which the accused has the right to be informed in detail of the charges against him; of the principle of the presumption of innocence; and of article 74(2) of the Statute and the

⁷⁵⁹ Prosecution Closing Brief, para. 308. See also Prosecution Oral Closing Statement, T. 336, pp. 11 and 13-14.

⁷⁶⁰ Prosecution Oral Closing Statement, T. 336, p. 11.

⁷⁶¹ Prosecution Oral Closing Statement, T. 336, p. 12.

⁷⁶² Closing Brief of the Defence for Mathieu Ngudjolo, para. 387.

⁷⁶³ Closing Brief of the Defence for Mathieu Ngudjolo, para. 336.

⁷⁶⁴ Closing Brief of the Defence for Mathieu Ngudjolo, para. 367.

definition of the concept of “charges” therein.⁷⁶⁵ The Defence maintains that “FNI” and “Lendu militia” are neither consubstantial nor interchangeable.⁷⁶⁶ Moreover, the substantiation of whether Mathieu Ngudjolo was an FNI commander must be proven by the Prosecution.⁷⁶⁷ The Defence accuses the Prosecution of employing a “[TRANSLATION] strategy of single-mindedly pursuing Mathieu Ngudjolo”.⁷⁶⁸

350. The Chamber notes that the Prosecution does not have the power to modify in its Closing Brief the charges confirmed by the Pre-Trial Chamber. Article 74(2) obliges the Chamber to ground its decision on the guilt or innocence of the Accused without exceeding the facts and circumstances described in the charges.⁷⁶⁹ In the Chamber’s view, the amendment proposed by the Prosecution does not exceed the facts and circumstances.

351. In this connection, the Chamber notes that the group of Lendu combatants from Bedu-Ezekere *groupement*, as described by the Prosecution in its written and oral submissions, bears various similarities to the FNI group referred to by the Pre-Trial Chamber in its *Decision on the confirmation of charges*. The military structure of both groups is characterised identically: the Pre-Trial Chamber and the Prosecution refer to an armed group organised into camps in Bedu-Ezekere *groupement* with a hierarchical military structure divided into sectors and led by a sole commander.⁷⁷⁰ The locations of the camps of these two groups and the commanders responsible for those camps are also identical in various respects.⁷⁷¹

⁷⁶⁵ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 365-394. See also the Oral Closing statement of the Defence for Mathieu Ngudjolo, T. 339, p. 34.

⁷⁶⁶ Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 22-23.

⁷⁶⁷ Closing Brief of the Defence for Mathieu Ngudjolo, para. 372.

⁷⁶⁸ Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, p. 22.

⁷⁶⁹ See also *Decision on the Filing of a Summary of the Charges by the Prosecutor*, 21 October 2009, ICC-01/04-01/07-1547.

⁷⁷⁰ *Decision on the confirmation of charges*, para. 544; Prosecution Closing Brief – see, *inter alia*, paras. 309-348.

⁷⁷¹ *Decision on the confirmation of charges*, para. 544, footnote 715; Prosecution Closing Brief, paras. 309-319.

Finally, Mathieu Ngudjolo is identified in both documents as being the commander of the Lendu group of combatants from Bedu-Ezekere.⁷⁷² Whilst the Chamber recognises that the Defence for Mathieu Ngudjolo has devoted a portion of its submissions to refuting the evidence relating to the existence of the FNI and the connection between him and this organisation, it nevertheless considers that the Prosecution's change does not affect the merits of the charges as confirmed by the Pre-Trial Chamber. The Chamber is of the view that from the commencement of the trial, the Accused was aware of the essential facts and circumstances contained in the charges and relating to his indirect criminal responsibility, *viz.*, that he exercised control over the Lendu combatants from Bedu-Ezekere *groupement* who took part in the 24 February 2003 attack on Bogoro.⁷⁷³

352. Accordingly, the Chamber will examine the criminal responsibility of Mathieu Ngudjolo in relation to the Lendu group of combatants from Bedu-Ezekere *groupement*.

C. ORGANISATION OF THE LENDU COMBATANTS OF BEDU-EZEKERE GROUPEMENT

353. In its Closing Brief, the Prosecution submits that there was a self-defence movement in Bedu-Ezekere *groupement* from August 2002 and that its purpose was to repel attacks from the Ugandan army and from the Hema, as well as from the UPC subsequently. The Prosecution also emphasises that the movement developed into an organised military structure initially constituted of small groups of fighters and later grew gradually to incorporate a significant number of members.⁷⁷⁴ Lastly, the Prosecution states that, unlike an ordinary self-defence

⁷⁷² *Decision on the confirmation of charges*, see, *inter alia*, paras. 404, 541 and 544; Prosecution Closing Brief, see, *inter alia*, paras. 304 and 321.

⁷⁷³ *Decision on the confirmation of charges*, see, *inter alia*, paras. 541, 544 and 547; Prosecution Closing Brief, paras. 349-417.

⁷⁷⁴ Prosecution Closing Brief, para. 301.

group, the Lendu combatants who were members of this movement also launched attacks.⁷⁷⁵

354. The Defence for Mathieu Ngudjolo did not challenge the existence of self-defence groups.⁷⁷⁶ However, relying on the evidence of Witness D03-88, the traditional chief of Bedu-Ezekere *groupement* during the material time,⁷⁷⁷ it maintains that there was a sole “grassroots committee” within this *groupement* including a “[TRANSLATION] council for youth and security” intended to protect the population.⁷⁷⁸ It emphasises that there was never a military camp and that “[TRANSLATION] [t]he youth merely defended their *groupement*”, without ever initiating an attack.⁷⁷⁹

355. The Prosecution challenges the existence of this “grassroots committee” on the basis, in particular, of the statements of Witnesses D03-44 and D03-963,⁷⁸⁰ who claimed that they were unaware of any such organisation⁷⁸¹ despite the fact that they had both been living in the *groupement* at that time.⁷⁸²

356. Hereinafter, the Chamber will first examine the evidence relating to the existence of a self-defence movement in Bedu-Ezekere *groupement* during the material time and will then analyse the structure and organisation of the Lendu combatants in the *groupement*.

1. Existence of a self-defence movement

357. The Chamber notes that several witnesses stated in effect that the self-defence movement emerged in Bedu-Ezekere *groupement* in response to the attacks against the *groupement*. Witness D03-88 insisted that in 2001 it was an

⁷⁷⁵ Prosecution Closing Brief, paras. 302 and 347-348.

⁷⁷⁶ Closing Brief of the Defence for Mathieu Ngudjolo, para. 1191.

⁷⁷⁷ See Section VII.

⁷⁷⁸ Closing Brief of the Defence for Mathieu Ngudjolo, para. 1191.

⁷⁷⁹ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 1194-1195.

⁷⁸⁰ Prosecution Closing Brief, para. 388.

⁷⁸¹ D03-44, T. 292, p. 17; D03-963, T. 312, p. 24.

⁷⁸² D03-44, T. 291, p. 35; D03-963, T. 312, pp. 10-11.

enclave surrounded by enemies located in Nyakeru, Bogoro, Kasenyi, Tchomia, Mandro and Bunia.⁷⁸³ He added that enemy troops attacked the *groupement* regularly, sometimes several times in a single day.⁷⁸⁴ He further stated that the population gradually found itself living in destitution, leading some of the inhabitants to undertake supply missions, sometimes at great risk to their lives, through Hema localities.⁷⁸⁵ These portions of D03-88's evidence are particularly credible and are also corroborated by various pieces of documentary evidence as well as by other witnesses.

358. For example, D03-55 stated that Zombe had been the target of several attacks launched from Bunia, Tchomia, Mandro and Kasenyi.⁷⁸⁶ D03-66 stated that the UPC attacked the *groupement* from all the Hema villages surrounding it, adding the village of Bogoro to the list of localities given by D03-55 as originating the attacks.⁷⁸⁷ He also confirmed that Bedu-Ezekere could only be supplied by means of extremely high-risk missions to Walendu-Bindi *collectivité*.⁷⁸⁸ D03-236 further reported his difficulty surviving during this period, when the *groupement* was being attacked by UPC troops.⁷⁸⁹ Finally, the documentary evidence attests to, and therefore confirms, the frequency of the attacks against Bedu-Ezekere *groupement* and the loss of human life resulting from some of them.⁷⁹⁰

⁷⁸³ D03-88, T. 299, pp. 39 and 40. The witness stated: “[TRANSLATION] The whole of the Zombe region was affected. Houses were burnt down. People were killed in their sleep. All of those people in Bogoro, Nyakeru, Kasenyi, Tchomia, Mandro and Bunia, they all fled to Zombe.” (D03-88, T. 299, p. 43).

⁷⁸⁴ D03-88, T. 299, p. 49

⁷⁸⁵ D03-88, T. 300, pp. 30-32.

⁷⁸⁶ D03-55, T. 292, p. 55. The witness also stated that during the period when he was living in Zombe, from 2001 to 2004, the village was the target of attacks by the UPC and the UPDF (D03-55, T. 293, p. 32).

⁷⁸⁷ D03-66, T. 295, p. 61; T. 297, pp. 8-9.

⁷⁸⁸ D03-66, T. 296, p. 21; T. 297, pp. 9-10. See also D03-44, T. 291, p. 40. Witness D03-44 confirmed that the *groupement* was attacked from Bogoro, Kasenyi, Tchomia and Bunia.

⁷⁸⁹ D03-236, T. 261, p. 34; T. 263, p. 32.

⁷⁹⁰ EVD-D03-00099: Report on Hema attacks on Bedu-Ezekere and EVD-D03-00098: Letter of complaint. It can be seen from the first of these two documents that military pressure intensified between 2001, when there were six incidents, and 2002, when there were nineteen, and that the frequency of attacks increased particularly from August 2002. According to the second document,

359. According to Witness D03-88, a self-defence group was thus established prior to Governor Lomondo's fall in August 2002.⁷⁹¹ Likewise, Witness D03-44 stated that from 2002 until March 2003, the inhabitants of Bedu-Ezekere *groupement* organised to defend themselves.⁷⁹² Meanwhile, Witness D02-01 explained that in the two weeks when he lived in the village of Zumbe – where he arrived a week after Nyankunde fell, *viz.*, in September 2002 – he noted the presence of armed combatants who were establishing the self-defence mechanism.⁷⁹³ Witness D02-161 heard that there were combatants in Zumbe.⁷⁹⁴ Although Witness D03-236 stated that he had not seen military camps or armed personnel⁷⁹⁵ when he visited Zumbe in 2002, after Lomondo fell, he did not discount the existence of combatants charged with protecting the village.⁷⁹⁶ He in fact stated that Zumbe had been surrounded and that he had noticed the presence of combatants.⁷⁹⁷ Mathieu Ngudjolo, for his part, stated that the population had asked the youths of Bedu-Ezekere *groupement* to defend their territory⁷⁹⁸ and that an organisation had been set up to enable them to defend themselves against the Ugandan attacks.⁷⁹⁹ The Chamber further notes that Witnesses D03-88,⁸⁰⁰ D03-55⁸⁰¹ and D03-66,⁸⁰² as well as Mathieu Ngudjolo himself, reported that there were several self-defence groups or forces in the *groupement*.

the raid on 9 August 2002 caused 377 deaths and that on 15 October 2002 caused 215. See also, EVD-OTP-00285: MONUC report on events in Ituri, para. 63. This report, written by Witness P-317, notes that the attack on 15 and 16 October 2002 alone caused 125 casualties in the *groupement*.

⁷⁹¹ D03-88, T. 303, p. 22.

⁷⁹² D03-44, T. 291, pp. 40-41; T. 292, p. 20.

⁷⁹³ D02-01, T. 276, p. 10; T. 277, pp. 36-38.

⁷⁹⁴ D02-161, T. 269, p. 23.

⁷⁹⁵ D03-236, T. 261, p. 32; T. 263, pp. 13-14.

⁷⁹⁶ D03-236, T. 263, p. 20.

⁷⁹⁷ D03-236, T. 263, p. 20.

⁷⁹⁸ D03-707, T. 327, p. 60. See also P-12, T. 195, pp. 68-69.

⁷⁹⁹ D03-707, T. 327, pp. 60-61; T. 330, p. 63.

⁸⁰⁰ D03-88, T. 301, p. 21; T. 307, pp. 33-35.

⁸⁰¹ See, e.g., D03-55, T. 294, pp. 26-28.

⁸⁰² D03-66, T. 295, p. 60; T. 297, p. 13.

360. Turning now to the Defence statements regarding the existence of the “grassroots committee”, the Chamber notes that there are several items of evidence to show the existence of this entity tasked with, *inter alia*, organising the self-defence groups of Bedu-Ezekere *groupement*.⁸⁰³

361. In this connection, the statements of D03-88 are well worth revisiting. He stated, as has been recalled, that at the time when the localities surrounding Zumbe were frequently the targets of attacks⁸⁰⁴ and the Lendu were being killed,⁸⁰⁵ the inhabitants of Bedu-Ezekere *groupement* and the Bunia region took refuge in Zumbe.⁸⁰⁶ The elders of the 29 localities in the *groupement* met for three days to resolve the issues facing them and decided to entrust the task of keeping watch for the arrival of the enemy to some youths.⁸⁰⁷ To this end, five groups were formed under the “grassroots committee”:⁸⁰⁸ the committee of elders, comprising seven prominent individuals, which ensured compliance with certain rules;⁸⁰⁹ the group of youths who patrolled the area and endeavoured to uncover possible enemy attacks;⁸¹⁰ the drafting committee, which compiled and recorded a daily inventory of all the activities;⁸¹¹ the health committee, which included Mathieu Ngudjolo and a nurse called Bahati Talika⁸¹² (or Bahati de Zumbe); and the administrative committee, which ensured the maintenance of order in the *groupement*, including by dealing with any offences and arresting troublemakers.⁸¹³

⁸⁰³ See, *inter alia*, D03-66, T. 295, pp. 38-39 and 59. See also D03-55, T. 294, p. 21; D03-100, T. 310, p. 15.

⁸⁰⁴ D03-88, T. 299, pp. 38-39.

⁸⁰⁵ D03-88, T. 299, p. 43.

⁸⁰⁶ D03-88, T. 299, pp. 43-45. See also D03-236, T. 261, pp. 32-33; T. 263, pp. 13-14 and 21.

⁸⁰⁷ D03-88, T. 299, p. 44.

⁸⁰⁸ D03-88, T. 300, pp. 25-27.

⁸⁰⁹ D03-88, T. 300, p. 26.

⁸¹⁰ D03-88, T. 300, p. 27.

⁸¹¹ D03-88, T. 300, p. 27.

⁸¹² D03-88, T. 300, p. 28.

⁸¹³ D03-88, T. 300, p. 27.

362. D03-88 stated that the youth committee, or the self-defence committee or group,⁸¹⁴ included youths “[TRANSLATION] in charge of communications” whose task it was to warn the *groupement* when the enemy came.⁸¹⁵ There was also a security committee which, according to this witness, amongst other things, took care of the wounded by transferring them to “[TRANSLATION] a safe place to treat [them]”.⁸¹⁶ Furthermore, D03-88 also stated that the youths took turns in using the available weapons and shared ammunition.⁸¹⁷ Witness D03-66, for his part, stated that the committee’s role was to “[TRANSLATION] assemble the youth” in the event of an attack.⁸¹⁸ Several witnesses stated that Jacques Banga Mandé was the “[TRANSLATION] chairman” responsible⁸¹⁹ for these youths,⁸²⁰ and D03-88 added that Banga Dheji Martin was also one of those responsible.⁸²¹ Witness D03-55 confirmed that both were members of the self-defence committee,⁸²² and Witness D03-66 stated that he was the vice-chairman of the self-defence committee.⁸²³ The Accused himself stated that the self-defence youth were “[TRANSLATION] at the disposal” of the “grassroots committee”.⁸²⁴

363. Regardless of this backdrop of continual attacks, and the spectre of potential annihilation perpetually looming over the *groupement*, the Chamber considers it unlikely that the apparent specialisation of the different activities of the “grassroots committee”, grounded in the separation of civil and military

⁸¹⁴ D03-88, T. 332, p. 6. See also D03-66, T. 295, pp. 38 and 39; D03-55, T. 294, p. 21; D03-707, T. 330, p. 57.

⁸¹⁵ D03-88, T. 300, p. 27. See also D03-707, T. 327, pp. 60-61.

⁸¹⁶ D03-88, T. 300, p. 27.

⁸¹⁷ D03-88, T. 302, pp. 6-7.

⁸¹⁸ D03-66, T. 295, p. 39.

⁸¹⁹ D03-88, T. 305, p. 43. Witness D03-88 nevertheless stated that “[TRANSLATION] within the committee there were youth leaders”, these youths did not have a commander, a “[TRANSLATION] youth leader for the war”. Likewise, Mathieu Ngudjolo explained that the youth self-defence structure was such that there were no leaders. (D03-707, T. 330, p. 62).

⁸²⁰ D03-55, T. 292, p. 56; D03-66, T. 295, p. 39; T. 298, p. 9; D03-88, T. 301, pp. 21 and 28.

⁸²¹ D03-88, T. 301, pp. 20-21, 28 and 32.

⁸²² D03-55, T. 292, p. 56.

⁸²³ D03-66, T. 298, pp. 29-30.

⁸²⁴ D03-707, T. 330, p. 57. See also D03-707, T. 327, p. 60.

activities, could have resisted the course of events for very long. Indeed, the evidence shows that gradually the inhabitants were increasingly obliged to engage in a struggle for survival which involved them all in defending their territory.

364. In this regard, from the accounts of numerous witnesses who lived in Bedu-Ezekere *groupement* between August 2002 and February 2003 it can be concluded that the population mobilised, thereby far exceeding the group of people theretofore active in the self-defence committee. D03-44 described the process in these terms:

[TRANSLATION] Where I come from, everybody is a combatant, even if you're a mother or a small child. We are all combatants, because when you come under attack, when war comes, you don't call on other people to defend you; you have to defend yourself where you are attacked. And there were several ways of going about defending yourself. When you could not maintain your defence position, you ran. And when you run, you are also defending yourself. That is why I say that he [Mathieu Ngudjolo] was a combatant as well as being a nurse. I myself was a nurse, but I was a combatant too. I cannot deny that. It is something that we did.⁸²⁵

365. The situation thus described by this witness was also mentioned by D02-01, who stated that everyone played a part in the efforts to ensure the security of Bedu-Ezekere *groupement*.⁸²⁶ Witness D03-55, for his part, stated that the inhabitants had had no other choice than to flee or to defend themselves.⁸²⁷

366. Based on this evidence, the credibility of which is not in question in this regard, the Chamber considers that self-defence did not remain within the purview of a limited group of people specialising in this activity but, rather, gradually came to involve all the inhabitants of Bedu-Ezekere *groupement*. Thus, in its view, it is clear that in the event of an attack, the population became involved in defending its territory.

⁸²⁵ D03-44, T. 292, p. 35.

⁸²⁶ D02-01, T. 277, p. 37.

⁸²⁷ D03-55, T. 292, pp. 55-56.

367. The Chamber therefore considers it to be established that in the light of the living conditions prevailing in Bedu-Ezekere *groupement* between 2001 and 2003, its survival depended heavily on the population's efforts and its involvement in defending the *groupement*, especially in the event of attacks.

368. The Chamber finds that this situation resulted in a change in the power dynamics within the *groupement*, and in this connection, several items of evidence show that D03-88, despite being the chief of the *groupement*, came to have only limited control over some of the principal combatants in Bedu-Ezekere.

369. Despite some reticence,⁸²⁸ he finally acknowledged in court that a number of the commanders did not submit to the authority of the "grassroots committee". He admitted that commanders Kute and Boba Boba had declared themselves "chiefs" without receiving prior consent from the elders⁸²⁹ and that they did not obey orders.⁸³⁰ Moreover, whilst D03-88 maintained before the Chamber that he had been informed of the movements of the people under his authority outside Bedu-Ezekere *groupement*,⁸³¹ D03-66 stated that he had been to Walendu-Bindi *groupement* without informing the chief of his *groupement*.⁸³² What is particularly interesting, however, is not that Witness D03-88 was unaware of the movement of such a large number of people but, rather, that D03-66 was a member of this delegation, comprising at least 15 persons,⁸³³ under the leadership of Martin Banga, who was the vice-chairman of the youth committee.

370. These examples show, in the Chamber's view, not only that the chief of the *groupement* was faced with a number of strong-willed personalities who

⁸²⁸ D03-88, T. 305, pp. 45-47.

⁸²⁹ D03-88, T. 305, p. 45.

⁸³⁰ D03-88, T. 305, p. 47; T. 301, p. 27.

⁸³¹ D03-88, T. 301, p. 20.

⁸³² D03-66, T. 296, p. 25.

⁸³³ EVD-OTP-00025: Letter signed in Bolo on 4 January 2003.

refused to submit to his authority as traditional chief, but also that the authority of the “grassroots committee” in Bedu-Ezekere *groupement* was limited at best.

2. Organisation and structure of the Lendu combatants of Bedu-Ezekere

371. Challenging the existence of the “grassroots committee”⁸³⁴ in its Closing Brief, the Prosecution argues that the self-defence movement which emerged in Bedu-Ezekere *groupement* developed into an organised military structure which, according to the Prosecution, did not merely engage in self-defence but also launched attacks.⁸³⁵ Prior to 24 February 2003, a general staff and well-defined chain of command were allegedly established within this structure.⁸³⁶

372. The Defence for Mathieu Ngudjolo, on the other hand, argued that the self-defence groups did not have an organised military structure⁸³⁷ and did not perpetrate any attacks.⁸³⁸

a) Existence of a general staff in Zumbe

373. To demonstrate that the self-defence group developed into a militia with an organised, hierarchical military structure and headquarters established in Zumbe, the Prosecution relied on a letter dated 4 January 2003, from D03-66 to an operator called Oudo living in Olongba, entitled “[TRANSLATION] Request for assistance”, requesting the provision of soap and bearing a stamp with the words “*Forces des Résistance Patriotique en Ituri, Bureau d’Etat-Major-Siège, Tatsi-Zumbe* [Patriotic Force of Resistance in Ituri, Office of the General Staff Headquarters, Tatsi-Zumbe]”.⁸³⁹

⁸³⁴ Prosecution Closing Brief, para. 388.

⁸³⁵ Prosecution Closing Brief, paras. 301-302.

⁸³⁶ Prosecution Closing Brief, paras. 320-323.

⁸³⁷ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 395, 397, 403 and 407-408.

⁸³⁸ Closing Brief of the Defence for Mathieu Ngudjolo, para. 406.

⁸³⁹ EVD-OTP-00025: Letter signed in Bolo on 4 January 2003.

374. As for the evidence of P-250, the Chamber must recall that it did not consider this witness to be credible.⁸⁴⁰ Regarding the letter requesting soap, it wishes to emphasise that this is the sole document, amongst all the evidence before it, bearing this stamp. It further notes that the author of this letter, whose statements in this regard it nevertheless recognises should be considered with caution, denied having affixed this stamp and also alleged that this was not the stamp used at the time.⁸⁴¹ Furthermore, on the basis of the sole document before it, the Chamber is not in a position to determine exactly in what circumstances and on what date the stamp was affixed. Finally, there is no other evidence to show that the FRPI was already established in Zumbe on 4 January 2003, when this document was allegedly dispatched.

375. Thus, in the Chamber's view, the existence of a general staff in Zumbe in early January 2003 cannot be established on the basis of this one testimony and the presentation of a stamp which it has not been able to authenticate.

b) Number of combatants

376. Referring to a hierarchical military structure, the Prosecution also submitted that it included a significant number of combatants,⁸⁴² describing these as being replaceable, precisely because there were so many of them. Furthermore, the Prosecution relies on this point to argue the existence of "[TRANSLATION] almost automatic compliance" by these combatants with their hierarchical superiors' orders.⁸⁴³ However, it draws essentially on the statements of Witnesses P-250, P-279 and P-280, whose credibility the Chamber has questioned in Section VII, as evidence of the large number of combatants. The

⁸⁴⁰ Section VII.

⁸⁴¹ D03-66, T. 297, pp. 47-54.

⁸⁴² Prosecution Closing Brief, paras. 301 and 302.

⁸⁴³ Prosecution Closing Brief, paras. 419-422.

Chamber notes that Witness D03-88 stated that there were more than 500 youths in charge of self-defence.⁸⁴⁴

377. Based on the evidence called, which was not challenged by the Defence for Mathieu Ngudjolo, the Chamber is therefore of the opinion that at the time of the facts, a group of at least 500 combatants existed in Bedu-Ezekere *groupement*.

c) Military camps and commanders

378. The Prosecution submitted that positions were created in Bedu-Ezekere *groupement* to which groups of combatants were assigned.⁸⁴⁵ Whilst they may not bear all the hallmarks of a classic military camp, these camps were, in the Prosecution's submission, headed by a commander.⁸⁴⁶ However, in support of this allegation, the Prosecutor has relied essentially on the statements of Witnesses P-250, P-279 and P-280, whom the Chamber found to lack credibility.⁸⁴⁷

379. The Defence for Mathieu Ngudjolo contested the existence of military camps in Bedu-Ezekere *groupement*, arguing that all that existed was the aforementioned "grassroots committee".⁸⁴⁸ In support of this assertion, it relied, *inter alia*, on the evidence of D03-88, confirmed by Mathieu Ngudjolo, that there were no military camps in the *groupement*.⁸⁴⁹ Mathieu Ngudjolo further stated that a civilian acting in self-defence should not be mistaken for a political and military group or the army, as these are two different things.⁸⁵⁰ In Ituri, he claimed, there were militias as well as self-defence groups,⁸⁵¹ a militia being a

⁸⁴⁴ D03-88, T. 307, p. 33.

⁸⁴⁵ Prosecution Closing Brief, para. 309.

⁸⁴⁶ Prosecution Closing Brief, paras. 309-310.

⁸⁴⁷ See Section VII.

⁸⁴⁸ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 1191 and 1194.

⁸⁴⁹ D03-707, T. 327, p. 62; T. 328, p. 3; D03-88, T. 300, pp. 17 and 53.

⁸⁵⁰ D03-707, T. 327, p. 62.

⁸⁵¹ D03-707, T. 333, pp. 23-24.

group with a structure and paramilitary training⁸⁵² whilst a self-defence group is merely a group of civilians who are defending themselves.⁸⁵³

380. In this regard, the Chamber notes that Witnesses D03-44, D03-55 and D03-66 all stated that whilst there was a self-defence organisation in place in Bedu-Ezekere *groupement* between August 2002 and March 2003, there were no military camps.⁸⁵⁴

381. However, the Prosecution maintained that all three witnesses were seeking to minimise the degree of organisation of the Lendu militia and the involvement of the Accused.⁸⁵⁵ It challenged their credibility by calling their impartiality into question, recalling in that regard that they all have a relationship with the Accused or those close to him.⁸⁵⁶

382. The Chamber further notes that Witness D03-236 stated that upon arriving in Zombe in 2002 after the fall of Governor Lomondo, he had not noticed anyone carrying firearms, that it was difficult to identify combatants⁸⁵⁷ and that he had not seen any military camps.⁸⁵⁸ The Prosecution challenged this part of the witness's evidence: it is of the view that the witness's version of events lacks credibility in light of the armed conflict that was raging at the time and emphasised that the witness contradicted himself in regard to his previous statement in which he acknowledged having noted the presence of combatants.⁸⁵⁹ In fact, as the Chamber has noted above,⁸⁶⁰ D03-236 merely stated in court that it was difficult to distinguish combatants from civilians, and the Chamber

⁸⁵² D03-707, T. 333, p. 23.

⁸⁵³ D03-707, T. 333, p. 24.

⁸⁵⁴ D03-44, T. 291, p. 36; D03-55, T. 292, pp. 55-56; D03-66, T. 295, p. 60.

⁸⁵⁵ Prosecution Closing Brief, para. 317.

⁸⁵⁶ Prosecution Closing Brief, paras. 364 and 465-470.

⁸⁵⁷ D03-236, T. 261, p. 32; T. 263, pp. 13-14 and 20.

⁸⁵⁸ D03-236, T. 263, p. 21.

⁸⁵⁹ Prosecution Closing Brief, para. 790.

⁸⁶⁰ See Section VII.

considers that it is clear from his statements that there were combatants in Zombe.⁸⁶¹

383. The Chamber further notes that D02-01 stated that in the two weeks during which he had lived in the village of Zombe – where he had arrived a week after the fall of Nyankunde in 2002⁸⁶² – he had seen armed combatants “[TRANSLATION] setting up” the self-defence system.⁸⁶³ In response to questions from the Prosecution, he confirmed that he had heard about Lagura and that there was a camp of “[TRANSLATION] soldiers” there commanded by Kute.⁸⁶⁴ Witness D03-100 also stated that Kute had received military training in Nyaleke – an APC training centre which primarily received Lendu and Ngiti⁸⁶⁵ – that he knew how to wage war and conduct operations and that this was the reason why he had been “[TRANSLATION] appointed” commander in Lagura.⁸⁶⁶ According to Witness D03-55, Kute “[TRANSLATION] lived” in Lagura and “[TRANSLATION] was a member of the self-defence group”⁸⁶⁷ and Kabosse was “[TRANSLATION] based in Lagura”.⁸⁶⁸ D03-66, for his part, confirmed that Kute was based in Lagura,⁸⁶⁹ and D03-236 stated, in his own words, that he had heard about Kute in Lagura, although he did not know what post he held.⁸⁷⁰ Finally, P-323, a UPC combatant,⁸⁷¹ stated that he had seen Kute at the battle of Bogoro and then later heard that he was “[TRANSLATION] the battalion commander in Lagura”.⁸⁷²

⁸⁶¹ D03-236, T. 263, p. 31.

⁸⁶² D02-01, T. 276, pp. 9-10.

⁸⁶³ D02-01, T. 277, p. 37.

⁸⁶⁴ D02-01, T. 277, p. 39.

⁸⁶⁵ P-12, T. 195, pp. 15-16.

⁸⁶⁶ D03-100, T. 310, p. 40. See also D03-707, T. 330, p. 64.

⁸⁶⁷ D03-55, T. 293, p. 49.

⁸⁶⁸ D03-55, T. 294, pp. 28-29.

⁸⁶⁹ D03-66, T. 297, p. 14.

⁸⁷⁰ D03-236, T. 263, p. 30.

⁸⁷¹ P-323, T. 116, p. 70.

⁸⁷² P-323, T. 117, pp. 32-33.

384. The Chamber also notes the statements of Witness D03-100 that, from August 2002 to March 2003, Boba Boba was the commander of the combatants in Ladile.⁸⁷³ D03-55, who claimed to know Boba Boba, confirmed that Boba Boba was a member of the self-defence group and recalled that he shuttled between the different localities, although he did not know where he was based.⁸⁷⁴

385. D03-100 also stated that Lone Nyunye was the commander of the combatants in Zumbe and that he had a deputy whose name the witness no longer recalled.⁸⁷⁵ He explained that “[TRANSLATION] [t]o be a commander, you had to be courageous enough to control the self-defence group”, that Nyunye “[TRANSLATION] was very committed” and that it was “[TRANSLATION] in those circumstances[”] that he acquired the aforementioned “rank”.⁸⁷⁶ D03-55 stated that Nyunye “[TRANSLATION] was [...] part of a self-defence group” and that he “[TRANSLATION] was in Zumbe”.⁸⁷⁷ D03-66 stated that Nyunye was a combatant and was based in Lagura.⁸⁷⁸ Explaining this geographic contradiction, Mathieu Ngudjolo stated that Lone Nyunye had first lived in Katonie, near Lagura, before moving to Zumbe.⁸⁷⁹

386. Whilst aware of the combatants’ mobility, the Chamber must note that some of them were mentioned repeatedly by the aforementioned witnesses as being “based” in the same place or holding the same positions. Regarding the self-defence system, D03-88 further stated that “[TRANSLATION] each group had a leader among the youths, because they had different positions”, that “[TRANSLATION] each team of youths had its own head or leader, and each group

⁸⁷³ D03-100, T. 310, p. 30.

⁸⁷⁴ D03-55, T. 294, p. 28.

⁸⁷⁵ D03-100, T. 310, pp. 39-40.

⁸⁷⁶ D03-100, T. 310, p. 39.

⁸⁷⁷ D03-55, T. 294, p. 27.

⁸⁷⁸ D03-66, T. 297, p. 14.

⁸⁷⁹ D03-707, T. 330, p. 61.

had to prepare an organisational chart”.⁸⁸⁰ The Chamber notes that the best known positions and camps in Bedu-Ezekere *groupement* were Zumbe, Ladile and Lagura. Moreover, it highlights that various testimonies consistently show that commander Kute held the position in Lagura, commander Boba Boba was the leader of a self-defence group posted in Ladile and commander Nyunye was in Zumbe.

387. The Chamber further notes that the 16 July 2004 United Nations Security Council report on the situation in Ituri from January 2002 to December 2003 mentions camps established in Zumbe and Kpandroma used as training sites for children.⁸⁸¹ Moreover, the Chamber recalls the evidence of photo-journalist P-373, who visited Zumbe on 2 July 2003. During evidence, this witness stated that the area commander was “Cobra” and commented on a series of photographs taken during his visit. These photographs show young people, some armed or lined up, who he claimed were in a military camp because the children there did not have the same tasks as those who lived outside it.⁸⁸² Nevertheless, the Chamber recalls that this testimony pertains to a visit to Zumbe in July 2003.

388. Admittedly, it cannot be stated that Bedu-Ezekere *groupement* had existing military camps in conventional sense. It cannot be found on the basis of the evidence accepted by the Chamber as being credible that the *groupement* possessed military camps with combatants serving under the orders of a hierarchical superior and all receiving military training. Likewise, the Chamber lacks evidence to support a finding that the Lendu combatants in the *groupement* were arranged in a single organisational structure divided into sectors and battalions, companies, platoons and sections, as stated in the *Decision on the*

⁸⁸⁰ D03-88, T. 301, p. 21.

⁸⁸¹ EVD-OTP-00285: MONUC report on events in Ituri, para. 147.

⁸⁸² P-373, T. 127, pp. 7-9; T. 128, pp. 13 and 18; EVD-OTP-00073: Statement of P-373, paras. 35, 38 and 45); EVD-OTP-00074 to EVD-OTP-00095: Photographs. The Defence argues that these photographs were not taken in Zumbe; see the Closing Brief of the Defence for Mathieu Ngudjolo, paras. 820 and 821.

confirmation of charges. Nor is it in a position to rule on the exact powers and roles of the various commanders mentioned by the witnesses.

389. However, several witnesses described the positions occupied by the self-defence system as “camps” or as self-defence “groups” comprised of what were variously referred to as combatants, soldiers or self-defence-group members, and the Chamber has been unable to determine whether or to what degree these different terms designate and pertain to quite distinct realities. It is of the view, nevertheless, that the evidence demonstrates the existence of groupings of combatants which were more or less permanent; established in fixed positions, such as Lagura, Ladile and Zumbe; and under the authority of clearly identified individuals. It therefore finds that positions of a military nature did exist in Bedu-Ezekere *groupement* prior to 24 February 2003.

d) Disciplinary procedure

390. The Prosecution maintained that there was a disciplinary procedure in Bedu-Ezekere *groupement* whereby hearings and a military police force provided the means to punish soldiers responsible for any act labelled as misconduct.⁸⁸³ The Prosecution used this in support of its argument, once again, that the military organisation of the *groupement* enabled the Accused to ensure that his orders were followed. However, it relied solely on Witnesses P-250, P-279 and P-280, whom the Chamber has found to lack credibility,⁸⁸⁴ to establish the existence of the military police force and a disciplinary system in the Lendu militia in Bedu-Ezekere *groupement*.⁸⁸⁵ The Chamber therefore considers that there is insufficient evidence to credit the existence of such a disciplinary procedure.

⁸⁸³ Prosecution Closing Brief, paras. 410-415 and 429-430.

⁸⁸⁴ See Section VII.

⁸⁸⁵ Prosecution Closing Brief, paras. 425-430.

**e) Reporting system, administrative organisation,
weapons and training, parades and communication
between camps**

391. In order to demonstrate that the combatants of Bedu-Ezekere *groupement* were part of a hierarchical military organisation, the Prosecution further submitted that there was a reporting system within the organisation to transmit orders along the chain of hierarchy⁸⁸⁶ and that there was an administrative organisation.⁸⁸⁷ In addition, it submitted that the combatants were supplied with firearms and ammunition,⁸⁸⁸ that they received training and took part in parades⁸⁸⁹ and that the various camps had means of communicating amongst themselves and outside of the *groupement*.⁸⁹⁰ However, in order to establish these various allegations, the Prosecution relied for the most part on the testimonies of Witnesses P-250, P-279 and P-280 and, to a lesser extent, P-219, all of whom the Chamber has not found credible.⁸⁹¹ The Chamber further notes that when testifying on the “grassroots committee”, Witness D03-66 stated that reports were sent by all committees to D03-88, the chief of the *groupement*.⁸⁹² The Chamber considers this sole piece of evidence insufficient to establish the existence of the reporting procedure or of an administrative organisation.

392. On the subject of the presence of firearms and ammunition within the *groupement*, D03-88 maintained that there were around seven AK47s⁸⁹³ in Zombe and one machine gun.⁸⁹⁴ Furthermore, he stated that in late 2002, Germain Katanga – whom he had met in Aveba, where he had travelled after a trip to Beni – had given him twelve packages of one hundred bullets. At that time, D03-88

⁸⁸⁶ Prosecution Closing Brief, para. 324.

⁸⁸⁷ Prosecution Closing Brief, paras. 325-326.

⁸⁸⁸ Prosecution Closing Brief, paras. 327-333.

⁸⁸⁹ Prosecution Closing Brief, paras. 334-341.

⁸⁹⁰ Prosecution Closing Brief, paras. 342-346.

⁸⁹¹ See Section VII.

⁸⁹² D03-66, T. 295, p. 46.

⁸⁹³ D03-88, T. 301, p. 63.

⁸⁹⁴ D03-88, T. 301, pp. 63-64. See also D03-707, T. 327, p. 57.

had asked Germain Katanga for ammunition in order to defend himself against assailants who had come to burn down his village.⁸⁹⁵ Mathieu Ngudjolo stated that he had indeed seen D03-88 return from Beni in December 2002 with twelve hundred cartridges.⁸⁹⁶ Hence the Chamber considers that firearms were indeed present in Bedu-Ezekere *groupement* and, in light of the evidence, in limited quantities. Furthermore, several witnesses stated that the Lendu had arrows and spears.⁸⁹⁷

393. As to the existence of training and parades,⁸⁹⁸ the Chamber notes that Witness D03-88 stated that Kute, Milu and Boba Boba would sometimes show the youths from the self-defence groups “[TRANSLATION] how to insert the bullet, load the gun and shoot” and apparently, how to clean the weapons.⁸⁹⁹ However, this is the only evidence which the Chamber has on this point, which is insufficient for it to establish the existence of training and parades.

394. Finally, as to the existence of a communications system, D03-88 stated that during the period from August 2002 to March 2003, the youths in charge of self-defence did not, strictly speaking, have any means of communication and that they used horns, whistles and drums.⁹⁰⁰

395. The Chamber further notes that several witnesses stated that prior to the attack, communications announcing an imminent attack had been intercepted.⁹⁰¹ Finally, the Chamber has before it the testimony of P-268 stating that during the

⁸⁹⁵ D03-88, T. 301, pp. 32, 58-61.

⁸⁹⁶ D03-707, T. 331, pp. 30-31.

⁸⁹⁷ D03-44, T. 291, p. 41; D03-66, T. 297, pp. 11-12; D03-88, T. 300, p. 59.

⁸⁹⁸ Prosecution Closing Brief, paras. 334-341.

⁸⁹⁹ D03-88, T. 305, pp. 33-34.

⁹⁰⁰ D03-88, T. 300, pp. 59-61.

⁹⁰¹ P-161, T. 111, pp. 21-22; P-166, T. 227, p. 37; P-233, T. 88, pp. 20-21; P-323, T. 117, pp. 23-24; D02-176, T. 225, pp. 26-27.

attack on Bogoro, the leaders of the Ngiti and Lendu combatants carried Motorola devices.⁹⁰²

396. In light of this evidence, the Chamber must find that the Lendu combatants of Bedu-Ezekere *groupement* had certain means of communication.

**f) Presence of child soldiers in Bedu-Ezekere
*groupement***

397. In order to support its proposition of the combatants' "almost automatic compliance" with orders, the Prosecution submitted that there were child soldiers in Bedu-Ezekere *groupement* and emphasised that their young age meant that they were less thoughtful and hence more tractable.⁹⁰³ The Chamber will address this issue in Section X.

g) Attacks launched from Bedu-Ezekere *groupement*

398. In the Prosecution's submission, the Lendu militia of Bedu-Ezekere had the capacity to plan and execute military operations and the combatants thus took the initiative to launch attacks, including the attack on Bogoro in August 2002.⁹⁰⁴

399. Witness D03-88 testified that the "youths" did not launch any attacks on the other localities, since the village was surrounded and attacking a village would have meant that the enemy could attack Zombe from another locality.⁹⁰⁵ Thus, they merely pursued fleeing enemies once the fighting was over, in order to make them relinquish whatever they were transporting.⁹⁰⁶

400. Conversely, some witnesses testified that attacks were indeed launched from Bedu-Ezekere *groupement*. Thus, several witnesses who were resident in

⁹⁰² P-268, T. 108, pp. 13-14.

⁹⁰³ Prosecution Closing Brief, para. 423.

⁹⁰⁴ Prosecution Closing Brief, paras. 347-348.

⁹⁰⁵ D03-88, T. 300, pp. 61-62.

⁹⁰⁶ D03-88, T. 300, p. 61.

Bogoro stated that there were Lendu amongst the assailants in an attack which took place in 2001;⁹⁰⁷ for example, Witnesses P-233 and P-166 specified that the assailants were mainly Northern Lendu.⁹⁰⁸

401. Similarly, various witnesses stated that the attack on Bogoro on 14 August 2002 was launched by Lendu, amongst others. One such witness, P-233, was able to identify Kute and Bahati as two of the Northern Lendu assailants.⁹⁰⁹ According to P-166, the Lendu assailants came from Zumbe.⁹¹⁰

402. In this connection, the Chamber notes the testimony of Witness D03-44 who, when questioned by the Prosecution, acknowledged that the Lendu responded in kind to the Hema-led attacks on Bedu-Ezekere *groupement* and went to attack the Hema in their community. He stated that they usually “[TRANSLATION] launched a counter-attack”.⁹¹¹

403. In light of the evidence before it, the Chamber therefore finds that the Lendu combatants of Bedu-Ezekere had a certain capacity to conduct offensives, from as early as 2001 onwards.

3. Conclusion

404. In light of all of the evidence in its possession, the Chamber finds that, in the aforementioned context of unremitting attacks on Bedu-Ezekere *groupement* between 2001 and 2003, and given the inhabitants’ very difficult living conditions resulting from such attacks, a self-defence movement became established within the *groupement*. The Chamber cannot endorse the Defence argument that the self-defence movement was merely a committee of youths which was established within the “grassroots committee”. Nevertheless, it is unable to determine on the

⁹⁰⁷ See, for example, P-233, T. 87, p. 24; P-268, T. 108, pp. 17-19; EVD-OTP-00202: statement of P-166, para. 25; V-4, T. 234, pp. 17-19; V-2, T. 232, pp. 22-23 and 34.

⁹⁰⁸ P-233, T. 87, p. 24; EVD-OTP-00202: statement of P-166, para. 25.

⁹⁰⁹ P-233, T. 87, p. 23.

⁹¹⁰ EVD-OTP-00202: statement of P-166, paras. 31 and 44.

⁹¹¹ D03-44, T. 292, p. 22.

basis of the evidence before it the exact structure of the self-defence movement. Nor can the Chamber establish beyond reasonable doubt on the basis of the evidence that the self-defence movement evolved into a military organisation with a defined hierarchical chain, as alleged by the Prosecution. However, the Chamber has established beyond reasonable doubt that at a given time between 2001 and 2003, the Lendu combatants of Bedu-Ezekere *groupement* formed groups on various positions, some of which were led by commanders. The evidence also shows that these combatants did not confine themselves to defending the territory of their *groupement* in the event of an attack, but that they too could launch attacks.

D. MATHIEU NGUDJOLO'S ROLE AND FUNCTIONS IN BEDU-EZEKERE GROUPEMENT DURING THE ATTACK ON BOGORO

405. In the *Decision on the confirmation of charges*, the Pre-Trial Chamber found that "there is sufficient evidence to establish substantial grounds to believe that, from the beginning of 2003 until he was integrated into the FARDC, Mathieu Ngudjolo Chui served as *de jure* supreme commander of the FNI".⁹¹² As the Chamber has recalled above, the Prosecution submits that the Accused was the commander-in-chief of the Bedu-Ezekere militia at the time of the attack on Bogoro. In support of this allegation, it relies on evidence pertaining to Mathieu Ngudjolo's military experience which he had acquired previously but also displayed subsequently, as well as the testimony of Witnesses P-250, P-279, P-280 and P-219.⁹¹³ However, the Chamber does not consider these witnesses to be credible and accordingly will not take their statements into account in its analysis at this juncture.⁹¹⁴

⁹¹² *Decision on the Confirmation of Charges*, para. 541.

⁹¹³ Prosecution Closing Brief, paras. 352-370.

⁹¹⁴ See Section VII.

406. The Defence for Mathieu Ngudjolo challenges these allegations⁹¹⁵ and submits, *inter alia*, that because of his nursing duties, the Accused was working at the Kambutso health centre on 24 February 2003 and therefore was not in Bogoro on the day of the attack.⁹¹⁶ It also submits that at that time he “[TRANSLATION] had no soldiers or combatants under his orders”.⁹¹⁷

407. The Chamber will examine the evidence before it pertaining to Mathieu Ngudjolo’s duties as a nurse and soldier, before turning to its findings on the evidence *in toto*.

1. Mathieu Ngudjolo’s social status

408. To support its allegations as to Mathieu Ngudjolo’s authority, the Prosecution relies on the Accused’s profile, and in particular, his family and his studies. It also emphasises his alleged relationships with influential figures in Ituri.⁹¹⁸

409. According to D03-88, Mathieu Ngudjolo’s elder brother was a dignitary.⁹¹⁹ This is uncontested by the parties. The Accused also knew the chief of the *groupement* well and shared family ties with him.⁹²⁰

410. The Accused stated in his testimony that he attended school until the third year of secondary and subsequently undertook medical studies. D03-88 also emphasised that Mathieu Ngudjolo was a nurse,⁹²¹ which made him an important person within a community with few members who had continued

⁹¹⁵ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 317, 367 and 387.

⁹¹⁶ Closing Brief of the Defence for Mathieu Ngudjolo, para. 256.

⁹¹⁷ Closing Brief of the Defence for Mathieu Ngudjolo, para. 256.

⁹¹⁸ Prosecution Closing Brief, paras. 391-397.

⁹¹⁹ D03-88, T. 303, pp. 52, 57-60. See also, EVD-D03-00094: “*Liste des sept notabilités du groupement de Bedu-Ezekere*”. See also, D03-707, T. 327, p. 13.

⁹²⁰ D03-88, T. 301, p. 8.

⁹²¹ D03-88, T. 305, p. 68.

their studies.⁹²² D03-88 further recalled that, contrary to the other “youths” in the *collectivité*, Mathieu Ngudjolo had a mastery of French and Lingala.⁹²³ According to D03-965, he was respected but also feared.⁹²⁴

411. Finally, the Accused explained that during his trainee placement in his third year of studies, in July to August 2002 in Bunia,⁹²⁵ he stayed in a house which Dr Adirodu had made available to him free of charge since he was his student trainee,⁹²⁶ and himself recalled that Dr Adirodu was at that time advisor to Mbusa Nyamwisi, President of the RCD-ML.⁹²⁷ The Chamber further notes that the Accused stated that when Bunia was captured on 8 August 2002 and he was compelled to flee from his house,⁹²⁸ he went to see Dr Adirodu to tell him of the events happening in the neighbourhoods of Bunia captured by the UPC.⁹²⁹ He stated that they then went together to Governor Lompondo’s residence, where Dr Adirodu spoke with the governor about the on-going events.⁹³⁰ He stated that it was also on that day he met Floribert Ngabu, the future President of the FNI, in the governor’s residence.⁹³¹ Finally, the Accused stated that he had fled Bunia with Governor Lompondo, who was leaving for a meeting with Commander Kandro in Songolo.⁹³²

⁹²² D03-88, T. 305, pp. 65-68.

⁹²³ D03-88, T. 306, pp. 67-68.

⁹²⁴ In response to a question from the Prosecution, Witness D03-965 stated that he respected Mathieu Ngudjolo but also feared him (D03-965, T. 313, p. 14). In Lendu, the words “respect” and “fear” can seemingly be used interchangeably (D03-965, T. 313, p. 18). However, according to the Defence for Mathieu Ngudjolo, “[TRANSLATION] in Africa, people respect nurses, teachers, customary judges who are wise people ... Respect does not mean fear.” (Closing Brief of the Defence for Mathieu Ngudjolo, para. 1190).

⁹²⁵ D03-707, T. 327, pp. 24-25. See also, EVD-D03-00108: Certificate of completion of internship, signed on 19 May 2011.

⁹²⁶ D03-707, T. 327, pp. 45 and 47; T. 331, p. 4.

⁹²⁷ D03-707, T. 327, p. 47.

⁹²⁸ D03-707, T. 327, pp. 45-46.

⁹²⁹ D03-707, T. 327, pp. 46-47.

⁹³⁰ D03-707, T. 327, pp. 46-47.

⁹³¹ D03-707, T. 327, p. 47.

⁹³² D03-707, T. 327, pp. 47-48.

2. Work as a nurse

412. Mathieu Ngudjolo stated that he had first trained as a first-aid nurse at the Red Cross in Bunia from 1990 to 1992;⁹³³ that he then worked as a first-aid nurse from August to December 1992 in Digeni;⁹³⁴ and that from 1993 to 1994 he continued this work in several locations in Bunia.⁹³⁵

413. According to Mathieu Ngudjolo's own testimony, after serving for some time in the civil guard – a point which will be revisited below – he worked for 10 months in 1997 as a first-aid nurse in Buy-Komi, Bedu-Ezekere *groupement*,⁹³⁶ then as a qualified nurse at Zumbe health centre from November 1997 to early 1999,⁹³⁷ and then from 1999 to 2002, he went for medical studies at the Bunia *Institut technique medical*.⁹³⁸ He stated that during that time – more specifically, from July 2000 to 9 January 2001 – he also worked as a nurse at the Vilo private dispensary in Katonie.⁹³⁹ Lastly, as stated above, the Accused testified that from July to August of his third year of studies at the *Institut*, he completed a trainee placement at the *Hôpital général de référence* in Bunia.⁹⁴⁰

⁹³³ D03-707, T. 327, p. 15; EVD-D03-00106: Certificate of completion of first-aid nursing studies, issued to Mathieu Ngudjolo in Bunia on 31 August 1992.

⁹³⁴ D03-707, T. 327, pp. 29-30.

⁹³⁵ D03-707, T. 327, pp. 30-31.

⁹³⁶ D03-707, T. 327, p. 30.

⁹³⁷ See EVD-D03-00109: Certificate of service rendered in the centre, issued on 18 June 2011. The Chamber notes on this point the existence of five letters of recommendation and appointment of medical auxiliaries which were countersigned by Mathieu Ngudjolo between 30 September 1998 and 25 June 1999: EVD-D03-00112; EVD-D03-00113; EVD-D03-00114; EVD-D03-00115; and EVD-D03-00116. The Accused explained that if he countersigned these documents, it was in his capacity as the qualified nurse of the Zumbe and subsequently the Kambutso health centres, as the person in charge of training; D03-707, T. 327, p. 39.

⁹³⁸ D03-707, T. 327, p. 15; EVD-D03-00107: Certificate of attendance at the *Institut* for the 1999-2002 academic years, issued on 19 May 2011.

⁹³⁹ EVD-D03-00111: Certificate of service, issued by the Vilo health centre on 11 June 2011.

⁹⁴⁰ D03-707, T. 327, p. 24. See also, EVD-D03-00108: Certificate of completion of trainee placement, signed on 19 May 2011.

414. Witnesses D02-228,⁹⁴¹ D03-100⁹⁴² and D02-129⁹⁴³ all testified that Mathieu Ngudjolo had worked as a nurse at some point. D03-44 also stated that the Accused taught courses at the health centre in 2002.⁹⁴⁴

415. Whilst Mathieu Ngudjolo's past as a nurse *per se* is uncontested, it is in dispute whether he was working in the medical field during the period from September 2002 to 6 March 2003. The Accused stated that as from August 2002 (more specifically, after Governor Lompondo was ousted from Bunia on 9 August 2002) until March 2003 – during which time he was in Zumbe and Kambutso⁹⁴⁵ – he was working as a nurse and a trainer of community health workers.⁹⁴⁶ He stated that he himself took the initiative to set up the Kambutso health centre in September 2002 in order to supplement his trainee placement hours⁹⁴⁷ and that he worked there as a nurse for that period.⁹⁴⁸ According to his own statement, he was the only nurse in Bedu-Ezekere *groupement*, and the other individuals who were qualified to provide care were “[TRANSLATION] health workers” whom he had trained himself.⁹⁴⁹ He further stated that he gave first-aid courses to members of self-defence groups so that they could administer care to the wounded.⁹⁵⁰

416. D03-88 stated that Mathieu Ngudjolo had come to Zumbe at his request, after Bunia was captured in August 2002, to join the health committee and provide care to the villagers.⁹⁵¹ According to the witness, the Accused

⁹⁴¹ D02-228, T. 251, p. 66.

⁹⁴² D03-100, T. 309, p. 26.

⁹⁴³ D02-129, T. 271, p. 48.

⁹⁴⁴ D03-44, T. 291, pp. 28-29.

⁹⁴⁵ He stated that he remained in Zumbe (and Kambutso) from 14 August 2002 to 6 March 2003. D03-707, T. 327, p. 43.

⁹⁴⁶ D03-707, T. 328, p. 5.

⁹⁴⁷ D03-707, T. 328, p. 6.

⁹⁴⁸ D03-707, T. 327, p. 31. See also, EVD-D03-00110: Certificate stating that Mathieu Ngudjolo was a trainee nurse at Kambutso health centre from September 2002 to 6 March 2003.

⁹⁴⁹ D03-707, T. 327, p. 33; T. 328, p. 5.

⁹⁵⁰ D03-707, T. 333, pp. 54-55.

⁹⁵¹ D03-88, T. 301, p. 9; T. 303, p. 22.

“[TRANSLATION] provided care to the ill” during the war, that is, from 2002 to late February 2003.⁹⁵² The witness stated that Mathieu Ngudjolo also belonged to the health committee, one of the five committees formed at that time within Bedu-Ezekere *groupement*.⁹⁵³ This point is also confirmed by Witness D03-66,⁹⁵⁴ to whom the Accused was a nurse during the period of 2002 to 2003.⁹⁵⁵

417. The Defence for Mathieu Ngudjolo stated that on account of his nursing duties, the Accused was not present in Bogoro during the attack of 24 February 2003.⁹⁵⁶ It supported its claim by referring in particular to the testimony of the Accused himself, which corroborates several other witnesses testifying that Mathieu Ngudjolo had worked the entire day of 24 February 2003 at Kambutso health centre helping a woman giving birth.⁹⁵⁷

418. It is the Prosecution’s view that, “[TRANSLATION] to the Accused’s mind”, this theory “[TRANSLATION] appears to be a defence of alibi” which “[TRANSLATION] is inconsistent with the truth” and it recalls that the main witnesses, who were supposed to corroborate the Accused’s statements on this point, were brought in at the very last minute⁹⁵⁸ – arguments which the Defence for Mathieu Ngudjolo strongly contested.⁹⁵⁹

419. The Chamber notes that, besides the Accused,⁹⁶⁰ several other witnesses testified to the delivery of the child on 24 February 2003 and Mathieu Ngudjolo’s presence at Kambutso health centre that day.⁹⁶¹

⁹⁵² D03-88, T. 301, p. 16.

⁹⁵³ D03-88, T. 300, p. 25-28; T. 301, p. 9.

⁹⁵⁴ D03-66, T. 295, p. 38.

⁹⁵⁵ D03-66, T. 296, p. 18-19.

⁹⁵⁶ Closing Brief of the Defence for Mathieu Ngudjolo, para. 256.

⁹⁵⁷ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 241-255, 466-469 and 585.

⁹⁵⁸ Prosecution Closing Brief, paras. 460-461 and 474.

⁹⁵⁹ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 885-894; Oral Submissions of the Defence for Mathieu Ngudjolo, T. 339, p. 45.

⁹⁶⁰ D03-707, T. 328, pp. 13-17.

⁹⁶¹ D03-44, T. 291, pp. 42-43 and 45; D03-55, T. 293, pp. 40-41; T. 294, p. 48; D03-963, T. 312, pp. 12-14 and 39-40; D03-965, T. 313, pp. 7-8.

420. However, in the Chamber's view, the statements of the Defence witnesses to the effect that Mathieu Ngudjolo worked the entire day of 24 February 2003 at Kambutso health centre are not credible. The Chamber noted that beyond that day, which they describe in detail, D03-963 and D03-965 were often incapable of remembering other aspects of life in Bedu-Ezekere.⁹⁶² In particular, D03-963 did not recall either the date of her husband's death or the date on which she had to leave Dele because of the war.⁹⁶³ Furthermore, she explained that she had difficulty remembering dates, and on the whole remembered only very little.⁹⁶⁴ D03-965, for his part, stated that he remembered the date of 24 February 2003 because it was the day on which one of his children was born. However, he had no precise memory of the date of death of his other children,⁹⁶⁵ nor did he mention the presence of D03-55, who stated that he was also at the health centre on 24 February 2003. In the Chamber's view, the testimony of both witnesses lacks credibility and hence cannot be taken into account.

421. As to Witness D03-44, the Chamber notes that he stated that he owed a lot to Mathieu Ngudjolo and that he remembered the date of 24 February "[TRANSLATION] because [the Accused] helped [him] a great deal during [his] life".⁹⁶⁶ On the basis of such a statement, the Chamber is compelled to treat the part of his testimony pertaining to Mathieu Ngudjolo's activities on 24 February 2003 with great circumspection, precisely because of the interest he may have in defending the Accused's case.

422. As regards Witness D03-55, the Chamber notes a number of contradictions, also recalled by the Prosecution,⁹⁶⁷ between his statements and the testimony of the aforementioned witnesses. Furthermore, it notes once again

⁹⁶² D03-963, T. 312, pp. 11, 17-19 and 35-37; D03-965, T. 313, p. 5.

⁹⁶³ D03-963, T. 312, pp. 11 and 23-24.

⁹⁶⁴ D03-963, T. 312, pp. 35-36.

⁹⁶⁵ D03-965, T. 313, p. 5.

⁹⁶⁶ D03-44, T. 292, p. 29.

⁹⁶⁷ Prosecution Closing Brief, paras. 468 and 470.

that the witness confuses a number of dates relating to his personal life, whereas he is able to describe the day of 24 February precisely.⁹⁶⁸ Hence on the basis of such contradictions and confusion, the Chamber cannot consider this part of his testimony to be credible.

423. Insofar as the Chamber has insufficient reliable evidence as to the Accused's presence at the Kambutso health centre on 24 February 2003, it cannot endorse this version of the facts. It emphasises that in any event, as the Prosecution recalled,⁹⁶⁹ this issue *per se* has no bearing on Mathieu Ngudjolo's criminal responsibility within the meaning of article 25(3)(a) of the Statute, since it is perfectly possible for him to have been a nurse and a militia leader concurrently.

424. Moreover, the Chamber notes that several individuals who were themselves nurses or had been in the past were active in self-defence or were important within the *groupement*. According to D03-88, as well as Mathieu Ngudjolo, Bahati was also on the health committee.⁹⁷⁰ In addition, several items of evidence show Bahati's importance within Bedu-Ezekere *groupement*. Germain Katanga stated that Bahati de Zumbe was present at the battle of Nyankunde⁹⁷¹ and Mathieu Ngudjolo told the Court that he had been appointed lieutenant-colonel in the FPRI, as part of the FNI/FRPI merger.⁹⁷² Finally, the Chamber also wishes to draw attention to commander Boba Boba, who also had at least a certain amount of medical experience. In this respect, D03-88 stated that Boba Boba had been trained and that he had worked at the Red Cross.⁹⁷³ Boba Boba –

⁹⁶⁸ D03-55, T. 293, pp. 59-61; T. 294, p. 46.

⁹⁶⁹ Prosecution Closing Brief, para. 437. See also Closing Brief of the Defence for Mathieu Ngudjolo, paras. 238, 256, 810; Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, p. 10.

⁹⁷⁰ D03-88, T. 300, p. 28.

⁹⁷¹ D02-300, T. 321, p. 67.

⁹⁷² D03-707, T. 333, pp. 68-69.

⁹⁷³ D03-88, T. 301, p. 17.

whom the Accused has known since childhood⁹⁷⁴ – was an influential person in the *groupement*: some individuals stated that he was a member of the self-defence group⁹⁷⁵ or even commander of the combatants in Ladile,⁹⁷⁶ whilst others stated that he had been a soldier in the army.⁹⁷⁷ The Chamber also notes that Boba Boba had worked as a member of the Red Cross⁹⁷⁸ – as had Mathieu Ngudjolo – and that he had also served in President Mobutu’s civil guard, where he too had reached the rank of corporal.⁹⁷⁹ Furthermore, the Accused stated that they were both present at the battle of Goma.⁹⁸⁰

3. Military activities

425. Mathieu Ngudjolo’s testimony makes clear that as of July 1994, he underwent nine months of training in the civil guard.⁹⁸¹ He testified that there he learned to use light weapons, such as AK-47s, and tear gas canisters, attending classes on military regulations and infantry drills.⁹⁸² Whereas the Prosecution views that institution as military in nature,⁹⁸³ the Accused contended that only police training was involved.⁹⁸⁴ He also stated that he attained the rank of corporal in the civil guard upon completion of the training.⁹⁸⁵

426. Although his rank is undisputed by the parties, the Chamber nonetheless notes divergent opinions as to the Accused’s exact role in the civil guard. Indeed, Mathieu Ngudjolo claimed that he performed his duties only in its medical

⁹⁷⁴ D03-707, T. 328, p. 50.

⁹⁷⁵ D03-55, T. 294, p. 28; D03-66, T. 296, p. 24.

⁹⁷⁶ D03-100, T. 310, p. 30; D03-88, T. 305, p. 45.

⁹⁷⁷ D03-100, T. 310, p. 30; D03-88, T. 305, pp. 33 and 35.

⁹⁷⁸ D03-88, T. 305, p. 35.

⁹⁷⁹ D03-707, T. 330, p. 65.

⁹⁸⁰ D03-707, T. 330, p. 65.

⁹⁸¹ D03-707, T. 327, pp. 28-29.

⁹⁸² D03-707, T. 333, p. 56.

⁹⁸³ Prosecution Closing Brief, paras. 349-350.

⁹⁸⁴ D03-707, T. 327, p. 29; T. 333, p. 57.

⁹⁸⁵ D03-707, T. 328, p. 47; T. 330, pp. 44 and 65.

corps,⁹⁸⁶ as confirmed in part by D03-88, who testified that the Accused joined the civil guard as a “[TRANSLATION] member of the Red Cross”.⁹⁸⁷ Although it did not dispute this point outright, the Prosecution however considers that Mathieu Ngudjolo sought to minimise the importance of his military experience thus acquired.⁹⁸⁸

427. Mathieu Ngudjolo maintained that he remained in the civil guard until October 1996,⁹⁸⁹ leaving it after the battle of Goma.⁹⁹⁰ He in fact acknowledged having participated in that battle as part of the civil guard but claimed to have served only as a member of the medical staff at the time.⁹⁹¹ However, the Chamber notes that at a meeting filmed in Bunia in late March 2003,⁹⁹² Mathieu Ngudjolo confirmed that he had been in Goma – “[TRANSLATION] not the first time [he had waged] war”⁹⁹³ and described himself as an experienced soldier.⁹⁹⁴ When asked to expound on these statements, Mathieu Ngudjolo asserted that they had been intended to give him importance.⁹⁹⁵

428. Accordingly, although it sees no reason to doubt the truth of the Accused’s medical activities in the civil guard, in light of the training he then underwent and his presence at the battle of Goma – facts which, moreover, are undisputed – the Chamber finds that Mathieu Ngudjolo did acquire at least basic military training before the attack on Bogoro.

⁹⁸⁶ D03-707, T. 329, p. 17.

⁹⁸⁷ D03-88, T. 305, p. 35; D03-707, T. 327, p. 15.

⁹⁸⁸ Prosecution Closing Brief, para. 349.

⁹⁸⁹ D03-707, T. 327, p. 42.

⁹⁹⁰ D03-707, T. 327, p. 42; T. 329, p. 17.

⁹⁹¹ D03-707, T. 329, p. 17.

⁹⁹² Prosecution Closing Brief, para. 351. See also EVD-OTP-00170: Video excerpt, at 0’00’’- 0’11 (concerning the same meeting).

⁹⁹³ EVD-OTP-00174: Video excerpt (DRC-OTP-1019-0237, line 0261).

⁹⁹⁴ EVD-OTP-00174 and EVD-OTP-00172: Video excerpts (DRC-OTP-1019-0237, lines 0255 and 0261).

⁹⁹⁵ D03-707, T. 329, p. 17.

429. Having set forth these observations, the Chamber will now turn to all of the testimonial and documentary evidence concerning the military duties assumed by the Accused before the battle of Bogoro.

a) Evidence concerning the position held by Mathieu Ngudjolo before or during the attack on Bogoro

430. In its *Decision on the confirmation of charges*, the Pre-Trial Chamber found that “from the beginning of 2003 until he was integrated into the FARDC”, Mathieu Ngudjolo served as *de jure* supreme commander of the FNI, had *de facto* ultimate control over FNI commanders and was the person to whom other commanders reported.⁹⁹⁶ In its Closing Brief, the Prosecution contends that at least in September 2002, as “[TRANSLATION] the Bedu-Ezekere Lendu militia became more organised [Mathieu] Ngudjolo became its commander-in-chief, the Chief of Staff”.⁹⁹⁷ In respect of the position held by the Accused before 24 February 2003, the Chamber hereby recalls some of the testimonial evidence *sub judice*.

431. Witness D02-176, UPC captain and company commander in Bogoro, stated that he “[TRANSLATION] knew very well” that Mathieu Ngudjolo was the “[TRANSLATION] number one” and “[TRANSLATION] commander of operations” during the attack on Bogoro.⁹⁹⁸ He stated it to be a “[TRANSLATION] truth known to all”,⁹⁹⁹ going on to single out Mathieu Ngudjolo as Chief of Staff of the “FNI”,¹⁰⁰⁰ a group to which, in his view, the Lendu combatants in Bogoro on 24 February 2003 belonged.¹⁰⁰¹

432. The Chamber certainly cannot underestimate this testimony inasmuch as D02-176 belonged to the UPC senior command, had responsibility for a company

⁹⁹⁶ *Decision on the confirmation of charges*, para. 541.

⁹⁹⁷ Prosecution Closing Brief, para. 304 (footnotes omitted).

⁹⁹⁸ D02-176, T. 257, p. 6.

⁹⁹⁹ D02-176, T. 257, p. 6.

¹⁰⁰⁰ D02-176, T. 257, p. 7.

¹⁰⁰¹ D02-176, T. 257, pp. 6-7.

and was engaged in defending the village of Bogoro. Hence, he was in principle particularly well-placed to state which military commanders were at enemy positions, given, as rehearsed above, that UPC troops had attacked Bedu-Ezekere *groupement* on numerous occasions.

433. Nonetheless, this assertion, founded on anonymous hearsay, was made by an individual who did not live in Zumbe and who, to boot, provided no further details on Mathieu Ngudjolo's status within that locality. Further still, having examined his statement, the Chamber cannot rule out that the witness had associated Mathieu Ngudjolo's status in the FNI with the position which he considered him to have held prior to the attack on Bogoro.

434. The testimony of P-317, who worked for MONUC from December 2002 to September 2006, was also tendered to the Bench.¹⁰⁰² Mathieu Ngudjolo allegedly told her in an interview on 4 April 2003,¹⁰⁰³ *viz.*, after joining the FNI-FRPI on 22 March 2003, that he had organised the attack on Bogoro.¹⁰⁰⁴ Although, as the Chamber pointed out at Section VII, there is no reason to doubt the credibility of this witness's statements, it cannot be presupposed that the Accused actually assumed those military responsibilities imputed by the Prosecution. Although somewhat indicative of the Accused's possible involvement in the preparation of the attack on Bogoro, P-317's statements appear too general ultimately to determine the Accused's precise status and role in Bedu-Ezekere *groupement*. Furthermore, in this regard, and although the argument must be treated with caution, it cannot be ruled out that Mathieu Ngudjolo, akin to others in Ituri at the time,¹⁰⁰⁵ had wanted to claim responsibility for an attack so that he would be given a higher rank if integrated into the regular Congolese army.

¹⁰⁰² P-317, T. 228, p. 10.

¹⁰⁰³ P-317, T. 228, p. 43.

¹⁰⁰⁴ P-317, T. 228, p. 44.

¹⁰⁰⁵ D03-11, the FNI President, too, claimed responsibility for the attack: T. 248, p. 26.

435. Two other witnesses, in principle less informed than those aforementioned, both relied on hearsay to state that Mathieu Ngudjolo's status in Zombe was, to say the least, important.

436. Witness P-28 stated that at the time of the attack on Bogoro and Mandro "[TRANSLATION] Zombe was Ngudjolo's territory".¹⁰⁰⁶ P-28 told the Court that when he was based in Bogoro, he had travelled to Mandro to reinforce troops in Zombe. In this respect, the Chamber refers to its findings concerning the witness's credibility.¹⁰⁰⁷ Unable to ascertain the foundation of such statements, the Chamber can therefore afford them only little probative value.

437. Responding to a series of questions under cross-examination, Witness D03-340 testified that around late 2002 to early 2003, he had heard that Mathieu Ngudjolo "[TRANSLATION] was in charge" in Zombe¹⁰⁰⁸ and that he was the "[TRANSLATION] chief defender" of the area.¹⁰⁰⁹ The Chamber notes, however, that the witness was unable to expound further on the assertion or even to specify its source. With reference to his previous statement to the Office of the Prosecutor, he claimed to have so testified only because the Prosecution had prompted him to use the term "[TRANSLATION] defender".¹⁰¹⁰ The Chamber further notes that the witness never lived in Zombe. Witness D02-161, who never lived in Zombe either, testified that she had heard in Aveba that Mathieu Ngudjolo was the chief of the combatants in Zombe¹⁰¹¹ and "[TRANSLATION] did not know what authority he had". Accordingly, the Chamber will afford little probative value to these two testimonies.

¹⁰⁰⁶ P-28, T. 218, p. 23.

¹⁰⁰⁷ See Section VII.

¹⁰⁰⁸ D03-340, T. 265, p. 74.

¹⁰⁰⁹ D03-340, T. 265, p. 74.

¹⁰¹⁰ D03-340, T. 265, p. 74.

¹⁰¹¹ D02-161, T. 269, p. 23.

438. The evidence of two witnesses who pointed to Mathieu Ngudjolo as one of those responsible for the attack on Bogoro was also put before the Chamber. Victim V-2 stated, on the basis of what she had been told, that Mathieu Ngudjolo was one of those responsible for the 2003 attack on Bogoro. However, the Chamber notes that the witness explained that such information was imparted by “[TRANSLATION] [market] women who came from the north and who said [...] that Mathieu Ngudjolo took part in training with people from his area [...] in Zumbe”,¹⁰¹² which in the Chamber’s view does not attest to his responsibility in Zumbe. Accordingly, the Chamber can only consider such statements of little probative value.

439. The same holds true for Victim V-4, who asserted that Mathieu Ngudjolo and Germain Katanga were both responsible for the 24 February 2003 attack on Bogoro,¹⁰¹³ yet failed to provide further details, particularly as to the source of such information. In this regard, the Chamber notes the somewhat confused statements of the witness, who also held them responsible for the 2001 attack.¹⁰¹⁴

440. In the view of the Chamber, although these two testimonies were provided by Bogoro residents, they can only be afforded low probative value insofar as the source of the information provided by one witness could not be ascertained, the other witness’s testimony was implausible, and none of the witnesses ever lived in Zumbe.

441. The Chamber further noted P-12’s allegation that in 2004 Germain Katanga had stated that he “[TRANSLATION] had to call Colonel Ngudjolo and ask him to muster all of the forces to evict the Hema who were in Bogoro.”¹⁰¹⁵ Mathieu Ngudjolo allegedly “[TRANSLATION] went down with his troops” very

¹⁰¹² V-2, T. 231, p. 50.

¹⁰¹³ V-4, T. 234, p. 22.

¹⁰¹⁴ V-4, T. 234, p. 19.

¹⁰¹⁵ P-12, T. 197, p. 27.

early in the morning and together they captured the village of Bogoro.¹⁰¹⁶ P-160 confirmed this account, alleging that Germain Katanga confided to him that the Lendu “[TRANSLATION] on Ngudjolo’s side” had helped him during the attack on Bogoro.¹⁰¹⁷ The Chamber takes no position on the credibility of the two witnesses in this regard, insofar as this is information allegedly imparted to P-12 and P-160 by Germain Katanga essentially concerning that Accused and is contested in the case against him. Further still, Mr Katanga categorically denied having made any such statements or mentioning the attack on Bogoro to P-12 and P-160.¹⁰¹⁸ The Chamber must therefore regard these assertions concerning Mathieu Ngudjolo with the utmost circumspection. It notes in this respect that on account of the ties binding the two witnesses, it cannot discount the possibility that they may have conferred before their in-court testimony, thereby precluding any corroboration. The Chamber cannot dismiss P-12’s recollections of his conversation with Germain Katanga, but affords them little probative value.¹⁰¹⁹

442. Lastly, Witness D02-129 claimed that Mathieu Ngudjolo had at one point become a soldier in Zumbe before joining the FARDC.¹⁰²⁰ However, since such statements do not relate to a specific timeframe, the Chamber can, yet again, afford them little probative value.

¹⁰¹⁶ P-12, T. 197, p. 27.

¹⁰¹⁷ P-160, T. 210, p. 63; T. 212, p. 58.

¹⁰¹⁸ D02-300, T. 319, p. 45

¹⁰¹⁹ The Chamber further notes Mathieu Ngudjolo’s alleged statements to Witness P-12 in Kampala, Uganda, wherein he expressed regret at having mistakenly killed many Hema on account of confusion between ethnicity and ideology (P-12, T. 197, pp. 36-37). The witness placed the conversation in May/June 2004 – Mathieu Ngudjolo claims to have been detained in the DRC at that time and therefore not to have met P-12 (D03-707, T. 329, p. 29). The Prosecution submitted that these events took place in 2005, and that Mathieu Ngudjolo’s repeated admissions to P-317, P-219 and P-12 prove his responsibility for the attack on Bogoro (Prosecution Closing Brief, paras. 496-499). In any event, the Chamber finds the statements of the Accused, as reported by P-12, too vague, of little bearing on the 24 February 2003 attack and of no assistance in substantiating Mathieu Ngudjolo’s position of authority to merit consideration at this juncture.

¹⁰²⁰ D02-129, T. 271, p. 48.

443. The Chamber finally notes that several witnesses claimed not know to whether Mathieu Ngudjolo was the leader of the Bedu-Ezekere Lendu combatants at the time of the attack on Bogoro. The Chamber deems it appropriate to mention their statements, whilst noting that, yet again, such testimony was given by persons who were not in Zombe at the material time.¹⁰²¹

**b) Evidence concerning the position held by Mathieu
Ngudjolo after the battle of Bogoro**

444. The Prosecution views Mathieu Ngudjolo's role and duties after 24 February 2003 as forming a continuum with those he discharged in the antecedent period and as circumstantial evidence of the position of authority he held even prior to the attack on Bogoro.¹⁰²² The Accused accounts for his rise from nurse to colonel in March 2003 as simply a mixture of chance and careerist opportunism, which drove him to take part in all of the major events which occurred after the capture of Bunia on 6 March 2003. The Prosecution considers Mathieu Ngudjolo's argument as uncorroborated¹⁰²³ and underscored that as of 6 or 7 March 2003, he appeared in a series of videos as a commander deeply involved in all of the key political and military events, proof that his commandership predated those two days.¹⁰²⁴

445. The Defence for Mathieu Ngudjolo contends that he turned his attention to activities of a military nature as of 6 March 2003, when the Zombe youths followed the Ugandan Captain Kiza and the UPDF in Dele, then under attack by the UPC.¹⁰²⁵ On 7 March 2003, Mathieu Ngudjolo allegedly met the Ugandan General Kale Kayihura, who purportedly informed him of the UPDF withdrawal from Ituri, the reunification of Congolese national territory, the formation of an

¹⁰²¹ D02-228, T. 251, pp. 65-67; D02-134, T. 259, pp. 55-61; D02-148, T. 280, pp. 36-37; D02-501, T. 260, p. 53.

¹⁰²² Prosecution Closing Brief, paras. 371-383.

¹⁰²³ Prosecution Closing Brief, paras. 445-446.

¹⁰²⁴ Prosecution Closing Brief, paras. 375-381; Prosecution Closing Statement, T. 336, p. 21.

¹⁰²⁵ Closing Brief of the Defence for Mathieu Ngudjolo, para. 957.

integrated national army and “[TRANSLATION] the incorporation of members of the political-*cum*-military groups into the new national army, on the basis of the ranks held in their respective groups prior to integration”. Thereafter, Mathieu Ngudjolo allegedly felt destined for a military career and proclaimed himself colonel.¹⁰²⁶

i. Mathieu Ngudjolo’s involvement in the attacks on Mandro of 4 March 2003 and Bunia of 6 March 2003

446. The attacks on Mandro on 4 March 2003 and Bunia on 6 March 2003 are undisputed.

447. In the Prosecution view, Mathieu Ngudjolo took part in the battle of Mandro, even organising and planning it in conjunction with Germain Katanga.¹⁰²⁷ He, it is claimed, also led the Lendu during the attack on Bunia. His forces and those of Germain Katanga, it is alleged, then collaborated with the UPDF to drive the UPC from Bunia.¹⁰²⁸ For the Prosecution, the Accused therefore already headed the militia and was not suddenly transformed into a soldier at that point in connection with action concerning targets that did not fall exclusively within the purview of defending his *groupement*.¹⁰²⁹

448. The Defence for Mathieu Ngudjolo argues that Mandro was attacked by the same forces which conquered Bogoro on 24 February 2003.¹⁰³⁰ In this connection, the Defence recalls Germain Katanga’s statements that it was the APC troops which, after taking Bogoro, overran Mandro.¹⁰³¹ The Defence holds the UPDF responsible for the attack on Bunia.¹⁰³²

¹⁰²⁶ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 958-959.

¹⁰²⁷ Prosecution Closing Brief, paras. 372 and 662.

¹⁰²⁸ Prosecution Closing Brief, paras. 373 and 663.

¹⁰²⁹ Prosecution Closing Brief, paras. 374.

¹⁰³⁰ Closing Brief of the Defence for Mathieu Ngudjolo, para. 417.

¹⁰³¹ Closing Brief of the Defence for Mathieu Ngudjolo, para. 183.

¹⁰³² Closing Brief of the Defence for Mathieu Ngudjolo, para. 418.

a. 4 March 2003 attack on Mandro

449. Mathieu Ngudjolo claims that he was in Kambutso on 4 March 2003, that the last battle in Bedu-Ezekere *groupement* occurred between 16 and 18 December 2002,¹⁰³³ and that he had no part in the battle of Mandro.¹⁰³⁴

450. Several witnesses, one of whom was at the battle, stated that combatants from Zumbe attacked Mandro.¹⁰³⁵ Moreover, according to the MONUC report on the events in Ituri, the Lendu and Ngiti launched the attack against the UPC positions and “the aggressors were reportedly Lendu militias from Zumbe and Loga”.¹⁰³⁶ The report also states: “Mathieu Ngudjolo [allegedly] acknowledged having organized the attack with the Ngiti in order to stop UPC operations against Lendu villages. According to him, each person in Mandro was a combatant in possession of a weapon”.¹⁰³⁷

451. P-317, the author of the report, told the Court that Mathieu Ngudjolo had told her that he had organised the attack on Mandro. As previously stated, the Chamber finds the witness credible but, in its view, the Accused’s purported statement is too imprecise to determine his exact role at the time.

b. 6 March 2003 attack on Bunia

452. The Chamber notes that the UPDF’s participation in the 6 March 2003 attack on Bunia is uncontested. The aforementioned MONUC report on the events in Ituri further states that on 6 March 2003, reportedly responding to an attack by

¹⁰³³ D03-707, T. 329, p. 48.

¹⁰³⁴ D03-707, T. 329, p. 49.

¹⁰³⁵ D02-148, T. 279, pp. 21-22. See also D02-129, T. 272, p. 6; D03-88, T. 306, pp. 5-8. Witness P-28 stated that the attack on Mandro was launched jointly by Zumbe, FRPI and APC troops (P-28, T. 218, p. 23). However, in light of the determination as to his credibility (Section VII), the Chamber will not rely on his statements.

¹⁰³⁶ EVD-OTP-00285: MONUC report on the events in Ituri, para. 72.

¹⁰³⁷ EVD-OTP-00285: MONUC report on the events in Ituri, para. 72.

UPC on their forces based in Ndele, the UPDF drove the UPC out of Bunia and took control of the town with the assistance of Lendu armed groups.¹⁰³⁸

453. In addition, several witnesses stated that the residents of Zumbe also took part in the attack, although some claimed to have been separated from the UPDF troops.¹⁰³⁹

454. As to Mathieu Ngudjolo's putative role in the attack, two witnesses for his Defence testified that he was present but was not leading the troops.¹⁰⁴⁰ D03-88 stated that he and the Accused were among the Zumbe troops to take part, clamouring and singing, in the attack on Bunia, adding that nobody was in command of the attack.¹⁰⁴¹ According to D03-66, Mathieu Ngudjolo did go to Bunia on that occasion but was not the one leading the troops; Banya Mande Jacques, according to the witness, was the "[TRANSLATION] leader of the combatants from Bedu-Ezekere *groupement*".¹⁰⁴²

455. Of note, however, is that to the question from a Congolese Prosecuting Officer – "[TRANSLATION] Were you ever present during military operations?" – Mathieu Ngudjolo replied that he "[TRANSLATION] directed only the operation that took place on 6 March 2003 in Bunia".¹⁰⁴³ He explained to the Chamber that that he had in fact been seeking to justify his rise to the key position of FNI-FRPI Chief of Staff and, therefore, this was the only reply he could give that prosecutor.¹⁰⁴⁴ Mathieu Ngudjolo actually claimed to have been at home, in Kambutso, on the morning of 6 March 2003. Accompanied by D03-88, he headed down towards Dele. Upon arrival in the area and whilst the battle was still raging, Captain Kiza of the UPDF allegedly told them to stay in the rear. Mathieu

¹⁰³⁸ EVD-OTP-00285: MONUC report on the events in Ituri, para. 73.

¹⁰³⁹ D02-129, T. 272, pp. 8-9; D03-88, T. 302, p. 34; D03-66, T. 298, pp. 9-12.

¹⁰⁴⁰ D03-88, T. 302, p. 34; D03-66, T. 298, p. 9.

¹⁰⁴¹ D03-88, T. 302, p. 34.

¹⁰⁴² D03-66, T. 298, pp. 9-11.

¹⁰⁴³ EVD-OTP-00283: Record of interview, 17 June 2004 (DRC-OTP-0039-0059).

¹⁰⁴⁴ D03-707, T. 331, pp. 69-70.

Ngudjolo claims not to have taken part in the battle but to have spent the night at his wife's home in Epoville, a neighbourhood in Bunia.¹⁰⁴⁵

456. The Chamber is unpersuaded by the justifications advanced by the Accused at trial and in view of his statements to the Congolese prosecutor, it cannot rule out the possibility that he led the Lendu combatants from Bedu-Ezekere during the Bunia operation, but is nonetheless unable to so determine beyond reasonable doubt. Mathieu Ngudjolo appears to claim leadership of the entire operation, whereas everything points to the Bunia offensive having been led by the UPDF and Lendu combatants. The Accused fails to indicate which troops he led in Bunia at the time. The Chamber further notes that in response to the Congolese prosecutor, the Accused made no mention of any participation whatsoever in the battles of Bogoro and Mandro.

ii. Mathieu Ngudjolo as of 6 March 2003

457. The Chamber notes that from early March 2003, Mathieu Ngudjolo was involved in various key events in Ituri, which are rehearsed hereunder.

a. The meeting at Bunia airport in early March 2003

458. According to Witness P-2, a meeting was held between 6 and 11 March 2003 with members of the Hema community, the FRPI, MONUC and General Kale Kayihura.¹⁰⁴⁶ Mathieu Ngudjolo was also in attendance, clad in military uniform.¹⁰⁴⁷ The Chamber notes that most of the meeting's participants remain unidentified and that, according to Witness P-2, a representative of the Bunia business community can nonetheless be seen.¹⁰⁴⁸

¹⁰⁴⁵ D03-707, T. 328, p. 29; T. 329, p. 51; T. 331, pp. 62-63.

¹⁰⁴⁶ P-2, T. 185, p. 65; T. 191, p. 22.

¹⁰⁴⁷ P-2, T. 185, pp. 73-74.

¹⁰⁴⁸ P-2, T. 185, pp. 67 and 73. Witness P-2 identified the person in two video excerpts of the meeting (EVD-OTP-00163 and EVD-OTP-00164).

459. At the meeting, General Kayihura reported that he had received instructions “[TRANSLATION] from the President” to resume the peace process,¹⁰⁴⁹ prompting him to invite to the discussions those persons he deemed capable of putting forward ideas on the matter.¹⁰⁵⁰ Addressing Mathieu Ngudjolo as “[TRANSLATION] doctor”, he asked him to “[TRANSLATION] be disciplined and remain in [his] territory” so as not to re-experience the war against the UPC.¹⁰⁵¹ Towards the end of the meeting, Androzo Dark claimed to have taken Bogoro by force,¹⁰⁵² unassisted by the UPDF¹⁰⁵³ or the Kinshasa troops.¹⁰⁵⁴

460. As the meeting drew to a close, Mathieu Ngudjolo interrupted Dark to conclude.¹⁰⁵⁵ Here, the Chamber observes that Dark, who took part in the attack on Bogoro and subsequently headed the troops which occupied the village, allowed himself to be interrupted without reacting. Mathieu Ngudjolo thus concluded the meeting by stating that he was a soldier and offering to talk to the “[TRANSLATION] UPC youths” who had taken refuge around Bunia. He ended by saying that he loved the profession of soldier and declaring that he who loves “[TRANSLATION] the military career” could be integrated into the army of the Kinshasa government, to applause from the participants.

461. Mathieu Ngudjolo told the Court that he had met General Kale Kayihura once prior to the airport meeting. On the day after the attack on Bunia, on the morning of 7 March 2003, he was preparing to return to Kambutso when he chanced upon Justin Lobho, an individual by the name of Saïdi and Captain Kiza of the UPDF, who were heading together to Bunia airport to meet the UPDF General Kale Kayihura. Justin Lobho and Saïdi then purportedly told him that

¹⁰⁴⁹ EVD-OTP-00284: Video excerpt (DRC-OTP-1045-0036, lines 202 and 203).

¹⁰⁵⁰ EVD-OTP-00284: Video excerpt (DRC-OTP-1045-0036, lines 207 and 208).

¹⁰⁵¹ EVD-OTP-00164: Video excerpt (DRC-OTP-1045-0039, lines 322-325).

¹⁰⁵² EVD-OTP-00167: Video excerpt (DRC-OTP-1045-0039-0062 and 0063, lines 1157-1175).

¹⁰⁵³ EVD-OTP-00167: Video excerpt (DRC-OTP-1045-0064, lines 1219-1224).

¹⁰⁵⁴ EVD-OTP-00167: Video excerpt (DRC-OTP-1045-0064, lines 1232-1241).

¹⁰⁵⁵ EVD-OTP-00169: Video excerpt (DRC-OTP-1045-0068, line 1383). See also EVD-OTP-00169: Video excerpt (DRC-OTP-1045-0068, lines 1397 and 1398).

they were going to see the General instead of D03-88, who was not present. They allegedly asked Mathieu Ngudjolo to accompany them, to which he agreed.¹⁰⁵⁶ The Prosecution does not consider the Accused's account credible since D03-88 was apparently in Bunia on that date¹⁰⁵⁷ and there is no testimony from Lobho Justin or Saïdi to corroborate it.¹⁰⁵⁸ The Chamber, too, considers that this account of a purely chance encounter strains credibility.

462. As to the proceedings of the airport meeting, Mathieu Ngudjolo argued that the fact that General Kayihura addressed him as “[TRANSLATION] doctor”¹⁰⁵⁹ clearly establishes that he did not belong to any group at the time.¹⁰⁶⁰ The Prosecutor regards the Accused's statements at the meeting as on the contrary showing that he was not merely a nurse who happened to be there, but rather a militia chief.¹⁰⁶¹

463. For the Chamber, Mathieu Ngudjolo's participation in the meeting, his appearance in military uniform, description of himself as a “[TRANSLATION] soldier”, General Kale Kayihura's request that he “[TRANSLATION] remain in his territory” and lastly commander Dark's unruffled composure when interrupted, attest to the importance of the Accused shortly before the battle of Bogoro. The Chamber attaches little importance to the fact that the General addressed him as “[TRANSLATION] doctor” and in this respect recalls that it is established that Mathieu Ngudjolo was a nurse and that that professional occupation in no way precluded the performance of other duties, including those of a military nature. Also noteworthy is the deference to Mathieu Ngudjolo by a soldier such as Dark. Nonetheless, the Chamber notes that the Accused's statements make no mention of any decision that he took or proposed

¹⁰⁵⁶ D03-707, T. 328, p. 29; T. 331, p. 63.

¹⁰⁵⁷ D03-88, T. 302, pp. 35-36.

¹⁰⁵⁸ Prosecution Closing Brief, para. 453.

¹⁰⁵⁹ EVD- OTP-00164: Video excerpt (DRC-OTP-1045-0039-0040, lines 324-327).

¹⁰⁶⁰ D03-707, T. 328, p. 49; Closing Brief of the Defence for Mathieu Ngudjolo, para. 788.

¹⁰⁶¹ Prosecution Closing Brief, para. 453.

to take and that there is nothing in the video to establish the position he held or his exact role in military terms.

b. The 18 March 2003 Agreement to end Hostilities

464. Mathieu Ngudjolo claims to have signed on 18 March 2003 the Agreement to end the Hostilities in Ituri (“the Agreement”). The Agreement, “[TRANSLATION] concluded with the facilitation and under the auspices of MONUC”, was specifically aimed at the total cessation of hostilities on the territory of Ituri¹⁰⁶² and was necessary to the preparation and commencement of the work of the Ituri Pacification Commission.¹⁰⁶³ Representatives of the Lendu from Djugu Territory, the Lendu-Bindi and MONUC, together with officials from the armed groups – the RCD-ML, PUSIC, the FNI, the FRPI, the FPDC, the UPC¹⁰⁶⁴ and the FAPC – signed the document.¹⁰⁶⁵ Mathieu Ngudjolo signed as “colonel” on 18 March 2003, on behalf of the Lendu representatives of Djugu Territory.¹⁰⁶⁶ D03-11, the FNI President and founder, signed the Agreement under the “FNI” head, as President of the movement,¹⁰⁶⁷ and Germain Katanga and D02-228 did so on 22 March 2003 on behalf of the FRPI. The three persons aforementioned confirmed in Court that they signed the Agreement on the dates indicated above.¹⁰⁶⁸ The signing took place on a rostrum on the main road in Bunia, in a location that allowed the population to attend the event.¹⁰⁶⁹

465. The Prosecutor maintained that Mathieu Ngudjolo’s signature of the Agreement establishes that the Accused was not a provisional leader but instead

¹⁰⁶² EVD-D03-00044: Agreement to end the Hostilities in Ituri (DRC-OTP-0043-0201 and 0202).

¹⁰⁶³ P-12, T. 195, p. 39.

¹⁰⁶⁴ See P-12, T. 195, p. 40.

¹⁰⁶⁵ EVD-D03-00044: Agreement to end the Hostilities in Ituri (DRC-OTP-0043-0204 and 0205).

¹⁰⁶⁶ EVD-D03-00044: Agreement to end the Hostilities in Ituri (DRC-OTP-0043-0204). EVD-OTP-00188: Video excerpt. D03-707, T. 329, pp. 9 and 10.

¹⁰⁶⁷ EVD-OTP-00188: Video excerpt.

¹⁰⁶⁸ D03-11, T. 243, p. 29; T. 246, p. 42; D02-228, T. 250, p. 15; D02-300, T. 318, pp. 43 and 46.

¹⁰⁶⁹ P-12, T. 195, p. 38.

a battle-hardened military chief, who had presented himself as such and whose presence at major public events came as no surprise to any participant.¹⁰⁷⁰

466. For his part, Mathieu Ngudjolo acknowledged having signed the Agreement as colonel, a rank he arrogated to himself. The defence raised by the Accused was that he had referred to himself as a colonel that day to gain the esteem of others, to “[TRANSLATION] promote an image of prestige” and to become known as such.¹⁰⁷¹ The Accused however denied that he belonged to an armed group then, submitting that he was part of a community and his signature of the Agreement as community representative showed that he was not a member of any armed group.¹⁰⁷² He further claimed to have been invited to sign the Agreement since every community had to provide four representatives as signatories, whereas the Northern Lendu only had three on that day.¹⁰⁷³ Finally, Mathieu Ngudjolo accounted for his military attire that day by his “[TRANSLATION] ambition” and an “[TRANSLATION] objective to achieve”:¹⁰⁷⁴ integration into the FARDC.

467. In light of the various pieces of evidence, the Chamber notes that on 18 March 2003, the date of signature of the Agreement, Mathieu Ngudjolo and three others represented Djugu Territory, which encompasses Bedu-Ezekere *groupement*. It notes that prominent figures from the *groupement* did not partake in the signing of the Agreement, notably commander Boba Boba, Martin Banga – Vice President of the youth committee tasked with self-defence in Bedu-Ezekere – and D03-88, the *groupement* Chief. Accordingly, the Chamber finds that Mathieu Ngudjolo’s signature of the Agreement instead of those reputedly more important individuals establishes that he had sufficient authority to represent his

¹⁰⁷⁰ Prosecution Closing Brief, paras. 375, 376, 379 and 380.

¹⁰⁷¹ Closing Brief of the Defence for Mathieu Ngudjolo, para. 961.

¹⁰⁷² D03-707, T. 328, p. 49; T. 331, pp. 42 and 44.

¹⁰⁷³ D03-707, T. 329, pp. 9-10.

¹⁰⁷⁴ D03-707, T. 329, p. 9.

community at the signing ceremony. The Chamber further notes that Mathieu Ngudjolo signed with reference to the rank of colonel and on that date therefore claimed that rank and perhaps performed the attendant duties. Nonetheless, the Chamber, unlike the Prosecution, is unable to infer from his signature of the document that he performed such duties as of 2002.¹⁰⁷⁵

c. Mathieu Ngudjolo's entry into the FNI-FRPI alliance

468. Mathieu Ngudjolo stated that he never belonged to the FNI proper, but rather to the FNI-FRPI alliance.¹⁰⁷⁶

469. He claimed that on 18 March 2003 at the Hotel Kappa in Bunia, he met the FNI President, D03-11, whom he had already seen briefly when he was fleeing Bunia in August 2002.¹⁰⁷⁷ According to the Accused, D03-11 handed him an FNI plan, told him of his intention to forge an alliance with the FRPI and reorganise the army, and asked him to work with him. Mathieu Ngudjolo, clad in military uniform that day, maintained that as he did not belong to any group and wanted to join the army,¹⁰⁷⁸ he agreed.¹⁰⁷⁹ He allegedly started "[TRANSLATION] working provisionally" on 22 March 2003 in Bunia.¹⁰⁸⁰ A structure was allegedly established within the alliance between 22 March and early April 2003, with Mathieu Ngudjolo as its Deputy Chief of Staff with responsibility for operations. In this capacity, he was tasked with leading three brigades: one in the north, in Kpandroma; one in the centre, in Bambu; and one posted to the south, in Gety.¹⁰⁸¹ He contends that as Deputy Chief of Staff with responsibility for operations he

¹⁰⁷⁵ Prosecution Closing Brief, para. 382.

¹⁰⁷⁶ D03-707, T. 328, p. 28.

¹⁰⁷⁷ D03-707, T. 328, pp. 28-29.

¹⁰⁷⁸ D03-707, T. 330, pp. 66-67.

¹⁰⁷⁹ D03-707, T. 328, pp. 28-30.

¹⁰⁸⁰ D03-707, T. 328, pp. 31 and 33. According to D03-11, Mathieu Ngudjolo's membership of the FNI dates back to March 2003, following the attack on Bunia (D03-11, T. 248, pp. 6-7).

¹⁰⁸¹ D03-707, T. 328, pp. 34-35. For Mathieu Ngudjolo's position in the alliance, see also D02-01, T. 277, p. 45.

did not lead any military operation.¹⁰⁸² Mathieu Ngudjolo belonged to the FNI-FRPI alliance until October 2003, when he was arrested.¹⁰⁸³ The Chamber therefore notes that it is uncontested that Mathieu Ngudjolo joined the FNI-FRPI alliance as Deputy Chief of Staff with responsibility for operations.

470. The Prosecution contended that D03-11 chose Mathieu Ngudjolo because he was “[TRANSLATION] the strongman” in Zombe¹⁰⁸⁴. Mathieu Ngudjolo stated that D03-11 had chosen him because they were acquainted, because he probably thought that he could use his civil guard training to organise and structure FRPI-FNI staff¹⁰⁸⁵ and because he “[TRANSLATION] trusted” him.¹⁰⁸⁶ As for D03-88, he believed that the FNI members, D03-11 and his staff, had chosen Mathieu Ngudjolo for his ability to speak French and understand issues.¹⁰⁸⁷ In his view, it was perhaps a way for the Accused to obtain some money and continue his education.¹⁰⁸⁸ In any event, the Chamber can only note that despite testifying in the instant case, D03-11 gave no indication of what drove him to select Mathieu Ngudjolo.

471. The Chamber takes the view that the appointment of Mathieu Ngudjolo to Deputy Chief of Staff of the alliance establishes that D03-11 considered Mathieu Ngudjolo to be a recognised authority in military matters and sufficiently qualified to hold that post.

d. Mathieu Ngudjolo’s activities as Chief of Staff in the FNI-FRPI alliance

¹⁰⁸² D03-707, T. 328, p. 35.

¹⁰⁸³ D03-707, T. 330, p. 49.

¹⁰⁸⁴ Prosecution Closing Brief, para. 457.

¹⁰⁸⁵ D03-707, T. 228, p. 35; T. 330, pp. 45-46.

¹⁰⁸⁶ D03-707, T. 330, p. 67.

¹⁰⁸⁷ D03-88, T. 306, pp. 67-69.

¹⁰⁸⁸ D03-88, T. 306, p. 68.

472. The Chamber notes Mathieu Ngudjolo's participation in a number of activities as of 22 March 2003, particularly in connection with the position he then held in the FNI-FRPI alliance.

473. The Prosecution submits that the Accused's presence at various meetings and major events in March 2003 shows yet again that he was not a provisional "[TRANSLATION] leader" but in fact a battle-hardened military chief whose presence came as no surprise to any of the participants.¹⁰⁸⁹

(i) The meeting with General Kayihura in late March 2003

474. In late March 2003, on the 21st or 22nd, Mathieu Ngudjolo took part in another meeting with General Kale Kayihura and various other individuals,¹⁰⁹⁰ particularly "[TRANSLATION] Lendu leaders". The meeting's agenda was peace in Ituri¹⁰⁹¹ and the General called on those "commanders" to "[TRANSLATION] halt attacks on the villages and coexist in fraternity with the other ethnic groups".¹⁰⁹²

475. At the meeting, the Accused introduced himself as Colonel Mathieu Ngudjolo, Chief of Staff¹⁰⁹³ and was seated immediately to the right of the General¹⁰⁹⁴ who, unable to recollect his name, called him "[TRANSLATION] colonel".¹⁰⁹⁵ In this regard, the Chamber recalls that the Accused stated that he became Chief of Staff of the FNI-FRPI alliance on 22 March 2003.¹⁰⁹⁶

¹⁰⁸⁹ Prosecution Closing Brief, paras. 375, 376, 378 and 380.

¹⁰⁹⁰ P-2, T. 187, pp. 4-5.

¹⁰⁹¹ EVD-OTP-00178: Video excerpt (DRC-OTP-1030-0028, lines 19-24; DRC-OTP-1030-0029, lines 77-80).

¹⁰⁹² EVD-OTP-00178: Video excerpt (DRC-OTP-1030-0028, lines 19-24; DRC-OTP-1030-0030, line 141 to DRC-OTP-1030-0031, line 150).

¹⁰⁹³ EVD-OTP-00179: Video excerpt (DRC-OTP-1030-0033, lines 235-240).

¹⁰⁹⁴ EVD-OTP-00178 to EVD-OTP-00180: Video excerpts.

¹⁰⁹⁵ EVD-OTP-00179: Video excerpt (DRC-OTP-1030-0031, line 177).

¹⁰⁹⁶ D03-707, T. 328, pp. 33-34.

(ii) The Ugandans' request for authorisation to access Bogoro

476. The Chamber wishes also to draw attention to P-317's statements. Drawing on information furnished by the Ugandan forces, she testified that to travel to Bogoro in optimal conditions, her Ugandan contacts had asked Mathieu Ngudjolo for access to the area.¹⁰⁹⁷ Mathieu Ngudjolo disputed this account,¹⁰⁹⁸ which his Defence argues is speculation *simpliciter*, founded on hearsay¹⁰⁹⁹ and whose veracity the witness neglected to verify.¹¹⁰⁰ The Chamber recalls that it has no reason to doubt P-317's honesty.

(iii) Televised interview with Mathieu Ngudjolo in late March 2003

477. In late March 2003, Mathieu Ngudjolo took part in a televised interview on "RTNC" Bunia,¹¹⁰¹ in which he was introduced as the "[TRANSLATION] colonel",¹¹⁰² and he stated that he was tasked with "[TRANSLATION] restoring peace and security to Bunia town",¹¹⁰³ announcing that he had just opened a liaison office to record residents' grievances.¹¹⁰⁴

478. In the interview, Mathieu Ngudjolo introduced himself as a "[TRANSLATION] colonel"¹¹⁰⁵ and urged the combatants and militia members "[TRANSLATION] to stop bothering people on the roads".¹¹⁰⁶ He underscored that security on the roads was "[TRANSLATION] in [his] hands"¹¹⁰⁷ and that he had instructed the commander of the Bogoro-based combatants to allow free passage

¹⁰⁹⁷ P-317, T. 228, p. 25.

¹⁰⁹⁸ D03-707, T. 328, p. 61; T. 329, p. 4.

¹⁰⁹⁹ Closing Brief of the Defence for Mathieu Ngudjolo, para. 359.

¹¹⁰⁰ Closing Brief of the Defence for Mathieu Ngudjolo, para. 358.

¹¹⁰¹ P-2, T. 186, pp. 77-79; EVD-OTP-00177: Video excerpt (DRC-OTP-1049-0535, lines 717-765). See also D03-707, T. 329, pp. 15-16.

¹¹⁰² EVD-OTP-00177: Video excerpt (DRC-OTP-1049-0535, lines 717-720).

¹¹⁰³ EVD-OTP-00177: Video excerpt (DRC-OTP-1049-0535, lines 739-740).

¹¹⁰⁴ EVD-OTP-00177: Video excerpt (DRC-OTP-1049-0535, lines 724-726).

¹¹⁰⁵ EVD-OTP-00177: Video excerpt (DRC-OTP-1049-0535, line 722).

¹¹⁰⁶ EVD-OTP-00177: Video excerpt (DRC-OTP-1049-0536, lines 740-741).

¹¹⁰⁷ EVD-OTP-00177: Video excerpt (DRC-OTP-1049-0536, lines 746-749).

to those drivers seeking to enter the town.¹¹⁰⁸ The Prosecution views such statements as indicative of Mathieu Ngudjolo's awareness of the prevailing situation, over which he exerted control.¹¹⁰⁹

479. Referring to his statements during that interview, Mathieu Ngudjolo submitted that he was in fact Dark's superior at the time on account of his new position in the FNI-FRPI alliance, but that in no way made him Dark's superior during the 24 February 2003 attack on Bogoro. He further stated that he had asked Dark not to obstruct the movement of people because it was a "[TRANSLATION] time of pacification".¹¹¹⁰

(iv) Televised debate of 30 March 2003 on pacification in Ituri

480. On 30 March 2003, Mathieu Ngudjolo took part in a televised debate on the Ituri Pacification Commission broadcast by "RTNC" Bunia.¹¹¹¹ P-12 claimed that the debate was intended to introduce the armed groups, to allow them to meet, talk and make statements, following the signing of the Agreement to end Hostilities, to the entire population of Ituri.¹¹¹² The witness explained to the Court that General Kale Kayihura considered the military groups a cause for concern, prompting him to arrange for them to meet and talk over the airwaves.¹¹¹³ P-12 further testified that that was the first time that Mathieu Ngudjolo introduced himself as the FRPI Chief of Staff.¹¹¹⁴ Moreover, the Accused is identified as an

¹¹⁰⁸ EVD-OTP-00177: Video excerpt (DRC-OTP-1049-0536, lines 759-763).

¹¹⁰⁹ Prosecution Closing Brief, para. 377.

¹¹¹⁰ D03-707, T. 333, p. 10.

¹¹¹¹ P-2, T. 186, p. 38, 48, 62 and 65; EVD-OTP-00170 to DRC-OTP-176: Video excerpts.

¹¹¹² P-12, T. 195, pp. 39 and 53.

¹¹¹³ P-12, T. 195, p. 18.

¹¹¹⁴ P-12, T. 195, pp. 18, 39-40 and 46-47.

FRPI member¹¹¹⁵ in the video of the debate. He was not representing the FNI in the debate.¹¹¹⁶

481. The Chamber notes that during the debate, Mathieu Ngudjolo took the floor, stating that he was a medical assistant from Bunia, where he had worked, but had left the town six months earlier.¹¹¹⁷ He also mentioned that he was a well-trained soldier, who had not been “[TRANSLATION] trained in two weeks”,¹¹¹⁸ then passing the floor to Androzo Dark, introduced as the “[TRANSLATION] commander of the Bogoro operations”.¹¹¹⁹ At the close of the debate, the Accused also referred to himself as “[TRANSLATION] Chief of Staff and Commander of the [FRPI] Division, Colonel Ngudjolo Mathieu Chui”.¹¹²⁰

482. Mathieu Ngudjolo told the Court that his claim to be a well-trained soldier and divisional commander during the debate was intended to give him importance. In fact, he had not been a divisional commander¹¹²¹ and recalled that he had acted out of opportunism in awarding himself the rank of colonel¹¹²².

¹¹¹⁵ EVD-OTP-00170: Video excerpt (DRC-OTP-1019-0248, line 324).

¹¹¹⁶ EVD-OTP-00170: Video excerpt (DRC-OTP-1019-0248, lines 314-316); a participant in the debate stated: “[TRANSLATION] [y]ou need to also understand that the FPDC and ... and the FNI should ordinarily be with us, but regrettably they are in Kampala on an official mission”. See also, P-12, T. 195, p. 18.

¹¹¹⁷ EVD-OTP-00172: Video excerpt (DRC-OTP-1019-0254, lines 544-548). The Chamber recalls that Mathieu Ngudjolo left Bunia after Lompondo fell from power in August 2002 (D03-88, T. 301, p. 9; T. 303, p. 22).

¹¹¹⁸ EVD-OTP-00172: Video excerpt (DRC-OTP-1019-0255, lines 585-587).

¹¹¹⁹ EVD-OTP-00172: Video excerpt (DRC-OTP-1019-0255, line 595).

¹¹²⁰ EVD-OTP-00176: Video excerpt (DRC-OTP-1019-0278, lines 1566-1567). Moreover, during the debate, one of the participants, Mago Paluku, described himself as a commander of FRPI brigades which he led with the colonel. Witness P-12 asserted that Mago Paluku was referring to Mathieu Ngudjolo when he spoke of the colonel. EVD-OTP-00171: Video excerpt (DRC-OTP-1019-0250, lines 395-401); P-2, T. 188, p. 75.

¹¹²¹ D03-707, T. 329, p. 17.

¹¹²² D03-707, T. 328, pp. 42-49.

**(v) The Ituri Pacification Commission and the Committee
for the Consultation of Armed Groups**

483. The work of the Ituri Pacification Commission took place from 4 to 14 April 2003¹¹²³ in the CECA 20 Church, Bunia.¹¹²⁴ P-12 told the Court that members of civil society and all of the armed groups, communities and tribes of Ituri took part, with the MONUC Vice-President chairing proceedings.¹¹²⁵ He further stated that the main goal of the Commission was to restore the State's authority in Ituri. The work accomplished established an interim administration tasked with governing activities in Bunia.¹¹²⁶ The withdrawal of Ugandan troops was announced during the Ituri Pacification Commission's work¹¹²⁷ and commenced around 26 or 28 April 2003.¹¹²⁸

484. According to P-30, Mathieu Ngudjolo wore military uniform at the inaugural ceremony.¹¹²⁹ The Chamber notes that the "*Rapport final de la Commission de Pacification de l'Ituri*" [Final Report of the Ituri Pacification Commission] mentions Mathieu Ngudjolo alongside Germain Katanga, as an FRPI and not an FNI delegate.¹¹³⁰ However, it is apparent that he signed the report of 14 April 2003 under the head of the "NFI (sic) & FRPI".¹¹³¹ In court, Mathieu Ngudjolo maintained that the Commission's work started at a time when he belonged to the FNI-FRPI alliance, which he was there to represent.¹¹³² He stated that at the start of the meeting, MONUC was uninformed of the FNI and FRPI alliance, which explains why the two organisations were positioned on

¹¹²³ EVD-OTP-00195: Final Report of the Ituri Pacification Commission (DRC-OTP-0107-0223); P-12, T. 195, p. 55; P-317, T. 228, p. 43.

¹¹²⁴ P-12, T. 195, p. 55; P-30, T. 176, p. 33.

¹¹²⁵ P-12, T. 195, pp. 54-55. See also EVD-OTP-00195: the Final Report of the Commission, moreover, bears the MONUC letterhead (DRC-OTP-0107-0223).

¹¹²⁶ P-12, T. 195, pp. 55-56. See also D02-228, T. 252, p. 45.

¹¹²⁷ P-12, T. 196, p. 41.

¹¹²⁸ P-12, T. 196, p. 23.

¹¹²⁹ P-30, T. 176, pp. 33-34, 50; EVD-OTP-00130 to EVD-OTP-00133: Video excerpts.

¹¹³⁰ EVD-OTP-00195: Final Report of the Ituri Pacification Commission (DRC-OTP-1017-0285).

¹¹³¹ EVD-OTP-00195: Final Report of the Ituri Pacification Commission (DRC-OTP-1017-0308).

¹¹³² D03-707, T. 331, pp. 45-46.

two different sides of the room¹¹³³ and that only in the course of the meeting were the MONUC representatives informed of the new state of affairs.¹¹³⁴ According to Mathieu Ngudjolo, Germain Katanga was supposed to represent the FNI-FRPI alliance but he did so in Germain Katanga's absence.¹¹³⁵ In this respect, the Chamber notes the absence of Germain Katanga's signature from the Commission's final report.¹¹³⁶ As to D03-11 and D02-228, they both attended the Commission's proceedings as FNI representatives and signed the final report as such.¹¹³⁷

485. The Final Report of the Ituri Pacification Commission documented the establishment of a *Comité de concertation des groupes armés* [Committee for the Consultation of Armed Groups] mandated, *inter alia*, with "[TRANSLATION] enabling its members to assess and analyse the security and military situation in Ituri, secure the effective cantonment of all of the armed groups and put in place a plan for the disarmament and demobilisation of the armed groups".¹¹³⁸ The Report also detailed the composition of the Consultation Committee whose members respectively represented the FAPC, FNI, FPDC, FPIC, RPLC and FRPI groups, as well as the "[TRANSLATION] government", MONUC and the UPDF.¹¹³⁹

486. P-12 explained that the Consultation Committee had held several meetings.¹¹⁴⁰ He underscored that at its fourth meeting in Kinshasa, in around mid-August 2003, it was apparent that although MONUC had hitherto recognised the FNI-FRPI party, the Congolese government viewed the FNI and

¹¹³³ D03-707, T. 331, p. 46.

¹¹³⁴ D03-707, T. 331, p. 46.

¹¹³⁵ D03-707, T. 331, p. 45.

¹¹³⁶ EVD-OTP-00195: Final Report of the Ituri Pacification Commission (DRC-OTP-1017-0308).

¹¹³⁷ D03-11, T. 243, p. 29; EVD-OTP-00195: Final Report of the Ituri Pacification Commission (DRC-OTP-1017-0285 and DRC-OTP-1017-0308).

¹¹³⁸ EVD-OTP-00195: Final Report of the Ituri Pacification Commission (DRC-OTP-1017-0256).

¹¹³⁹ EVD-OTP-00195: Final Report of the Ituri Pacification Commission (DRC-OTP-1017-0261).

¹¹⁴⁰ P-12, T. 196, p. 49.

FRPI as two separate movements and Mathieu Ngudjolo as representing the FRPI.¹¹⁴¹ P-12 also stated that a hotel reservation had been made for Colonel Mathieu Ngudjolo, as it had for D03-11, but that Mr Ngudjolo had left for Beni and did not appear.¹¹⁴² D03-11, in attendance at the meeting, allegedly told P-12 that he had replaced Mathieu Ngudjolo with Germain Katanga, who from that meeting hence, would be the party's Chief of Staff. Lastly, P-12 explained that after much discussion, it was decided to bring the two parties together for the meeting.¹¹⁴³

e. Resumption of hostilities in early May 2003

487. Hostilities resumed as from 11 and 12 May 2003 and Mathieu Ngudjolo alleged that on 12 May 2003, people fled Bunia on account of the war which was raging there. As for him, he was not there on that date, having left for Kambutso in Bedu-Ezekere *groupement*.¹¹⁴⁴

488. It is undisputed that following this resumption of hostilities, attacks took place in Tchomia and Kasenyi between May and July 2003. The Prosecution views the attacks on these two localities, as well as those on Mandro on 4 March 2003 and Bunia on 6 March 2003, as having been fuelled by revenge against towns which, like Bogoro, had been behind the encirclement to which both Accused had been subjected and from which they had suffered. Moreover, the crimes committed there are akin to those perpetrated in Bogoro on 24 February 2003 and are characterised by a *modus operandi* driven by a desire for vengeance and a feeling of hatred towards the Hema enemy.¹¹⁴⁵ In the view of the Defence for Mathieu Ngudjolo, by ascribing responsibility for the attacks on Tchomia and Kasenyi to the Accused, the Prosecution sought to rely on unproven allegations

¹¹⁴¹ P-12, T. 196, p. 52.

¹¹⁴² P-12, T. 196, pp. 52-53.

¹¹⁴³ P-12, T. 196, p. 52.

¹¹⁴⁴ D03-707, T. 329, p. 34; T. 330, pp. 54-56.

¹¹⁴⁵ Prosecution Closing Brief, paras. 659-660.

propounded by only P-12 and two witnesses, P-280 and P-250, who are not credible, to prove that Mathieu Ngudjolo took part in the attack on Bogoro.¹¹⁴⁶

489. The Chamber is unable to rely on such evidence to find that Mathieu Ngudjolo took part in the attacks.

4. Conclusion

490. The Chamber must now determine whether, when placed in perspective, the various pieces of aforecited evidence prove beyond reasonable doubt that Mathieu Ngudjolo was the commander-in-chief of the Lendu combatants from Bedu-Ezekere who allegedly attacked Bogoro on 24 February 2003, as the Prosecution alleges.

491. The Chamber considers that at the end of 2002 Mathieu Ngudjolo was a man of some standing within Bedu-Ezekere *groupement* owing to the status of his family, his highly-placed acquaintances in Ituri, his education and his military training in the civil guard.

492. As to Mathieu Ngudjolo's activities within the group of combatants, the Chamber finds on the basis of the evidence tendered before it that the Accused was indeed working as a nurse in Kambutso prior to the attack on Bogoro. However, the Chamber would note that his status as a nurse would not preclude Mathieu Ngudjolo from holding a position of authority within the group of Bedu-Ezekere combatants, which is the mainstay of the case against him.

493. The Chamber further notes that Mathieu Ngudjolo's statements show that he was very well acquainted with events in Ituri and they could not have been the figment of the imagination of a nurse with little knowledge of the situation in the district. Indeed, in the interview conducted in late March 2003, Mathieu Ngudjolo stated that a liaison office had been opened in Bunia to receive reports

¹¹⁴⁶ Closing Brief of the Defence for Mathieu Ngudjolo, para. 423.

on important incidents, asserted that the region's security was in his hands and indicated that he was receiving updates on a worrying hostage-taking incident in Bogoro.¹¹⁴⁷ The Chamber analysed these statements in conjunction with the position of authority attributed to him by the Ugandan authorities over the same period. Indeed, it bears recalling that P-317, a MONUC investigator, stated that UPDF soldiers had sought authorisation from Mathieu Ngudjolo to allow her to enter the Bogoro area on 26 March 2003.¹¹⁴⁸ The Accused himself confirmed that the Ugandan General-in-Chief, Kale Kayihura, approached him to contact commander Dark in Bogoro to discuss the disappearance of a vehicle and the worrying fate of some Hema hostages who had been accompanying the convoy.¹¹⁴⁹

494. Hence, the Chamber does not subscribe to the Defence argument that Mathieu Ngudjolo was an impostor who succeeded in deceiving all the officials whom he encountered in Ituri during the course of events. The Chamber recalls that during March 2003, Mathieu Ngudjolo had dealings with several persons who played a prominent role in Ituri at the time and that it therefore seems implausible that he could have deceived them all. These persons included not only commander Dark, who took part in the attack on Bogoro, but also General Kale Kayihura, head of the Ugandan armed forces in Ituri (the then occupying power), MONUC officials involved in the Ituri pacification process, and D03-11, the FNI President, who furthermore had appointed Mathieu Ngudjolo to a key military post in the FNI/FRPI alliance.

495. Consequently, based on the evidence before it, the Chamber concluded that the Accused's testimony regarding the circumstances in which he rose to a

¹¹⁴⁷ EVD-OTP-00177: Video excerpt.

¹¹⁴⁸ P-317, T. 228, pp. 25-26; T. 230, pp. 29-30.

¹¹⁴⁹ D03-707, T. 329, pp. 17-18.

high military rank – which he describes as a mixture of chance and careerist opportunism – lacks credibility.

496. As to the position effectively held by Mathieu Ngudjolo prior to the attack on Bogoro, the Chamber notes that although several witnesses in essence confirmed that the Accused was the leader of the Bedu-Ezekere militia, all, with the exception of P-28 and P-317, did so on the basis of hearsay and none were actually present in Bedu-Ezekere *groupement* before the attack. The Chamber also wishes to emphasise that this evidence, which is based on hearsay, must be considered with the greatest circumspection, especially as it relates to a crucial point in the Prosecution's case. In this regard, the Chamber notes that the witnesses in question did not provide any other details on the authority purportedly held by Mathieu Ngudjolo in their view or on the manner in which he exercised it. Furthermore, the Chamber cannot discount the possibility that some witnesses associated Mathieu Ngudjolo's status in the FNI in late March 2003 with the position which he actually held prior to the attack on Bogoro. For all these reasons, the Chamber can only attach very low probative value to their testimony.

497. As regards the revelations that the Accused allegedly made on two occasions, initially to Witness P-317, telling her that he had organised the attacks on Bogoro and Mandro, and subsequently to an official from the DRC State Prosecutor's Office during separate proceedings, stating that he had "[TRANSLATION] led only the operation that took place on 6 March 2003 in Bunia", the Chamber, whilst noting that Mathieu Ngudjolo's statements on this point were both vague and not very precise, is compelled to note a certain inconsistency between these two items of evidence. The first one fails to mention Mathieu Ngudjolo's participation in the battle of Bunia and the second does not mention his participation in hostilities at Bogoro and Mandro. Hence, whilst not impugning the credibility of P-317 or the reliability of the document provided by

the Congolese authorities, the Chamber is compelled to treat such revelations with circumspection.

498. The Chamber must also have regard to all the evidence demonstrating that Mathieu Ngudjolo had played an active role, as recalled above, at several official events held in March 2003.

499. However, this evidence, all of which postdates the attack on Bogoro, does not support a finding beyond reasonable doubt that Mathieu Ngudjolo was indeed the commander-in-chief of the Lendu combatants from Bedu-Ezekere who were present in Bogoro on 24 February 2003.

500. Whilst the Chamber notes that the Accused wore a military uniform from the time of his first public appearances in March 2003, in particular during the first meeting with General Kale Kayihura, it also noted that the rank of colonel was only mentioned during the signing of the 18 March 2003 Agreement to end Hostilities. Besides, the Chamber is possessed of no other reliable evidence previous to this date supporting a finding beyond reasonable doubt that Mathieu Ngudjolo was the commander-in-chief of the Lendu combatants from Bedu-Ezekere. Furthermore, it cannot necessarily be entirely discounted that, as a soldier operating within the prevailing political and military context of the time, Mathieu Ngudjolo was able to position himself as a key figure after the battle of Bogoro, but not before. Furthermore, the Chamber is of the view that his appointment to a very senior position within the FNI/FRPI alliance does not necessarily prove that he was already a senior military leader prior to the appointment and, in particular, before 24 February 2003.

501. Given the prevailing situation in Bedu-Ezekere *groupement*, Mathieu Ngudjolo was, by virtue of his social status, military experience and relations with the various regional officials, quite naturally led to play a role which went beyond the strict scope of his medical work. His active participation as a colonel

in the various meetings mentioned above, which were held after 18 March 2003, as well as the content of testimonies regarding his role prior to the attack, led the Chamber to ponder the precise nature of his military activities at the time. In his regard, the Chamber cannot discount the possibility that, at the time of the events under consideration, he was one of the military commanders who held a senior position among the Lendu combatants from Bedu-Ezekere *groupement*, but emphasises that it is not in a position to establish this fact beyond reasonable doubt.

502. Furthermore, the Chamber underscores that, in any event, its analysis has not provided it with credible evidence to find that Mathieu Ngudjolo had issued military orders or instructions, taken steps to enforce such orders or instructions, initiated disciplinary proceedings or ordered sanctions of this kind.

503. Consequently, the Chamber cannot, on the basis of all the evidence in the case record, find beyond reasonable doubt that the Accused was the leader of the Lendu combatants who took part in the 24 February 2003 attack on Bogoro.

X. FACTUAL FINDINGS AS TO THE PARTICIPATION OF CHILD SOLDIERS FROM BEDU-EZEKERE GROUP IN THE ATTACK ON BOGORO OF 24 FEBRUARY 2003

A. INTRODUCTION

504. The Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that Mathieu Ngudjolo had used children under the age of 15 years for multiple purposes and “to take part [actively] [...] prior to, during, and following the [...] attack” on the village of Bogoro on 24 February 2003.¹¹⁵⁰ The Pre-Trial Chamber found that the children were integrated into the militias, received military training on the Accused’s orders, frequently paraded in his presence and were used by Mathieu Ngudjolo as his escorts or personal bodyguards.¹¹⁵¹

505. The Prosecution alleged that child soldiers were present¹¹⁵² in the Bedu-Ezekere militias, its camps and, more generally throughout the *groupement*.¹¹⁵³ It claimed that some had been abducted; all were treated as adults and subject to the same activities and punishment as adults.¹¹⁵⁴ They underwent intensive training and paraded under Mathieu Ngudjolo’s instruction.¹¹⁵⁵ Some were assigned to the military police¹¹⁵⁶ and the Accused used them for any other activity connected to the operation of the militia. The Prosecution further asserted that child soldiers formed part of the Bedu-Ezekere commanders’ and the Accused’s escorts.¹¹⁵⁷ It also pointed to the demobilisation of FNI child soldiers.¹¹⁵⁸ According to the Prosecution, scores of children under the age of

¹¹⁵⁰ *Decision on the confirmation of charges*, para. 256.

¹¹⁵¹ *Decision on the confirmation of charges*, paras. 253-263, 553-554 and 564.

¹¹⁵² Prosecution Closing Brief, pp. 67-68.

¹¹⁵³ Prosecution Closing Brief, paras. 66, 423, 692 and 715-723; Prosecution Oral Closing Statement, T. 336, pp. 9 and 17.

¹¹⁵⁴ Prosecution Closing Brief, paras. 423, 715 and 725.

¹¹⁵⁵ Prosecution Closing Brief, paras. 334-341, 424, 721 and 723.

¹¹⁵⁶ Prosecution Closing Brief, para. 717.

¹¹⁵⁷ Prosecution Closing Brief, paras. 66, 717 and 724.

¹¹⁵⁸ Prosecution Closing Brief, para. 734.

15 years were involved in the preparation and participated actively in the attack on Bogoro as part of the Lendu troops.¹¹⁵⁹ In substantiation of these various allegations, the Prosecution relied essentially on the testimony of P-279 and P-280 and, to a lesser extent, that of P-250 – three witnesses whom the Chamber did not find credible.¹¹⁶⁰

506. The Legal Representative of the child-soldier victims submits that the evidence in the record lends support to the allegation of recruitment and presence of children, including those under the age of 15 years, in the armed groups in Ituri, particularly in the camps located in Zumbe, between August 2002 and May 2003.¹¹⁶¹ These children, he submitted, underwent training and took part in various activities of a military nature,¹¹⁶² and combat in particular.¹¹⁶³

507. In respect of the battle of Bogoro, the Legal Representative contended that the young children took part in its preparation, the attack proper and the aftermath.¹¹⁶⁴ Those with responsibility for the operation, he alleged, distributed weapons and ammunition for the attack, including to children under the age of 15 years.¹¹⁶⁵ He views the nexus between the child soldiers and Mathieu Ngudjolo as established on account of the Accused' status as military chief¹¹⁶⁶ as well as his command and issuance of instructions during the Bogoro operation.¹¹⁶⁷ Lastly, the Legal Representative recalled that according to

¹¹⁵⁹ Prosecution Closing Brief, in particular paras. 4, 41, 69-72 and 96; Prosecution Closing Statement, T. 336, pp. 5 and 7.

¹¹⁶⁰ See Section VII.

¹¹⁶¹ Closing Brief of the Legal Representative of the child soldier victims, paras. 57-67, 69-73 and 87.

¹¹⁶² Closing Brief of the Legal Representative of the child soldier victims, para. 58.

¹¹⁶³ Closing Brief of the Legal Representative of the child soldier victims, paras. 73 and 77.

¹¹⁶⁴ Closing Brief of the Legal Representative of the child soldier victims, paras. 108 and 197.

¹¹⁶⁵ Closing Brief of the Legal Representative of the child soldier victims, paras. 160 and 176-180.

¹¹⁶⁶ Closing Brief of the Legal Representative of the child soldier victims, paras. 113 and 130.

¹¹⁶⁷ Closing Brief of the Legal Representative of the child soldier victims, para. 174.

witnesses, children under the age of 15 years were used as bodyguards or members of the escorts of Mathieu Ngudjolo and some of his officers.¹¹⁶⁸

508. The Defence disputed the alleged presence of child soldiers in Bedu-Ezekere *groupement*¹¹⁶⁹ and recalled that several witnesses testified in support of its view.¹¹⁷⁰ It argued that as regards the testimony of those witnesses who claimed to have seen children in Bogoro, it was in reality impossible to ascertain to which group they belonged or their age, relying on their appearance alone.¹¹⁷¹ In its view, the FNI's purported involvement in the use of child soldiers to participate in hostilities does not prove the Accused's commission of that crime,¹¹⁷² arguing that no inference can be drawn simply from Mathieu Ngudjolo's signature of the Agreement to end Hostilities and participation in the proceedings of the Ituri Pacification Commission.¹¹⁷³ In the opinion of the Defence, it is therefore not established that the Accused used children in his escort, that a "[TRANSLATION] troop" of child soldiers was under his orders or that he attacked Bogoro using children under the age of 15 years.¹¹⁷⁴

B. ANALYSIS

509. The Chamber notes that Witnesses P-2, P-12, P-30 and P-267 stated that child soldiers were in the ranks of the armed groups which came into existence in Ituri between 2002 and 2003,¹¹⁷⁵ including in the Lendu and Ngiti

¹¹⁶⁸ Closing Brief of the Legal Representative of the child soldier victims, paras. 58 and 114.

¹¹⁶⁹ Closing Brief of the Defence for Mathieu Ngudjolo, in particular paras. 399 and 554-568; Oral Closing Statement of the Defence for Mathieu Ngudjolo, T. 339, pp. 18-19 and 58.

¹¹⁷⁰ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 399, 566-568, 1197-1200. See also para. 407.

¹¹⁷¹ Closing Brief of the Defence for Mathieu Ngudjolo, in particular paras. 554-555. See also paras. 561-564.

¹¹⁷² Closing Brief of the Defence for Mathieu Ngudjolo, para. 579.

¹¹⁷³ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 571-581.

¹¹⁷⁴ Closing Brief of the Defence for Mathieu Ngudjolo, paras. 345-348, 554-567 and 585.

¹¹⁷⁵ According to Witness P-12, in Ituri in early 2003, the child-soldier phenomenon was rife in the Hema, Lendu and Bira armed groups. P-12, T. 197, p. 42 and 48; T. 198, pp. 57-58. Witness P-30 stated that between late 2002 and early 2003, the armed groups, including the Lendu combatants groups, included children within their ranks. The witness made specific reference to Lendu

communities.¹¹⁷⁶ The final report of the Ituri Pacification Commission which met in Bunia from 4 to 14 April 2003 – signed by Mathieu Ngudjolo –¹¹⁷⁷ also attests to the “[TRANSLATION] the strong presence of children in the combatant forces”.¹¹⁷⁸

510. The Chamber further underscores that by signing the Agreement to end Hostilities on 18 March 2003 as Lendu representative of Djugu Territory, Mathieu Ngudjolo undertook “[TRANSLATION] to halt all recruitment and use of child soldiers in their armed forces”.¹¹⁷⁹ It considers that attention must be drawn to the reference in the Agreement to a practice “[TRANSLATION] inconsistent with international law”¹¹⁸⁰ and therefore not solely affecting those children under the age of 15 years.

511. For MONUC, which investigated the events which occurred in Ituri between January 2002 and December 2003,¹¹⁸¹ “there can be no doubt that all of the armed groups [...] systematically recruited [...] children – ranging from 7 to 17 years old – throughout the district of Ituri”.¹¹⁸² It even goes on to state that “at least 40 per cent of each militia force are children below the age of 18, with a significant minority below the age of 15”.¹¹⁸³ MONUC further reported that the

combatants in the town of Bunia, P-30, T. 178, pp. 45-46 and 50-51. See also the testimonies of D02-129 and D02-134 who both stated having read in the press that in Ituri between late 2002 and 2003, child soldiers were members of the militias and participated in combat, D02-129, T. 272, pp. 25-30; D02-134, T. 259, p. 70.

¹¹⁷⁶ According to Witness P-2, in the period from November 2002 to March 2003, weapon-bearing youths and children could be found in all of the groups in Ituri, including the FRPI and FNI. P-2, T. 188, p. 74. Witness P-267 was of the view that the first instances of incorporation of children into the self-defence groups or Lendu and Ngiti militias dated back to 2002, when such communities had to defend themselves against Ugandan attacks, P-267, T. 170, p. 27.

¹¹⁷⁷ EVD-OTP-00195: Final Report of the Ituri Pacification Commission, Bunia, 4-14 April 2003, p. 21.

¹¹⁷⁸ EVD-OTP-00195: Final Report of the Ituri Pacification Commission, Bunia, 4-14 April 2003, Annex “*Rapport de la sous-commission assistance humanitaire et réhabilitation*” [Report of the sub-committee on humanitarian assistance and rehabilitation] of 11 April 2003, p. 5.

¹¹⁷⁹ EVD-D03-00044: Agreement to end the Hostilities in Ituri, pp. 3-4.

¹¹⁸⁰ EVD-D03-00044: Agreement to end the Hostilities in Ituri, p. 3.

¹¹⁸¹ EVD-OTP-00285: MONUC report on the events in Ituri.

¹¹⁸² EVD-OTP-00285: MONUC report on the events in Ituri, para. 138. See also paras. 6, 39, 141-143 and 147.

¹¹⁸³ EVD-OTP-00285: MONUC report on the events in Ituri, paras. 6, 39 and 141.

Lendu and Ngiti militias enlisted children to whom summary training was dispensed at training sites and the Zumbe area was regularly used to this end.¹¹⁸⁴

512. The Chamber notes that Witness P-268 claimed that on 24 February 2003, from his hideout in Bogoro, he saw scores of children, some bearing weapons such as machetes, spears and arrows,¹¹⁸⁵ participate in the destruction of houses and the pillaging of property.¹¹⁸⁶ The witness stated that they had come from Zumbe and Katonie, “[TRANSLATION] [f]rom the area where the Lendu were”,¹¹⁸⁷ estimating them to be “[TRANSLATION] 10 to 15, 16 years of age”,¹¹⁸⁸ the youngest of them aged between 8 and 10 years.¹¹⁸⁹ The Chamber further notes that P-323 claimed to have seen during battle, in both the Lendu and Ngiti assailant groups, “*kadogos*”, that is young combatants, but did not specify their age.¹¹⁹⁰ Finally, P-287 stated that those assailants she was forced to lead to the centre of Bogoro and who had purloined merchandise from a shop, included children under the age of 12 years.¹¹⁹¹ The witness added that these attackers were taking the property which they had pillaged back to Zumbe hill.¹¹⁹² The Chamber finds the witnesses credible in respect of these various points of their testimony. Finally, it recalls its earlier finding that the Lendu assailants who took part in the 24 February 2003 attack on Bogoro had come from Bedu-Ezekere *groupement*.¹¹⁹³

¹¹⁸⁴ EVD-OTP-00285: MONUC report on the events in Ituri, para. 147.

¹¹⁸⁵ P-268, T. 107, pp. 37-38; T. 108, pp. 40-41.

¹¹⁸⁶ P-268, T. 107, pp. 26-27 and 38-39.

¹¹⁸⁷ P-268, T. 107, p. 26; T. 108, pp. 11-12 and 40-42. See also T. 108, p. 62. EVD-D03-00010: Map whereon P-268 located the positions of Zumbe and Katonie; P-268, T. 108, pp. 60-62.

¹¹⁸⁸ P-268, T. 107, p. 38.

¹¹⁸⁹ P-268, T. 107, p. 39. See also T. 108, p. 27.

¹¹⁹⁰ P-323, T. 117, p. 33 and 55-56.

¹¹⁹¹ P-287, T. 129, pp. 44-50.

¹¹⁹² P-287, T. 129, p. 45.

¹¹⁹³ See Section VIII.

513. Furthermore, as the Chamber has already noted, on 2 July 2003 P-373 met armed children under the age of 15 years coming from a camp located on Zumbe mountain.¹¹⁹⁴

514. As to Mathieu Ngudjolo's use of child soldiers as bodyguards, the Chamber notes that the only testimony before it on this point is that of P-12, who stated that children under the age of 15 years belonged to the Accused's escort.¹¹⁹⁵ The Chamber nonetheless notes that the period adverted to by the witness perforce postdates 18 March 2003.¹¹⁹⁶ Since this evidence refers to a period postdating the 24 February 2003 attack on Bogoro, the Chamber does not consider itself able to rely on or make any finding based on that evidence alone.

515. The Chamber notes that D03-55 disputed the presence of child soldiers in Zumbe¹¹⁹⁷ and that D03-44¹¹⁹⁸ and D03-66¹¹⁹⁹ also contested such a presence in Bedu-Ezekere *groupement*. It notes that the three witnesses lived in that *groupement* at the material time. The Chamber nevertheless notes that they all replied almost automatically and in similar fashion, by categorical denials, furnishing no details when examined on the matter by counsel for the Accused. The Chamber further recalls that it considers that D03-44 may hold a certain interest in supporting Mathieu Ngudjolo's case.¹²⁰⁰ To the Chamber such conduct is indicative of an attempt by the witnesses to avoid harming the Accused's case by their answers. Accordingly, in light of the evidence before it, the Chamber can only attach little weight to their testimony on the subject. Moreover, as stated above,¹²⁰¹ the Chamber also approached with circumspection the justifications advanced by D03-88 to deny that "[TRANSLATION] child soldiers" were actually

¹¹⁹⁴ P-373, T. 127, pp. 7-14, 42-43 and 46-47; EVD-OTP-00073: P-373's written statement, pp. 7-9.

¹¹⁹⁵ P-12, T. 196, pp. 54-55.

¹¹⁹⁶ P-12, T. 195, p. 39; T. 196, pp. 54-55.

¹¹⁹⁷ D03-55, T. 292, pp. 55-56.

¹¹⁹⁸ D03-44, T. 291, p. 36.

¹¹⁹⁹ D03-66, T. 295, p. 60.

¹²⁰⁰ See Section IX D 2.

¹²⁰¹ See Section VII.

present in the *groupement*.¹²⁰² Finally, the Chamber notes that Witness D02-01 gave a contradictory and unclear reply concerning the presence of child soldiers during his stay in Zumbe;¹²⁰³ hence, it does not consider itself able to accept his statements on the matter.

C. CONCLUSION

516. In light of these various pieces of evidence, the Chamber considers it established that the presence of children in combatant groups in Ituri was, at the material time, a widespread phenomenon and that this was also the case in Djugu Territory, where Bedu-Ezekere *groupement* is located. The Chamber further notes that children under the age of 15 years, including some bearing bladed weapons, from Bedu-Ezekere *groupement* were present at the 24 February 2003 attack on Bogoro. However, it also notes that there is insufficient evidence to establish, for example, that military training had been given to the children under the age of 15 years on the Accused's orders, that he used them as personal bodyguards or for any other purpose prior to, during or following the attack. Consequently, the Chamber is unable to establish beyond reasonable doubt a link between the Accused and the children who were in Bogoro on 24 February 2003.

¹²⁰² See D03-88, T. 300, pp. 55-58; T. 307, pp. 3-6.

¹²⁰³ D02-01, T. 277, pp. 37-38.

XI. DISPOSITION

FOR THESE REASONS, the Chamber unanimously

DECLARES Mathieu Ngudjolo

NOT GUILTY, within the meaning of article 25(3)(a) of the Statute, of the war crimes of wilful killing (article 8(2)(a)(i)), attacks against a civilian population (article 8(2)(b)(i)), destruction of property (article 8(2)(b)(xii)), pillaging (article 8(2)(b)(xvi)), sexual slavery (article 8(2)(b)(xxii)), rape (article 8(2)(b)(xxii)), and using children under the age of 15 years to participate actively in hostilities (article 8(2)(b)(xxvi));

NOT GUILTY within the meaning of article 25(3)(a) of the Statute of the crimes against humanity of murder (article 7(1)(a)), sexual slavery (article 7(1)(g)) and rape (article 7(1)(g)).

Consequently, the Chamber

ACQUITS Mathieu Ngudjolo of all the charges against him in the instant case;

ORDERS the Registrar to take the measures necessary to ensure the immediate release of Mathieu Ngudjolo; and

ORDERS the Victims and Witnesses Unit to take the measures necessary to ensure the protection of the witnesses pursuant to article 68 of the Statute.

Judge Van den Wyngaert appends a concurring opinion on the interpretation of article 25(3)(a) of the Statute to this judgment.

Done in English and in French, the French version being authoritative.

[signed]

**Judge Bruno Cotte
Presiding Judge**

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 18 December 2012
At The Hague, The Netherlands